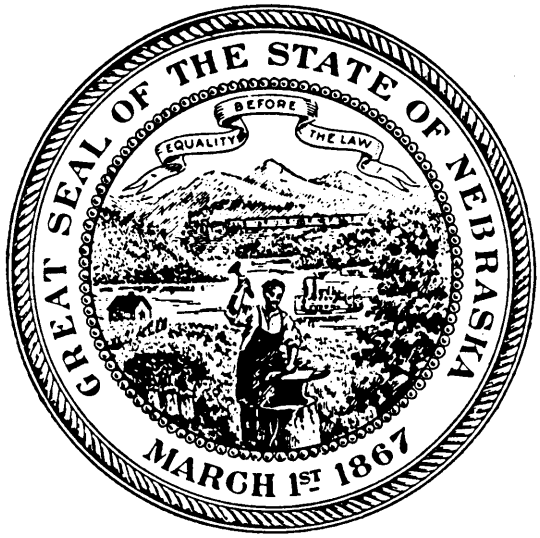
REVISED STATUTES
OF
NEBRASKA

REISSUE OF VOLUME 2
2008

COMPRISING ALL THE STATUTORY LAWS OF A
GENERAL NATURE IN FORCE AT DATE OF
PUBLICATION ON THE SUBJECTS ASSIGNED
TO CHAPTERS 24 TO 28, INCLUSIVE



Published by the Revisor of Statutes

CERTIFICATE OF AUTHENTICATION

I, Joanne M. Pepperl, Revisor of Statutes, do hereby certify that the Reissue of Volume 2 of the Revised Statutes of Nebraska, 2008, contains all of the laws set forth in Chapters 24 to 28, appearing in Volume 2, Revised Statutes of Nebraska, 1995, as amended and supplemented by the Ninety-fourth Legislature, Second Session, 1996, through the One Hundredth Legislature, Second Session, 2008, of the Nebraska Legislature, in force at the time of publication hereof.

Joanne M. Pepperl
Revisor of Statutes

Lincoln, Nebraska
August 1, 2008

Recommended manner of
citation from
this volume
REISSUE REVISED STATUTES
OF NEBRASKA, 2008
(in full)
R.R.S.2008
(abbreviated)

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CONSTITUTION OF THE STATE OF NEBRASKA OF 1875, AND SUBSEQUENT AMENDMENTS

Preamble. We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska.

The Preamble of the Constitution is not a part of the Constitution, but only a general statement of purpose. The State of Nebraska does not derive any of its substantive powers from the Preamble to the Nebraska Constitution. The Preamble cannot exert any power to secure the declared objects of the Constitution unless, apart from the Preamble, such power can be found in, or can be properly implied from, some express delegation in the Constitution. Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

ARTICLE I

BILL OF RIGHTS

Section

Sec. 1. Statement of rights.

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use,

and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

Source: Neb. Const. art. I, sec. 1 (1875); Amended 1988, Initiative Measure No. 403.

1. Personal rights

Section 29-2203 does not violate either the U.S. or Nebraska Constitution. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

Statute providing it shall be unlawful just to be in place where controlled substance is being used illegally is unconstitutionally vague and overbroad. State v. Adkins, 196 Neb. 76, 241 N.W.2d 655 (1976).

Requirement of continuous residency of four months independent of school attendance to establish residence for tuition purposes does not violate this section. Thompson v. Board of Regents of University of Nebraska, 187 Neb. 252, 188 N.W.2d 840 (1971).

Failure to appoint counsel to represent a defendant in a criminal case upon appeal did not violate this section. State v. Dabney, 181 Neb. 263, 147 N.W.2d 768 (1967).

Sexual psychopath law does not deny equal protection of the laws. State v. Madary, 178 Neb. 383, 133 N.W.2d 583 (1965).

Statute prohibiting state and federal officers and employees from being delegates to county, district, and state political conventions did not violate this section. State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950).

Habitual criminal law, defining habitual criminal and providing punishment therefor, is not violative of this section. Rains v. State, 142 Neb. 284, 5 N.W.2d 887 (1942).

The provision of an agreement between a labor organization and an employer that when a female employee, member of the organization, marries, her employment shall terminate, does not violate constitutional rights of employee. Brisbin v. E. L. Oliver Lodge No. 335, 134 Neb. 517, 279 N.W. 277 (1938).

The right to engage in the sale of intoxicating liquors is not an inherent and inalienable right which the state is forbidden to abridge. Griffin v. Gass, 133 Neb. 56, 274 N.W. 193 (1937).

Statute forbidding possession of liquor elsewhere than in private dwelling is not void as discriminatory. Fitch v. State, 102 Neb. 361, 167 N.W. 417 (1918).

''Sunday Law'' is not repugnant to the Constitution. In re Caldwell, 82 Neb. 544, 118 N.W. 133 (1908).

A statute regulating and limiting the hours of employment of females in manufacturing, mechanical and mercantile establishments, hotels and restaurants is not repugnant to the provisions of the Constitution. Wenham v. State, 65 Neb. 394, 91 N.W. 421 (1902), 58 L.R.A. 825 (1902).

2. Property rights

Statute requiring fencing of right-of-way by railroads did not operate to deprive railroad of equal rights. Linenbrink v. Chicago & N.W. Ry. Co., 177 Neb. 838, 131 N.W.2d 417 (1964).

Every citizen has the right to acquire property and sell it at such price as he can obtain in fair barter. Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963).

A private employment agency is not a business in which the public has such an interest that price fixing may properly be included as a method of regulation. Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507 (1943).

Act regulating sale of motor vehicles for purpose of preventing fraud is not a violation of constitutional rights. Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939), 126 A.L.R. 729 (1939).

The right to acquire property and dispose of it in such innocent manner as he pleases for such price as he can obtain in fair barter is guaranteed to every person. State ex rel. English v. Ruback, 135 Neb. 335, 281 N.W. 607 (1938).

Property used for ''religious purpose'' is within the spirit of Constitution exempting it from taxation. Ancient & Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N.W. 93 (1932), 81 A.L.R. 1166 (1932).

City ordinance requiring Sunday closing of places of business for sale or exchange of motor vehicles is valid under police power, and not discriminatory under this article. Stewart Motor Co. v. City of Omaha, 120 Neb. 776, 235 N.W. 332 (1931).

Statute requiring railroad company to fence right–of–way is constitutional. Middaugh v. Chicago & N.W. Ry. Co., 114 Neb. 438, 208 N.W. 139 (1926).

Law prohibiting merchants from giving trading stamps is unconstitutional. State ex rel. Hartigan v. Sperry & Hutchinson Co., 94 Neb. 785, 144 N.W. 795 (1913), 49 L.R.A.N.S. 1123 (1913).

3. Taxation

Ordinance of city of Lincoln imposing occupation tax on taxicabs was not objectionable as unjust, discriminatory and denial of equal protection of the laws, though no tax was imposed on trucks carrying freight. Richter v. City of Lincoln, 136 Neb. 289, 285 N.W. 593 (1939).

Gross premium tax on foreign insurance companies is an excise tax on privilege of doing business in Nebraska, and does not violate equal rights clause of Constitution. State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N.W. 555 (1937).

4. Right to bear arms

The ''Right to Bear Arms'' amendment to this provision does not abolish the death penalty in Nebraska. Anderson v. Gunter, 235 Neb. 560, 456 N.W.2d 286 (1990).

Section 28–1203(1) is not vitiated by the ''Right to Bear Arms'' amendment of 1988, is a valid exercise of the State's police power in reasonable regulation of certain firearms, and does not contravene this provision. State v. LaChapelle, 234 Neb. 458, 451 N.W.2d 689 (1990).

The constitutional right to keep and bear arms is subject to reasonable regulation by statute if the statute does not frustrate the guarantee of the constitutional provision. State v. Comeau, 233 Neb. 907, 448 N.W.2d 595 (1989).

5. Miscellaneous

Section 39-6,193, imposing vicarious liability on owners-lessors of trucks for damages by lessees and operators of the leased trucks, is constitutional. Bridgeford v. U-Haul Co., 195 Neb. 308, 238 N.W.2d 443 (1976).

Act establishing vocational technical schools does not violate this section. Campbell v. Area Vocational Technical School No. 2, 183 Neb. 318, 159 N.W.2d 817 (1968).

Statute creating Nebraska Power Review Board did not violate this section. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N.W.2d 629 (1965).

Zoning ordinance of city of Omaha did not violate this section. Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964).

Sunday closing law violated this section and was unconstitutional in its entirety. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N.W.2d 475 (1964).

Sunday closing ordinance of city of first class violated this section. Skag–Way Department Stores, Inc. v. City of Grand Island, 176 Neb. 169, 125 N.W.2d 529 (1964).

Zoning act and ordinance sustained as constitutional. Schlientz v. City of North Platte, 172 Neb. 477, 110 N.W.2d 58 (1961).

In the interpretation of the Bill of Rights, the court will consider its history, the development of the evil sought to be restrained, the established laws, usages and customs at time of its adoption, and scope of the remedy its terms imply. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938).

Statute arbitrarily dividing county into commissioner districts, without regard to population, is unconstitutional. State ex re. Harte v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916).

The constitutional right to life, liberty and the pursuit of happiness is not infringed by statutes prohibiting deceit or fraud. In re Barnes, 83 Neb. 443, 119 N.W. 662 (1909).

Bill of rights is not enumeration of all powers reserved to people. State ex rel. Smyth, Attorney General v. Moores, 55 Neb. 480, 76 N.W. 175 (1898), 41 L.R.A. 624 (1898).

Law of land and due process do not mean merely legislative enactments. The Atchison & Nebraska R.R. Co. v. Baty, 6 Neb. 37, 29 Am. R. 356 (1877).

Sec. 2. Slavery prohibited.

There shall be neither slavery nor involuntary servitude in this state, otherwise than for punishment of crime, whereof the party shall have been duly convicted.

Source: Neb. Const. art. I, sec. 2. (1875).

An employer's intentional concealment of the dangers inherent in the work environment and the true nature and effect of an occupational disease does not constitute involuntary servitude—the use or threat of physical force or legal coercion to extract labor from an unwilling worker—and thus construing the Workers' Compensation Act to include such conduct does not violate U.S. Const. amend. XIII or this provision. Abbott v. Gould, Inc., 232 Neb. 907, 443 N.W.2d 591 (1989).

Imprisonment at hard labor for contempt of court, arising out of violation of injunctive order, is involuntary servitude prohibited by this section. Smolczyk v. Gaston, 147 Neb. 681, 24 N.W.2d 862 (1946).

Sec. 3. Due process of law; equal protection.

No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws.

Source: Neb. Const. art I, sec. 3 (1875); Amended 1998, Laws 1997, LR 20CA.

1. Criminal prosecutions
2. Vague or overbroad
3. Arbitrary or unreasonable
4. Procedural due process
5. Reasonable regulation
6. Deprived of liberty
7. Deprived of property
8. Contract rights
9. Labor and employment
10. Taxes and special assessments
11. Laws held generally to violate due process
12. Laws held generally not to violate due process
13. Miscellaneous

1. Criminal prosecutions

The amendment to this provision providing that ''no person shall ... be denied equal protection of the laws'' operates prospectively only. In order to prove that a defendant's race unconstitutionally taints enforcement of the death penalty, the defendant must at a minimum establish that the decision to enforce the death penalty is based on a conscious discriminatory purpose, resulting in a discriminatory effect suffered by the defendant. A defendant has a life interest in connection with the imposition of the death penalty and is entitled to due process in the imposition of the sentence. State v. Reeves, 258 Neb. 511, 604 N.W.2d 151 (2000).

This section provides that no person shall be deprived of liberty ''without due process of law'', and article I, section 11, provides that the accused in a criminal prosecution shall have the right to ''trial by an impartial jury''. These provisions are interconnected and require that criminal convictions rest upon a jury determination that a criminal defendant is guilty beyond a reasonable doubt of every element of the crime charged. State v. White, 249 Neb. 381, 543 N.W.2d 725 (1996).

The due process clause of this provision precludes admissibility of an involuntary confession. State v. Mantich, 249 Neb. 311, 543 N.W.2d 181 (1996).

The due process clause precludes admissibility of an involuntary confession. State v. Martin, 243 Neb. 368, 500 N.W.2d 512 (1993).

Allegedly coercive conduct on the part of private detective obtaining a statement from defendant did not carry over to statement made by defendant several hours later in the presence of others. State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992).

Section 29-2203 does not violate either the U.S. or Nebraska Constitution. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

Prosecutions for felonies, including murder, may be had on informations filed by the county attorney, and such procedure neither violates the 14th amendment to the U.S. Constitution nor the due process clause of the Nebraska Constitution. State v. Burchett, 224 Neb. 444, 399 N.W.2d 258 (1986).

No one has a vested right in a procedure, and procedural matters can be changed at any time before trial and are binding on a defendant. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Photographic lineup did not violate due process despite defendant's argument that the identification procedure was unduly suggestive in that the relative heights of suspects were readily determinable by reference to the strategically placed doorframe visible in each photograph. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Trial court's determination that defendant's incriminating statements were made in a non-custodial setting was not clearly wrong; thus, police did not violate defendant's constitutional right against self-incrimination. State v. Saylor, 223 Neb. 694, 392 N.W.2d 789 (1986).

Due process is afforded defendant in capital case by the traditional trial to court or jury, the presentence report on defendant, a presentence hearing and findings relating to aggravating and mitigating circumstances, and automatic review in Supreme Court, all to assure the death penalty will not be imposed arbitrarily or capriciously. State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977).

Sections 29-3301 to 29-3307 do not violate privilege against self-incrimination, are constitutional, and apply to physical evidence, not to oral communications or testimony. State v. Swayze, 197 Neb. 149, 247 N.W.2d 440 (1976).

Due process does not require a prosecuting attorney to hold an adversary hearing prior to determining the manner in which a minor defendant shall be proceeded against. State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974).

Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Sanchell, 191 Neb. 505, 216 N.W.2d 504 (1974).

Failure to appoint counsel to represent a defendant in a criminal case upon appeal did not violate this section. State v. Dabney, 181 Neb. 263, 147 N.W.2d 768 (1967).

Use of any confession obtained in violation of the due process clause requires reversal of the conviction, even though there is other evidence sufficient to sustain the conviction. State v. Long, 179 Neb. 606, 139 N.W.2d 813 (1966).

Due process of law in a criminal case includes right to trial by jury and right to defend in person or by counsel. Johnson v. State, 169 Neb. 783, 100 N.W.2d 844 (1960).

Detention in jail for six months awaiting trial was not a denial of due process. Svehla v. State, 168 Neb. 553, 96 N.W.2d 649 (1959).

Proceedings in contempt were not violative of due process. Cornett v. State, 155 Neb. 766, 53 N.W.2d 747 (1952).

Denial of continuance did not operate to violate due process clause. Hawk v. State, 151 Neb. 717, 39 N.W.2d 561 (1949).

Where a jury in a criminal case disagrees and is properly discharged, a second trial upon original charge, even though one or more degrees of the offense have been withdrawn, does not violate this section. State v. Hutter, 145 Neb. 798, 18 N.W.2d 203 (1945).

A person charged with a crime waives constitutional rights by judicial confession of guilt. In re Application of Carper, Tesar v. Bowley, 144 Neb. 623, 14 N.W.2d 225 (1944).

Where, after objection that copy of amended information had not been served, trial proceeded upon the original information which had been served, there was no violation of this section. Hoctor v. State, 141 Neb. 329, 3 N.W.2d 558 (1942).

An information alleging all facts necessary to constitute a criminal offense, does not violate constitutional provision as to due process of law. Chadek v. State, 138 Neb. 626, 294 N.W. 384 (1940).

Habitual criminal statute upheld. Right of accused to counsel deemed waived where no demand made. Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82 (1940).

Due process of law in a criminal case requires a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to answer the charge, trial according to the settled course of judicial proceeding, and a right to be discharged unless found guilty. Dutiel v. State, 135 Neb. 811, 284 N.W. 321 (1939).

Statute prohibiting granting of new trial if Supreme Court considers that no substantial miscarriage of justice has actually occurred, does not justify court in denying new trial where accused's constitutional right to fair trial was violated. Scott v. State, 121 Neb. 232, 236 N.W. 608 (1931).

The Constitution guarantees a fair and impartial trial to every person accused of crime, and that no person shall be compelled in any criminal case to be a witness against himself, nor shall he be deprived of life, liberty, or property without due process of law. Coxbill v. State, 115 Neb. 634, 214 N.W. 256 (1927).

The judge of a district court has no jurisdiction to try and determine the guilt or innocence of a defendant charged with a felony who pleads not guilty, without a trial to a jury, and such jurisdiction cannot be conferred by consent of the accused. Michaelson v. Beemer, 72 Neb. 761, 101 N.W. 1007 (1904).

Prosecution of accused on information of prosecuting attorney did not contravene the due process of law clause of the Constitution. Bolln v. State, 51 Neb. 581, 71 N.W. 444 (1897).

2. Vague or overbroad

Statute providing it shall be unlawful just to be in place where controlled substance is being used illegally is unconstitutionally vague and overbroad. State v. Adkins, 196 Neb. 76, 241 N.W.2d 655 (1976).

Motor vehicle flight to avoid arrest, act held unconstitutional upon the ground of vagueness and uncertainty. Heywood v. Brainard, 181 Neb. 294, 147 N.W.2d 772 (1967).

Grade A Milk Act contained an unlawful delegation of legislative power to an administrative agency and was unconstitutional. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N.W.2d 227 (1960).

Municipal ordinance directed against obscene publications was void for uncertainty. State v. Pocras, 166 Neb. 642, 90 N.W.2d 263 (1958).

3. Arbitrary or unreasonable

In setting rates that may be charged by a utility, a state cannot set rates which are unjust, unreasonable, and confiscatory and which, therefore, deprive the utility of property without the due process of law. K N Energy, Inc. v. Cities of Broken Bow et al., 244 Neb. 113, 505 N.W.2d 102 (1993).

If it becomes apparent that a statute does not tend to preserve the public health, safety, or welfare but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional. Gillette Dairy, Inc. v. Nebraska Dairy Products Board, 192 Neb. 89, 219 N.W.2d 214 (1974).

Public Auction Law imposes arbitrary and unreasonable limitations on conduct of a lawful business. Blauvelt v. Beck, 162 Neb. 576, 76 N.W.2d 738 (1956).

Primary purpose of constitutional guaranty afforded by this section was security of the individual from the arbitrary exercise of the powers of government. Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947).

Prohibiting manufacture and sale of milk to which has been added any fat or oil other than milk, violates the Constitution as being arbitrary and unreasonable and taking property without due process of law. Carolene Products Co. v. Banning, 131 Neb. 429, 268 N.W. 313 (1936).

Statute regulating size of loaf of bread and authorizing Secretary of Agriculture to fix reasonable excess tolerance is not

violative of due process clause. Petersen Baking Co. v. Bryan, 290 U.S. 570 (1934), affirming 124 Neb. 464, 247 N.W. 39 (1933).

Statute fixing maximum weights for loaves of bread is repugnant to the Fourteenth Amendment of the Constitution of the United States. Burns Baking Co. v. Bryan, 264 U.S. 504 (1924), reversing Burns Baking Co. v. McKelvie, 108 Neb. 674, 189 N.W. 383 (1922).

4. Procedural due process

Municipal employees' claim that they were denied substantive due process of law by employer's payment of disability pension benefits failed because employees presented no evidence that employer denied employees the benefit of vested employment benefits. Constitutional deprivations are not founded upon speculation or mere possibilities. Bauers v. City of Lincoln, 255 Neb. 572, 586 N.W.2d 452 (1998).

The exclusive remedy provided by the Workers' Compensation Act satisfies the due process requirements of this provision, as well as the requirements of Neb. Const. art. I, section 13, that every person shall have a remedy by due course of law for any injury done to him or her. Abbott v. Gould, Inc., 232 Neb. 907, 443 N.W.2d 591 (1989).

The hearing each motorist has on each offense before points are assessed, and right to appeal to district court from revocation of his motor vehicle operator's license under sections 39-669.27 and 39-669.28, R.R.S.1943, pending which the court may stay revocation, provide due process. Stauffer v. Weedlun, 188 Neb. 105, 195 N.W.2d 218 (1972).

A person has no property in rules of the common law and such rules subject to constitutional limitations may be changed by the Legislature. State Securities Co. v. Norfolk Livestock Sales Co., Inc., 187 Neb. 446, 191 N.W.2d 614 (1971).

Preliminary hearing before a county judge not an attorney not violative of this section. State v. Howard, 184 Neb. 274, 167 N.W.2d 80 (1969).

Statute providing for withdrawal from area vocational technical schools did not violate this section in failing to provide hearing for determination of validity of signatures. Chaloupka v. Area Vocational Technical School No. 2, 184 Neb. 196, 165 N.W.2d 719 (1969).

Requirement for furnishing of probate appeal bond did not deprive party of due process of law. Rundall v. Whiteside, 182 Neb. 176, 153 N.W.2d 736 (1967).

Requirement of due process of law was satisfied by original notice of hearing before board of appraisers in eminent domain proceedings. Weiner v. State, 179 Neb. 297, 137 N.W.2d 852 (1965).

The incorporation of a village by the county board upon a petition of a majority of the taxable inhabitants is not a denial of due process of law. Kriz v. Klingensmith, 176 Neb. 205, 125 N.W.2d 674 (1964).

Due process of law was not denied by failure to mail notice of intention to pass resolution of necessity declaring advisability of constructing sewer. Jones v. Village of Farnam, 174 Neb. 704, 119 N.W.2d 157 (1963).

Procedure for investigation of conduct of attorneys was not a denial of due process of law. State ex rel. Nebraska State Bar Assn. v. Jensen, 171 Neb. 1, 105 N.W.2d 459 (1960).

Prosecution before a judge disqualified by pecuniary interest is a violation of due process of law. Conkling v. DeLany, 167 Neb. 4, 91 N.W.2d 250 (1958).

Provision for service of process upon Director of Banking in action for violation of Installment Loan Act was constitutional. McNish v. General Credit Corp., 164 Neb. 526, 83 N.W.2d 1 (1957).

Act for change of boundaries of school district required notice and opportunity to be heard. Schutte v. Schmitt, 162 Neb. 162, 75 N.W.2d 656 (1956).

Judgment is void unless a proper method of notification is employed. Board of Trustees of York College v. Cheney, 160 Neb. 631, 71 N.W.2d 195 (1955).

Service under reciprocal nonresident guardianship act did not violate due process clause. Howell v. Fletcher, 157 Neb. 196, 59 N.W.2d 359 (1953).

Statute authorizing annexation of additional territory of rural fire protection district did not deny due process. Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N.W.2d 700 (1953).

Fact that examiner of State Railway Commission considered the interrelationship of various applications when determining action to be taken on each application separately was not a denial of due process. In re Application of Petersen & Petersen, Inc., 153 Neb. 517, 45 N.W.2d 465 (1951).

Party who invoked special proceeding could not question constitutionality thereof under this section. Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950).

Action of county board in determining population of county at a secret meeting without notice to county officers whose salaries were thereby affected, vitally affected the rights and interests of the officers and is void. Shambaugh v. Buffalo County, 133 Neb. 46, 274 N.W. 207 (1937).

Where juror failed to disclose his ineligibility when questioned by trial court, and is permitted to serve on jury, a new trial should be granted. Berg v. Griffiths, 126 Neb. 235, 252 N.W. 918 (1934).

A statute providing that an action for injury to person or property by a common carrier, bus or trucking company may be brought in any county on the road or line where service could be obtained on a driver thereof is not improper or taking of property without due process of law. Schwarting v. Ogram, 123 Neb. 76, 242 N.W. 273 (1932), 81 A.L.R. 769 (1932).

Statute authorizing counties to foreclose lien for taxes delinquent more than three years is not taking property without due process of law. Commercial Savings & Loan Assn. v. Pyramid Realty Co., 121 Neb. 493, 237 N.W. 575 (1931).

Legislation authorizing county superintendent, clerk, and county board to change boundary lines between school districts without notice or hearing is a violation of due process of law. Ruwe v. School District No. 85 of Dodge County, 120 Neb. 668, 234 N.W. 789 (1931).

Statute relating to service on nonresident car owners is constitutional except as to provision for 90 day continuance and does not deprive such owners of property without due process of law. Herzoff v. Hommel, 120 Neb. 475, 233 N.W. 458 (1930).

Statute empowering department to cancel water appropriation, in view of provision for notice and appeal does not deprive one of his property without due process of law. Dawson County Irr. Co. v. McMullen, 120 Neb. 245, 231 N.W. 840 (1930).

Curative act to validate proceedings for creation of a light and power district, but applicable only to particular district, is unconstitutional because it violates due process of law clause. Anderson v. Lehmkuhl, 119 Neb. 451, 229 N.W. 773 (1930).

Where an increase in the assessed valuation of property as returned by county, is made by the State Board of Equalization without notice and without affording sufficient opportunity to be heard, it amounts to confiscation of property without due process. American Tel. & Tel. Co. v. State Board of Equalization & Assessment, 119 Neb. 142, 227 N.W. 455 (1929); Northwestern Bell Tel. Co. v. State Board of Equalization & Assessment, 119 Neb. 138, 227 N.W. 452 (1929); Lincoln Tel. & Tel. Co. v. State Board of Equalization & Assessment, 119 Neb. 137, 227 N.W. 454 (1929); Stanton County v. State Board of Equalization & Assessment, 119 Neb. 136, 227 N.W. 454 (1929).

Failing to provide for notice to resident owners of appraisers' meeting to assess damages in condemnation proceedings by county contravened the Constitution. Sheridan County v. Hand, 114 Neb. 813, 210 N.W. 273 (1926).

The issuance of bonds upon a petition of not less than fifty-one per cent of the voters stands upon the same legal footing as bonds issued by virtue of an election and the fact the taxpayer is given no opportunity to contest the validity of the bonds is not taking of property without due process of law. McCord v. Marsh, 108 Neb. 723, 189 N.W. 386 (1922).

Failure to provide in statute for notice to the property owner of the time and place at which the appraisers would meet for purpose of making their assessment in condemnation of school site is unconstitutional and actual notice cannot operate as a substitute. Albin v. Consolidated School Dist. No. 14 of Richardson County, 106 Neb. 719, 184 N.W. 141 (1921).

Law permitting jury, in court's discretion, to view premises does not violate constitutional provision of taking property without due process of law. Drollinger v. Hastings & N. W. R. R. Co., 98 Neb. 520, 153 N.W. 619 (1915).

Law purporting to validate proceedings of probate court under prior act which had been held unconstitutional contravenes due process of law and is unconstitutional. Draper v. Clayton, 87 Neb. 443, 127 N.W. 369 (1910).

Striking answer from files and denying defendant right to further defense in divorce suit violates the constitutional right of the defendant to due process of law. McNamara v. McNamara, 86 Neb. 631, 126 N.W. 94 (1910).

No judgment of a court is due process of law if rendered without jurisdiction in the court, or without due notice to the party. Herman v. Barth, 85 Neb. 722, 124 N.W. 135 (1910).

To constitute due process of law it is not necessary that notice be given of each step in the process of taxation. It is sufficient if the taxpayer has an opportunity to appear, at some time before a tribunal having jurisdiction, and there procure an adjustment of his liabilities. State v. Several Parcels of Land, 83 Neb. 13, 119 N.W. 21 (1908).

Statute authorizing the revival of a dormant judgment against a nonresident upon service by publication is not repugnant to state Constitution. White v. Ress, 80 Neb. 749, 115 N.W. 301 (1908).

Statute providing for the organization of a drainage district whenever the same will promote the public health, convenience or welfare, funds to be raised in proportion to benefits received, notice giving owner right to appear and be heard and to appeal from order of assignment, does not amount to the taking of private property for private use, nor for public use without just compensation nor without due process of law. State ex rel Harris v. Hanson, 80 Neb. 724, 115 N.W. 294 (1908).

A statute that provides for seizure and forfeiture of guns used in hunting out of season, if no hearing provided for, is unconstitutional. McConnell v. McKillip, 71 Neb. 712, 99 N.W. 505 (1904).

Whenever an opportunity is offered to invoke equal protection of law by judicial proceeding appropriate for the purpose and adequate to secure the end and object sought to be attained, due process of law is said to be satisfied. Reed v. Reed, 70 Neb. 779, 98 N.W. 73 (1904).

In an action to quiet the title to real estate on the grounds of adverse possession, the former owner has not been deprived of his property without due process of law if the period has expired which, under the law, would bar an action for its recovery by the real owner. Linton v. Heye, 69 Neb. 450, 95 N.W. 1040 (1903), affirmed in 194 U.S. 628 (1904).

Act providing for assessment of damages under herd law, by arbitration, if cumulative, and not exclusive is not taking of property without due process of law. Randall v. Gross, 67 Neb. 255, 93 N.W. 223 (1903).

Statute providing that all witness fees and costs uncalled for within a certain specified time, in default of which they shall be paid into school fund is not taking of property without due process of law. Douglas County v. Moores, 66 Neb. 284, 92 N.W. 199 (1902).

Drainage district assessments, where owners are given opportunity to appear and be heard and accorded a right to review, are not taking of property without due process of law. Dodge County v. Acom, 61 Neb. 376, 85 N.W. 292 (1901).

Lord Campbell's Act gives right of action to personal representative of deceased for death of passenger and does not deprive railroad companies of their property without due process of law. Chicago, R. I. & P. Ry. Co. v. Zernecke, 59 Neb. 689, 82 N.W. 26 (1900); Chicago, R. I. & P. Ry. Co. v. Hambel, 2 Neb. Unof. 607, 89 N.W. 643 (1902).

''Due process of law'' is defined as such exertion of power of government as sanctioned by settled maxims of law and under such safeguards for protection of individual rights as prescribed for class of cases to which the one in question belongs. It has never been construed as right to be heard in court of last resort, but is satisfied by proceeding applicable to subject matter and conformable to such general rules as affect all persons alike. Chicago, B. & Q. R. R. Co. v. Headrick, 49 Neb. 286, 68 N.W. 489 (1896).

Providing for organization of drainage districts and charging lands for payment of bonds, upon petition and notice is valid. Board of Directors of Alfalfa Irrigation Dist. v. Collins, 46 Neb. 411, 64 N.W. 1086 (1895).

A statute authorizing a city to change existing grades but failing to provide for notice to property owners of appraisers' meeting is unconstitutional. McGavock v. City of Omaha, 40 Neb. 64, 58 N.W. 543 (1894).

Due process requires that a prisoner receive meaningful access to the courts to defend civil suits brought against the prisoner. Board of Regents v. Thompson, 6 Neb. App. 734, 577 N.W.2d 749 (1998).

5. Reasonable regulation

Due process is not violated in termination of parental rights statutes where a parent of ordinary intelligence can ascertain, without guessing, the prescribed standards governing parental conduct. State v. A. H., 198 Neb. 444, 253 N.W.2d 283 (1977).

Section 39-6,193, imposing vicarious liability on owners-lessors of trucks for damages by lessees and operators of the leased trucks, is constitutional. Bridgeford v. U-Haul Co., 195 Neb. 308, 238 N.W.2d 443 (1976).

Legislative act requiring continuous residency of four months independent of school attendance to establish residence for tuition purposes does not violate this section. Thompson v. Board of Regents of University of Nebraska, 187 Neb. 252, 188 N.W.2d 840 (1971).

Prohibiting wholesaler from giving discounts for quantity purchases of alcoholic liquor to retailers is not a denial of due process. Central Markets West, Inc. v. State, 186 Neb. 79, 180 N.W.2d 880 (1970).

Statute authorizing county board to relocate roads did not violate this section. Emry v. Lake, 181 Neb. 568, 149 N.W.2d 520 (1967).

Statute providing for limited access to interstate highway is not violative of due process. Fougeron v. County of Seward, 174 Neb. 753, 119 N.W.2d 298 (1963)

Act authorizing revocation of driver's license for failure to submit to blood or urine test did not violate this section. Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961).

Statute requiring a warehouseman to report list of property held in storage was not a denial of due process of law. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N.W.2d 408 (1959).

Statute prohibiting state and federal officers and employees from being delegates to county, district, and state political conventions did not violate this section. State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950).

Act requiring proper lights on mainline switch stands by railroads was not void under due process clause. State v. Chicago & N.W. Ry. Co., 147 Neb. 970, 25 N.W.2d 824 (1947).

Claim made and rejected that appropriation of surface and ground waters without compensation violated this section. Dis-

chner v. Loup River P.P. Dist., 147 Neb. 949, 25 N.W.2d 813 (1947).

Legislative act providing for proceedings with reference to children born out of wedlock sustained as constitutional. In re Application of Rozgall, 147 Neb. 260, 23 N.W.2d 85 (1946).

While it is competent for the Legislature to classify, the classification, to be valid, must rest on some reason of public policy, or some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. Webber v. City of Scottsbluff, 141 Neb. 363, 3 N.W.2d 635 (1942).

Statutes creating housing authorities and granting right of eminent domain to operate for slum clearance do not violate due process clause. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Act regulating and licensing sale of motor vehicles, and prohibiting price discriminations does not interfere with rights of property or personal liberty. Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939).

Act regulating manufacture of ice cream and dairy products is a proper exercise of police power. State v. McCosh, 134 Neb. 780, 279 N.W. 775 (1938)

City ordinance requiring persons engaged in business of moving houses to procure licenses is constitutional and reasonable exercise of police power. State v. Phillips, 133 Neb. 209, 274 N.W. 459 (1937).

Ordinance requiring peddler to have a license must be reasonable, considering the nature of the business and not so high as to prohibit the carrying on of the business. Hoyt Bros. v. City of Lincoln, 130 Neb. 79, 263 N.W. 898 (1936).

Zoning ordinance enacted as having substantial relation to public health, safety and general welfare is not deprivation of property without due process of law. State ex rel. Herbert v. Anderson, 122 Neb. 738, 241 N.W. 545 (1932); City of Lincoln v. Logan-Jones, 120 Neb. 827, 235 N.W. 583 (1931); City of Lincoln v. Foss, 119 Neb. 666, 230 N.W. 592 (1930).

Statute denying to persons under 16 the right to motor vehicle drivers' license is not in violation of this section. State ex rel. Oleson v. Graunke, 119 Neb. 440, 229 N.W. 329 (1930).

A valid exercise of police power may affect or destroy values where the use of the property for its original purpose has become unlawful by a change in public policy as disclosed by a new statute, but legislation on that ground is constitutional and does not deprive one of property without due process of law. Miller v. McLaughlin, 118 Neb. 174, 224 N.W. 18 (1929), affirmed in 281 U.S. 261 (1930).

Statute relating to drainage by irrigation company of subirrigated land is constitutional and does not violate the due process clause of Constitution. State ex rel. Read v. Farmers Irr. Dist., 116 Neb. 373, 217 N.W. 607 (1928).

Authorizing life insurance company to change plan of business from mutual to stock by amending articles does not violate provision relating to due process of law in Constitution. Leininger v. North Amer. Nat. L. Ins. Co., 115 Neb. 801, 215 N.W. 167 (1927).

Prohibiting foreign installment investment company doing business without certificate of approval by Department of Trade and Commerce is not in violation of due process of law. Investors Syndicate v. Bryan, 113 Neb. 816, 205 N.W. 294 (1925).

Statute prohibiting the soliciting of certain classes of claims for the purpose of instituting suits thereon outside of the state and providing a penalty therefor, are regulatory measures and as such, do not infringe the rights of an individual under the Constitution. Chicago, B. & Q. R. R. Co. v. Davis, 111 Neb. 737, 197 N.W. 599 (1924).

Statute providing for the housing of municipal courts in the county courthouse does not interfere with vested rights of the county in such property, and is not unconstitutional as a deprivation of the use of property without due process of law. State ex rel. City of Omaha v. Bd. of County Commissioners of Douglas County, 109 Neb. 35, 189 N.W. 639 (1922).

Statute prohibiting liquor to be kept elsewhere than in private dwelling is not in violation of constitutional provision for due process of law. Fitch v. State, 102 Neb. 361, 167 N.W. 417 (1918).

City ordinance prohibiting the removal of garbage through the streets or alleys by any one not employed by the city for that purpose, is not unconstitutional as taking the property of a restaurant proprietor for public use without just compensation or as depriving him of his property without due process of law. Urbach v. City of Omaha, 101 Neb. 314, 163 N.W. 307 (1917).

Statute fixing maximum rates of premium for surety and fidelity companies under certain circumstances by the insurance board is not taking property without due process of law. State ex rel. Martin v. Howard, 96 Neb. 278, 147 N.W. 689 (1914).

Ordinance prohibiting billiard and pool halls does not take property without due process of law. Cole v. Village of Culbertson, 86 Neb. 160, 125 N.W. 287 (1910); McCarter v. City of Lexington, 80 Neb. 714, 115 N.W. 303 (1908).

Every property holder is secured in his title thereto and holds it under implied rule and understanding that its use may be so regulated and restricted that it shall not be injurious to others having equal right of enjoyment of their property, or to the rights of the community. Wenham v. State, 65 Neb. 394, 91 N.W. 421 (1902).

Statute prohibiting transfer of mortgaged chattels without written consent does not violate Constitution. State v. Heldenbrand, 62 Neb. 136, 87 N.W. 25 (1901).

Statute imposing penalty for neglecting to remove obstruction in line of newly established highway does not deprive owner of property without due process of law. Black v. Stein, 23 Neb. 302, 36 N.W. 548 (1888).

Zoning ordinance of city of Lincoln limiting the rental of a single-family dwelling to one family, which is defined as including not more than three unrelated persons, does not violate due process. State v. Champoux, 5 Neb. App. 68, 555 N.W.2d 69 (1996).

Statute allowing reasonable attorney's fees to plaintiff in suit on policy covering real property does not violate the Constitution on taking of property without due process of law. Farmers & Merchants Ins. Co. v. Dobney, 189 U.S. 301 (1903).

Statute regulating the practice of veterinary medicine and surgery is not a violation of this section. Peet Stock Remedy Co. v. McMullen, 32 F.2d 669 (8th Cir. 1929).

Amendment to charter and ordinance thereunder authorizing city to sell gasoline and oil does not violate provision of Constitution relating to taking of property without due process of law. Mutual Oil Co. v. Zehrung, 11 F.2d 887 (D. Neb. 1925).

6. Deprived of liberty

A penal law which makes criminal an act which the utmost care and circumspection would not enable one to avoid violates this section. Markham v. Brainard, 178 Neb. 544, 134 N.W.2d 84 (1965).

Sexual psychopath law did not deprive accused of his liberty without due process of law. State v. Madary, 178 Neb. 383, 133 N.W.2d 583 (1965).

Sentence of juvenile offender to state penitentiary was not a denial of due process of law. Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955).

Habitual criminal law, defining habitual criminal and providing punishment therefor, is not violative of this section. Rains v. State, 142 Neb. 284, 5 N.W.2d 887 (1942).

7. Deprived of property

The right of ingress and egress by way of a street is a property right of which an abutting property owner cannot be deprived without compensation. Swanson v. State Dept. of Roads, 178 Neb. 671, 134 N.W.2d 810 (1965).

Statute requiring fencing of right-of-way of railroads did not deprive railroad company of due process of law. Linenbrink v. Chicago & N.W. Ry. Co., 177 Neb. 838, 131 N.W.2d 417 (1964).

Statutory authorization for recovery of treble the actual damages sustained violates this section. Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960).

Legislative act will not be permitted to operate retrospectively when effect would be to interfere with vested rights. Dell v. City of Lincoln, 170 Neb. 176, 102 N.W.2d 62 (1960).

Holder of school land lease giving option to purchase fee title could not be deprived of that right by subsequent legislation. Pfeifer v. Ableidinger, 166 Neb. 464, 89 N.W.2d 568 (1958).

Right of owner of property abutting a street to ingress and egress to and from his premises is a property right of which he cannot be deprived without due process of law. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N.W.2d 76 (1957).

Repeal of ordinance creating a water district did not invade any property rights. Brasier v. City of Lincoln, 159 Neb. 12, 65 N.W.2d 213 (1954).

Suspension of license under Motor Vehicle Safety Responsibility Act does not deprive licensee of property right. Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952).

Provision for allowance of claim for reimbursement against recipient of old age assistance is not violative of due process. Boone County Old Age Assistance Board v. Myhre, 149 Neb. 669, 32 N.W.2d 262 (1948).

Relieving drainage district from liability for damages because of vote of landowners not to become part thereof violated this section. Cooper v. Sanitary District No. 1 of Lancaster County, 146 Neb. 412, 19 N.W.2d 619 (1945).

Zoning ordinance requiring certain size of buildings and ground area did not operate to deny property owners due process of law. Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N.W.2d 634 (1944).

It is a general rule that a person has no vested right in statutory licenses, permits or privileges. Beisner v. Cochran, 138 Neb. 445, 293 N.W. 289 (1940).

Statute making a stay bond a judgment against the surety does not conflict with the due process clause. Baker Steel & Machinery Co. v. Ferguson, 137 Neb. 578, 290 N.W. 449 (1940).

Act taking away right of licensees to sell alcoholic liquors at wholesale in quart bottles, by fixing uniform standards for containers, though reducing value of property formerly used in liquor traffic, does not violate constitutional provision. Marsh & Marsh v. Carmichael, 136 Neb. 797, 287 N.W. 616 (1939).

Statute authorizing reparation of freight rates unlawfully collected cannot be construed to permit retroactive action by Railway Commission. Farmers Union Livestock Commission v. Union Pacific R. R. Co., 135 Neb. 689, 283 N.W. 498 (1939).

Every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter. State ex rel. English v. Ruback, 135 Neb. 335, 281 N.W. 607 (1938).

Public power districts taking land by eminent domain does not violate due process clause of Constitution providing just compensation is paid. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

Creating depositors' final settlement fund authorizing assessment against state banks for payment of losses in banks closed is invalid for the reason one is deprived of his property without due process. Hubbell Bank v. Bryan, 124 Neb. 51, 245 N.W. 20 (1932), certiorari denied 289 U.S. 753 (1933).

Water right acquired prior to 1895 is a vested property right not to be taken away by legislative action. City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932).

City ordinance prohibiting installation and operation of ''automatic coin-in-the-slot gasoline pumps'' at filling station is not violative of this section. Hawkins v. City of Red Cloud, 123 Neb. 487, 243 N.W. 431 (1932).

Statute transferring assets from depositors' guaranty fund to depositors' final settlement fund, excluding assets subject to payment of judgment liens, is not a violation of due process clause. Bliss v. Bryan, 123 Neb. 461, 243 N.W. 625 (1932).

Appropriation by Legislature of public money to reimburse depositors for losses sustained by depositors in banks operated by guaranty fund commission is in violation of due process provision of federal and state Constitutions. Weaver v. Koehn, 120 Neb. 114, 231 N.W. 703 (1930).

Statute authorizing license to guardian to mortgage insane ward's realty without requiring notice to ward does not violate the Constitution relating to taking of property without due process of law. Mead v. Polly, 119 Neb. 206, 228 N.W. 369 (1929).

Order of Railway Commission requiring the physical connection of two telephone companies and directing that they shall divide all new business in a certain proportion, is in effect taking of property without due process of law. Blackledge v. Farmers Independent Tel. Co. of Red Cloud, 105 Neb. 713, 181 N.W. 709 (1921), 16 A.L.R. 343 (1921).

Law depriving citizens of right to sell hog-cholera serum under certain conditions is unconstitutional. Hall v. State, 100 Neb. 84, 158 N.W. 362 (1916), L.R.A. 1916F 136 (1916).

Order of Railway Commission requiring railroad to construct private overhead crossing violates due process of law as provided in the Constitution. Postle v. Chicago, B & Q. R. R. Co., 98 Neb. 192, 152 N.W. 379 (1915).

Ordinance declaring that the carcasses of all dead animals found within the city, which were not slain for food, should at once become the property of the public contractor, is void so far as it attempts to take private property without due process of law. Whelan v. Daniels, 94 Neb. 642, 143 N.W. 929 (1913).

License to sell intoxicating liquors is but a mere temporary permit and is not a property right within the meaning of this section. Harding v. Board of Equalization of Douglas County, 90 Neb. 232, 133 N.W. 191 (1911).

A statute limiting the dower right of a non-resident widow to lands of which her husband died seized, and extending the dower right of a resident widow to other lands, does not contravene the Constitution. Miner v. Morgan, 83 Neb. 400, 119 N.W. 781 (1909).

Statute authorizing the entry of a judgment for costs against a complaining witness in a criminal case is unconstitutional. Teats v. Fox, 75 Neb. 747, 106 N.W. 779 (1906); Rickley v. State, 65 Neb. 841, 91 N.W. 867 (1902).

Statute preventing and punishing the desecration of the flag of the United States is not obnoxious to the provisions of Constitution against depriving any person of his property without due process of law and against special or class legislation. Halter v. State, 74 Neb. 757, 105 N.W. 298 (1905).

Divesting persons entitled thereto of unclaimed witness fees for benefit of school fund is taking of property without due process of law. State ex rel. Broatch v. Moores, 52 Neb. 770, 73 N.W. 299 (1897).

Commission's order to compel railroad to establish underpass for convenience and benefit of landowner in use of his own property is taking of property without due process of law. Chicago, St. P., M. & O. Ry. Co. v. Holmberg, 282 U.S. 162 (1930), Holmberg v. Chicago, St. P., M. & O. Ry. Co., reversing 115 Neb. 727, 214 N.W. 746 (1927).

''Cedar Rust'' law does not deprive cedar tree owners of property without due process of law. Upton v. Felton, 4 F.Supp. 585 (D. Neb. 1932).

8. Contract rights

Act reducing penalty for violation of Installment Loan Act did not violate this section. Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N.W.2d 907 (1964).

Recovery on behalf of city by taxpayer of amount paid on void contract did not deny defendant due process of law. Arthur v. Trindel, 168 Neb. 429, 96 N.W.2d 208 (1959).

Construction of a collective bargaining contract decided upon contract and estoppel and not under due process clause of Constitution. Brisbin v. E. L. Oliver Lodge No. 335, 134 Neb. 517, 279 N.W. 277 (1938).

Statute may not operate retrospectively where it would impair obligation of contracts or interfere with vested rights. Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N.W. 449 (1929).

Requiring contract work for a city to be performed by union labor violates the due process clause of the Constitution. Wright v. Hoctor, 95 Neb. 342, 145 N.W. 704 (1914).

Statutes on unfair competition do not contravene the Constitution relative to class legislation, freedom of contract or of taking property without due process of law. It is not the making of contracts which is forbidden, but the conduct, purpose and motives of the parties in connection with their acts. State v. Drayton, 82 Neb. 254, 117 N.W. 768 (1908).

Anti-pass law, imposing a penalty on either who give or receive a free railroad pass, is not an impairment of contract or taking property without due process of law. State v. Martyn, 82 Neb. 225, 117 N.W. 719 (1908).

Regulation of Board of Soldiers and Sailors Home providing that certain specific per cent of pension be paid into cash fund of home is a matter of contract and not that of depriving inmate of property without due process of law. Howell v. Sheldon, 82 Neb. 72, 117 N.W. 109 (1908).

9. Labor and employment

Sunday closing law violated this section and was unconstitutional in its entirety. Terry Carpenter, Inc. v. Wood, 177 Neb. 515, 129 N.W.2d 475 (1964).

Sunday closing ordinance of city of first class violated this section. Skag-Way Department Stores, Inc. v. City of Grand Island, 176 Neb. 169, 125 N.W.2d 529 (1964).

Fixing of a scale of wages to be paid by a successful contractor at a public letting violated this section. Philson v. City of Omaha, 167 Neb. 360, 93 N.W.2d 13 (1958).

City ordinance fixing closing hour of barber shops but not of beauty parlors is a discrimination within the due process clause of the Constitution. Ernesti v. City of Grand Island, 125 Neb. 688, 251 N.W. 899 (1933).

Statute requiring taxicab operators to deposit liability insurance or other security is not taking property without due process of law. Petersen v. Beal, 121 Neb. 348, 237 N.W. 146 (1931).

Ordinance prohibiting the selling or exchange of motor vehicles on Sunday is constitutional as police regulation. Stewart Motor Co. v. City of Omaha, 120 Neb. 776, 235 N.W. 332 (1931).

Sunday labor law is not repugnant to this section. In re Caldwell, 82 Neb. 544, 118 N.W. 133 (1908).

Statute regulating hours of employment of females in certain businesses is not unconstitutional. Wenham v. State, 65 Neb. 394, 91 N.W. 421 (1902).

Prescribing 8 hour day for certain kinds of labor is a denial of due process of law. Low v. Rees Printing Co., 41 Neb. 127, 59 N.W. 362 (1894).

10. Taxes and special assessments

A statute which authorized taxation of capital gain including portion of gain which accrued during taxing period prior to adoption of act was not unconstitutional. Altsuler v. Peters, 190 Neb. 113, 206 N.W.2d 570 (1973).

Laws for the levy and collection of general taxes stand upon a different footing than laws for the levy and collection of special assessments or special taxes. Frye v. Haas, 182 Neb. 73, 152 N.W.2d 121 (1967).

Penalty for failure to return personal property for taxation operated to deprive person of property without due process of law. Bachus v. Swanson, 179 Neb. 1, 136 N.W.2d 189 (1965).

An order by district court to produce a copy of income tax return is not a violation of due process clause of state Constitution. Rhodes v. Edwards, 178 Neb. 757, 135 N.W.2d 453 (1965).

Fixing of tax levy for municipal university did not violate due process clause. Ratigan v. Davis, 175 Neb. 416, 122 N.W.2d 12 (1963).

Action of State Board of Equalization and Assessment in raising values was not denial of due process. County of Howard v. State Board of Equalization & Assessment, 158 Neb. 339, 63 N.W.2d 441 (1954).

Ordinance of city of Lincoln imposing occupation tax on taxicabs does not violate due process of law. Richter v. City of Lincoln, 136 Neb. 289, 285 N.W. 593 (1939).

City taxes levied and assessed in accordance with home rule charter do not violate constitutional provision. Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 276 N.W. 196 (1937).

Gross premium tax on foreign insurance companies is an excise tax on privilege of doing business in Nebraska, and not violative of due process clause of Constitution. State ex rel. Smrha v. General American Ins. Co., 132 Neb. 520, 272 N.W. 555 (1937).

Statute imposing excise tax on gasoline is consistent with the due process clause of the Constitution. Burke v. Bass, 123 Neb. 297, 242 N.W. 606 (1932).

A special assessment levied upon state banks was not deprivation of private property in violation of this section. Abie State Bank v. Weaver, 119 Neb. 153, 227 N.W. 922 (1929), affirmed in Abie State Bank v. Bryan, 282 U.S. 765 (1931).

Sanitary District Law does not require the officers of a sanitary district to give notice of the levying of a tax which is within their power to levy; if they exceed their power, they may be enjoined. Whedon v. Wells, 95 Neb. 517, 145 N.W. 1007 (1914).

Occupation tax is a revenue measure and does not violate this section. Norris v. City of Lincoln, 93 Neb. 658, 142 N.W. 114 (1913).

Due process of law does not necessarily require a judicial hearing in matters of taxation. Trainor v. Maverick Loan & Trust Co., 80 Neb. 626, 114 N.W. 932 (1908).

The provisions of the statute granting the landowner the right to object to the confirmation of sale, affords him an opportunity to have the question of the validity of the tax determined before he is deprived of his property. State v. Several Parcels of Land, 75 Neb. 538, 106 N.W. 663 (1906).

Statute providing for an assessment of railway property by State Board of Equalization is not deprivation of property by taxation without due process of law. Chicago, B. & Q. R. R. Co. v. Richardson County, 72 Neb. 482, 100 N.W. 950 (1904); State ex rel. Morton v. Back, 72 Neb. 402, 100 N.W. 952 (1904).

An owner is not deprived of his property without due process of law if he has an opportunity to question its validity or the amount of tax or assessment at some stage of the proceedings, either before the amount is finally determined or in subsequent proceedings for its collection. Hacker v. Howe, 72 Neb. 385, 101 N.W. 255 (1904).

Statute providing for foreclosure of tax lien on land for payment of delinquent taxes by proceeding in district court with notice by publication sufficiently answers the demand of due process of law. Woodrough v. Douglas County, 71 Neb. 354, 98 N.W. 1092 (1904).

The power of the state to levy taxes obviously carries with it the power to collect them and to provide all means necessary or appropriate to insure and enforce their collection. Leigh v. Green, 64 Neb. 533, 90 N.W. 255 (1902).

11. Laws held generally to violate due process

Rural Cemetery District Act violated this provision of the Constitution. Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961).

Weather Control Act of 1957 violated this section. Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N.W.2d 748 (1960).

Fair Trade Act violated due process clause. McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N.W.2d 608 (1955).

12. Laws held generally not to violate due process

This section was not violated in adoption of L.B. 425 (Laws 1967) amending section 14-1041 and creating section 14-1042, R.R.S.1943. Evans v. Metropolitan Utilities Dist., 187 Neb. 261, 188 N.W.2d 851 (1971).

Statutes relating to annexation of urban and suburban land by first-class cities and providing annexation benefits thereto held constitutional. Plumfield Nurseries, Inc. v. Dodge County, 184 Neb. 346, 167 N.W.2d 560 (1969).

Airport Authority Act did not violate this section. Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 105 (1967).

Statute creating Nebraska Power Review Board did not violate this section. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N.W.2d 629 (1965).

Zoning ordinance of city of Omaha did not violate this section. Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964).

Statute authorizing paving in city of the second class did not deny due process of law. Elliott v. City of Auburn, 172 Neb. 1, 108 N.W.2d 328 (1961).

Reorganization of School Districts Act did not violate this section. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

Reclamation Act did not violate this section. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Unfair Sales Act sustained as constitutional. Hill v. Kusy, 150 Neb. 653, 35 N.W.2d 594 (1949).

Par Check Law sustained as constitutional exercise of police power. Placek v. Edstrom, 148 Neb. 79, 26 N.W.2d 489 (1947).

Statute prohibiting trial of divorce suit until six months after service of summons does not violate due process of law. Garrett v. State, 118 Neb. 373, 224 N.W. 860 (1929).

Employees liability act does not violate the constitutional guaranty that no person shall be deprived of property without due process of law. United States Fidelity and Guaranty Co. v. Wickline, 103 Neb. 21, 170 N.W. 193 (1918).

Innkeepers' act providing for night watchman to protect guest from fire does not contravene the Constitution in that it deprives the innkeeper of life, liberty and property without due process of law. Strahl v. Miller, 97 Neb. 820, 151 N.W. 952 (1915), Ann. Cas. 1917A 141 (1915).

Bulk sales law does not violate provision of taking property without due process of law. Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N.W. 1133 (1912).

13. Miscellaneous

Constitutionality of legislative act as being in violation of this section raised but not decided, as act was in violation of another section of the Constitution. Williams v. County of Buffalo, 181 Neb. 233, 147 N.W.2d 776 (1967).

Constitutionality of Municipal Ground Water Act raised, but not decided. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966).

Claim of deprivation of property without due process of law under labor relations ordinance was raised but not decided. Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 131 N.W.2d 609 (1964).

Unconstitutionality of tax statute under this section raised but not decided. Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

Issue of double taxation of motor vehicles raised but not decided. Peterson v. Hancock, 166 Neb. 637, 90 N.W.2d 298 (1958).

Effect of instruction as denial of due process raised but not decided. Liakas v. State, 161 Neb. 130, 72 N.W.2d 677 (1955).

Constitutionality of statute authorizing service by publication raised but not decided. Johnson v. Richards, 155 Neb. 552, 52 N.W.2d 737 (1952).

Sec. 4. Religious freedom.

All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Source: Neb. Const. art. I, sec. 4 (1875).

Right to religious freedom was not denied by requirement that all schools be taught by qualified teacher. Meyerkorth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962).

Legislature cannot authorize donations by public corporations for religious purposes. United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).

A public exhibition of religious worship, in the form of a seance for gain on stage or at show, is not a religious liberty guaranteed by Constitution. Dill v. Hamilton, 137 Neb. 723, 291 N.W. 62 (1940).

Restricting term "Religious purpose" to church organization is a transgression of the constitutional inhibition made by this section. Ancient & Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N.W. 93 (1932), overruled Scottish Rite Bldg. Co. v. Lancaster County, 106 Neb. 95, 182 N.W. 574 (1921), and Mt. Moriah Lodge, A.F. & A.M. v. Otoe County, 101 Neb. 274, 162 N.W. 639 (1917).

Use of state funds to support a school maintained by religious denomination is in violation of this section. State ex rel. Public Sch. Dist. No. 6 of Cedar County v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932).

Holding Sunday School or religious meetings in a country schoolhouse so infrequently as not to exceed four times a year, and which does not interfere with the school work, does not constitute a place of worship within the meaning of this section. State ex rel. Gilbert v. Dilley, 95 Neb. 527, 145 N.W. 999 (1914).

Courts will not refuse to protect property rights because they may thereby interfere with religious convictions of some individual or group. Constitution contemplates courts may be called upon to protect religious denominations in peaceable enjoyment of own form of worship. Parish of the Immaculate Conception v. Murphy, 89 Neb. 524, 131 N.W. 946 (1911).

Reading in public schools of passages from the Bible, singing of hymns, and offering prayer, in accordance with the doctrines of sectarian churches, is forbidden by the Constitution. State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902), judgment adhered to 65 Neb. 876, 93 N.W. 169 (1903).

Sec. 5. Freedom of speech and press.

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense.

Source: Neb. Const. art. I, sec. 5 (1875).

1. Freedom of speech
2. Freedom of the press
3. Truth
4. Miscellaneous

1. Freedom of speech

The parameters of the constitutional right to freedom of speech are the same under this provision and the U.S. Constitution. State v. Hookstra, 263 Neb. 116, 638 N.W.2d 829 (2002).

A content-neutral nude dancing ordinance satisfies the constitutional guarantee of freedom of speech when the ordinance (1) is within the power of the government to enact, (2) reasonably furthers a substantial government interest, (3) is unrelated to the suppression of free expression, and (4) imposes a restriction that is no greater than is essential to the furtherance of the substantial government interest. Village of Winslow v. Sheets, 261 Neb. 203, 622 N.W.2d 595 (2001).

The parameters of the constitutional right to freedom of speech are the same under the Nebraska and U.S. Constitutions. Village of Winslow v. Sheets, 261 Neb. 203, 622 N.W.2d 595 (2001).

The free speech provision of the Nebraska Constitution does not guarantee a picketer or a protester an audience, it only guarantees a reasonable opportunity to speak. Hartford v. Womens Services, P.C., 239 Neb. 540, 477 N.W.2d 161 (1991).

A prior restraint on speech is not per se unconstitutional, but there is a heavy presumption against its constitutional validity. To be lawful, a prior restraint on speech must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. Content-based restrictions on commercial speech are permissible. Commercial speech is speech related solely to the economic interests of the speaker and the audience, or speech which does no more than propose a commercial transaction. Speech intended to exercise a coercive impact is not removed from the reach of the first amendment. J. Q. Office Equip. v. Sullivan, 230 Neb. 397, 432 N.W.2d 211 (1988).

As used in section 28-729, ''resist'' is not unconstitutionally vague, and use of ''fighting words'' to constitute ''abuse'' depends upon the circumstances under which used. State v. Boss, 195 Neb. 467, 238 N.W.2d 639 (1976).

2. Freedom of the press

Obscenity is not within the protection of freedom of the press. State v. Pocras, 166 Neb. 642, 90 N.W.2d 263 (1958).

The freedom implies the publisher's respect for the constitutional rights of others, including the rights of litigants to appear before an independent, impartial court uninfluenced or unembarrassed by contemptuous publications pending litigation. State v. Lovell, 117 Neb. 710, 222 N.W. 625 (1929).

The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by this section of the Constitution. Howell v. Bee Pub. Co., 100 Neb. 39, 158 N.W. 358 (1916).

Constitution does not protect any person from punishment for contempt of court for publishing a newspaper article commenting upon a pending cause or proceeding when the publication is calculated to hinder, obstruct, or impede the due administration of justice. Rosewater v. State, 47 Neb. 630, 66 N.W. 640 (1896).

3. Truth

When a publication is made by a chief officer of a fraternal insurance association, addressed to the members of the association, concerning a subject matter which affects the general welfare of the association, such communication, although containing words which are libelous per se, is qualifiedly privileged, and is a complete defense unless it is shown by plaintiff by a preponderance of the evidence that the publication was made with express malice. Peterson v. Cleaver, 105 Neb. 438, 181 N.W. 187 (1920).

Where the purpose of members of village board in signing notice to hotel keeper was to do away with bawdy house, rather than to injure plaintiff, it was with good motives, and for justifiable ends. Deupree v. Thorton, 98 Neb. 804, 154 N.W. 557 (1915).

Truth alone is not a defense in action for libel unless with good motives and for justifiable ends. Wertz v. Sprecher, 82 Neb. 834, 118 N.W. 1071 (1908); Neilson v. Jensen, 56 Neb. 430, 76 N.W. 866 (1898); Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N.W. 358 (1894).

In a criminal prosecution for publishing an alleged libelous article, the truth of the article, when established, is a perfect defense. Razee v. State, 73 Neb. 732, 103 N.W. 438 (1905), but see Wertz v. Sprecher, 82 Neb. 834, 118 N.W. 1071 (1908).

4. Miscellaneous

The protections of sections 5 and 7 of this article intertwine when films are the ''things'' seized. State v. Skolnik, 218 Neb. 667, 358 N.W.2d 497 (1984).

Statute providing it shall be unlawful just to be in place where controlled substance is being used illegally is unconstitutionally vague and overbroad. State v. Adkins and Sutherland, 196 Neb. 76, 241 N.W.2d 655 (1976).

Statute providing that candidates for judicial and educational offices should not be nominated, indorsed, recommended, censured, criticized or referred to in any manner by any political convention, or primary, or at any primary election is a violation

of this section. State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N.W. 473 (1909).

City ordinance prohibiting distribution of handbills or circulars upon public streets, does not violate this section. In re Anderson, 69 Neb. 686, 96 N.W. 149 (1903).

Sec. 6. Trial by jury.

The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.

Source: Neb. Const. art. I, sec. 6 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 1.

1. Meaning and effect
2. Waiver
3. Entitled to jury trial
4. Not entitled as matter of right
5. Miscellaneous

1. Meaning and effect

The purpose of this provision is to preserve the right to a jury trial as it existed at common law and under statutes in force when the Nebraska Constitution was adopted in 1875. The essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the petition determine whether a particular action is one at law to be tried to a jury or in equity to be tried to a court. State ex rel. Cherry v. Burns, 258 Neb. 216, 602 N.W.2d 477 (1999).

Right to jury trial not abridged by mandatory review of medical claim under Nebraska Hospital-Medical Liability Act. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

The court may require that a motion to waive a jury trial be made or filed within a reasonable time prior to trial as a condition to the consent of the court. State v. Godfrey, 182 Neb. 451, 155 N.W.2d 438 (1968).

Determination of sentence to be imposed by court instead of jury does not violate this section. Poppe v. State, 155 Neb. 527, 52 N.W.2d 422 (1952).

Constitution merely preserves right of jury trial as it existed at common law and under statutes in force when Constitution was adopted. One charged with drunken driving under city ordinance is not entitled to jury trial in absence of statute. State v. Hauser, 137 Neb. 138, 288 N.W. 518 (1939).

Constitutional provision does not extend right to jury trial beyond the limits existing at time of adoption of Constitution; jury trial is not a constitutional right in proceeding for appointment or removal of guardian. In re Guardianship of Warner, 137 Neb. 25, 288 N.W. 39 (1939).

The right of trial by jury is a right not extended by the Constitution but one preserved. In an equity case the court may, but is not bound to, give a jury trial. Omaha Fire Insurance Co. v. Thompson, 50 Neb. 580, 70 N.W. 30 (1897).

An action upon a contract for the payment of money only, unencumbered by any collateral agreements, contracts or securities whatever, is a legal action and the issue of fact is triable to a jury. Kuhl v. Pierce County, 44 Neb. 584, 62 N.W. 1066 (1895).

Where a petition states a cause of action for equitable relief and prays for equitable relief, a jury cannot be demanded as a matter of right for the trial of any issue arising in the case. Sharmer v. McIntosh and Johnson, 43 Neb. 509, 61 N.W. 727 (1895).

2. Waiver

Right to a trial by jury may be waived by defendant in criminal case. State v. Carpenter, 181 Neb. 639, 150 N.W.2d 129 (1967).

In a civil action, right of trial by jury may be waived. McKinney v. County of Cass, 180 Neb. 685, 144 N.W.2d 416 (1966); Davis v. Snyder 45 Neb. 415, 63 N.W. 789 (1895).

Right to trial by jury may be waived. Johnson v. State, 169 Neb. 783, 100 N.W.2d 844 (1960).

Party who invoked special proceeding could not question constitutionality thereof under this section. Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950).

A plea of guilty waived defendant's right to be served with copy of accusation, time in which to examine the charge and prepare his defense, and waived all other preliminary steps. In re Application of Rice, Rice v. Olson, 144 Neb. 547, 14 N.W.2d 850 (1944), reversed in 324 U.S. 786 (1945).

A request by both parties for direction of a verdict amounts to a waiver of a jury. In re Bose's Estate, 136 Neb. 156, 285 N.W. 319 (1939).

Right to trial by jury in civil case is mere personal privilege which the litigant may waive. Berg v. Griffiths, 126 Neb. 235, 252 N.W. 918 (1934)

In felony case, where prisoner waived jury and trial had to court the judgment and sentence is void. Michaelson v. Beemer, 72 Neb. 761, 101 N.W. 1007 (1904); Arnold v. State, 38 Neb. 752, 57 N.W. 378 (1894).

3. Entitled to jury trial

Cited in determining that material issues of fact in contested garnishment proceedings are triable to jury. Christiansen v. Moore, 184 Neb. 818, 172 N.W.2d 620 (1969).

It is a part of our fundamental law that the right of trial by jury shall remain inviolate. Fugate v. Skate, 169 Neb. 420, 99 N.W.2d 868 (1959).

Value of an attorney's services is ordinarily a jury question. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N.W.2d 667 (1956).

Right of trial by jury is not denied to defendant charged with being the father of a child born out of wedlock. In re Application of Rozgall, 147 Neb. 260, 23 N.W.2d 85 (1946).

Cashier of insolvent bank, made party to proceeding to establish preference, is entitled to jury trial. Gering v. Buerstetta, 118 Neb. 54, 223 N.W. 625 (1929).

In proceeding to revive dormant judgment, where payment or satisfaction is pleaded, it is error for the court to deny a request for a trial by jury. Farak v. First Nat. Bank of Schuyler, 67 Neb. 463, 93 N.W. 682 (1903); McCormick & Brother v. Carey, 62 Neb. 494, 87 N.W. 172 (1901).

Clause in fire insurance policy providing that no action shall be brought thereon after breach but all differences settled by arbitration is void, as tending to oust the courts of the jurisdiction. Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N.W. 736 (1902); Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 92 N.W. 746 (1902).

In action for money judgment for breach of contract, though equitable in nature, the issue should be submitted to a jury if demand is made for one. Lett v. Hammond, 59 Neb. 339, 80 N.W. 1042 (1899).

If purpose of action is primarily for recovery of money, though in part equitable in nature, the right to trial by jury exists. Yager v. Exchange Nat. Bank of Hastings, 52 Neb. 321, 72 N.W. 211 (1897); Omaha Fire Ins. Co. v. Thompson, 50 Neb. 580, 70 N.W. 30 (1897).

In garnishment proceedings, if the garnishee makes legal or equitable claim to the funds he is entitled to trial by jury. Clark v. Foxworthy, 14 Neb. 241, 15 N.W. 342 (1883).

4. Not entitled as matter of right

Notwithstanding constitutional mandates regarding a jury trial, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less. State v. Kennedy, 224 Neb. 164, 396 N.W.2d 722 (1986).

It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury. State v. Johnson, 191 Neb. 535, 216 N.W.2d 517 (1974).

Right to jury trial not given in school district reorganization appeal. Schroeder v. Oeltjen, 184 Neb. 8, 165 N.W.2d 81 (1969).

Trial without a jury for violation of city or village ordinance is not a violation of this section. State v. Lookabill, 176 Neb. 254, 125 N.W.2d 695 (1964).

Legislature may authorize trial of petty offenses without a jury for violation of city or village ordinance. State v. Amick, 173 Neb. 770, 114 N.W.2d 893 (1962).

Election contest is a summary action and is not a suit in which a trial by jury is guaranteed under the Constitution. McMaster v. Wilkinson, 145 Neb. 39, 15 N.W.2d 348 (1944).

Action to quiet title to real estate, acquired by accretion, is tried as an equitable action, without a jury. Frank v. Smith, 138 Neb. 382, 293 N.W. 329 (1940).

Enjoining defendants from betting on horse races in their places of business is an equitable remedy to prevent a nuisance and not a proceeding to punish defendants, and does not violate constitutional guarantee of jury trial. State ex rel. Hunter v. The Araho, 137 Neb. 389, 289 N.W. 545 (1940).

Cases arising under Workmen's Compensation Act may be tried and determined as a suit in equity, and it is not in violation of Constitution not to provide for jury. Nosky v. Farmers Union Cooperative Assn., 109 Neb. 489, 191 N.W. 846 (1922).

This section has no application to judicial proceedings concerning the amount or legality of special assessments for benefits to highways within a drainage district. Drainage Dist. No. 1, Richardson County v. Richardson County, 86 Neb. 355, 125 N.W. 796 (1910).

On a motion for a deficiency judgment in the foreclosure of a real estate mortgage, the mortgagors are not entitled to a trial by a jury. Daniels v. Mutual Benefit Life Insurance Company, 73 Neb. 257, 102 N.W. 458 (1905).

Action by county, to foreclose tax lien, is a suit in equity and there is no constitutional right of a trial by jury. Woodrough v. Douglas County, 71 Neb. 354, 98 N.W. 1092 (1904).

Quo warranto and injunction to exclude a corporation from the privilege of doing business in this state does not require a trial by jury. State v. Standard Oil Co., 61 Neb. 28, 84 N.W. 413 (1900).

In quo warranto proceedings against a public officer, a jury trial cannot be demanded as a matter of right. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

The accused is not entitled to jury trial in prosecution under city ordinance. Liberman v. State, 26 Neb. 464, 42 N.W. 419 (1889).

An action to foreclose mechanic's lien is essentially a suit in equity, and a party is not as a matter of right entitled to a jury therein. Dohle v. Omaha Foundry & Machine Co., 15 Neb. 436, 19 N.W. 644 (1884).

Contempt proceeding is solely to protect public justice from obstruction and the accused is not entitled to trial by jury. Gandy v. State, 13 Neb. 445, 14 N.W. 143 (1882).

5. Miscellaneous

The right of trial by jury hereunder does not apply to second offense drunk driving because that is a misdemeanor, not recognized by the common law or any statute in existence when the Constitution was adopted. State v. Young, 194 Neb. 544, 234 N.W.2d 196 (1975).

Denial of request for a separate trial of defendant in a criminal case did not violate this section. State v. Adams, 181 Neb. 75, 147 N.W.2d 144 (1966).

Verdict in civil case by five-sixths of jury was authorized. Cartwright & Wilson Constr. Co. v. Smith, 155 Neb. 431, 52 N.W.2d 274 (1952).

Right of jury trial is not denied where adverse claims are presented and tried in mortgage foreclosure proceeding. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N.W.2d 545 (1943).

Where defendant is charged with a felony, it is prejudicial error for court, without notice to and in absence of defendant and his counsel, to instruct jury orally while it is deliberating upon its verdict. Strasheim v. State, 138 Neb. 651, 294 N.W. 433 (1940).

Where cause of action is reversed and remanded, both parties are entitled to a retrial of the cause generally and it is error for trial court to enter judgment for a certain amount though Supreme Court had indicated that aggrieved party was entitled to damages. Parish v. County Fire Ins. Co., 137 Neb. 385, 289 N.W. 765 (1940).

A judgment notwithstanding the verdict can only be entered when the pleadings of the party in whose favor verdict was rendered confess facts entitling other party to judgment. Wolfinger v. Shaw, 136 Neb. 604, 287 N.W. 63 (1939).

A verdict so clearly excessive as to induce the belief that it must have been found through passion, prejudice or mistake, will be set aside. Collins v. Hughes & Riddle, 134 Neb. 380, 278 N.W. 888 (1938).

It is error to submit a case to a jury and permit it to speculate with the rights of litigants where no question for the jury is involved. Smith v. Epstein Realty Co., 133 Neb. 842, 277 N.W. 427 (1938).

Function of determining facts must, under the Constitution, be discharged by jury in action for damages for personal injuries. Storm v. Christenson, 130 Neb. 86, 263 N.W. 896 (1936).

Practice of nonsuiting plaintiff at close of opening statements to jury disapproved. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N.W. 349 (1934).

Statute authorizing city to condemn public utility property, although no jury trial provided, is constitutional. City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N.W. 484 (1933).

Statute vesting magistrates and police courts with powers to try liquor violations without jury where penalty within certain limits, does not violate this section. State v. Kacin, 123 Neb. 64, 241 N.W. 785 (1932).

A fair determination of the facts involved in a criminal prosecution adversely to the accused, by a constitutional jury, is a prerequisite to the infliction of punishment. Scott v. State, 121 Neb. 232, 236 N.W. 608 (1931).

Mandamus will not lie to vacate order denying jury trial for liquor offense, in view of adequate remedy by appeal or error. State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N.W. 28 (1929).

Litigant cannot demand jury on issue of adverse possession in suit to quiet title. Krumm v. Pillard, 104 Neb. 335, 177 N.W. 171 (1920).

Legislature may enact a law declaring possession and transportation of intoxicating liquors to be misdemeanors, and providing that violators of the law be tried before magistrates and police courts without a jury, where the penalty does not exceed a fine of one hundred dollars or imprisonment for three months. Bell v. State, 104 Neb. 203, 176 N.W. 544 (1920).

Provision for assessment of $300 against building enjoined as liquor nuisance, if construed as penalty, is unconstitutional as violating owner's right to jury trial. State ex rel. McGuire v. Macfarland, 104 Neb. 42, 175 N.W. 663 (1919).

Every person is guaranteed a fair and impartial trial by an impartial jury, and the obligation to protect these constitutional rights devolves upon the courts, and no court, when called upon to act, can shirk or evade the responsibility cast upon it by law. Wilson v. State, 87 Neb. 638, 128 N.W. 38 (1910).

In a law action a party is entitled to a jury trial as a matter of right. Yeiser v. Broadwell, 80 Neb. 718, 115 N.W. 293 (1908).

Whether or not a right to trial by jury exists must be determined from the object of the action as determined by the averments of the petition, and in case of ambiguity by resort to the prayer. Gandy v. Wiltse, 79 Neb. 280, 112 N.W. 569 (1907).

Where a statute providing for selection of juries is incomplete, it is invalid because its requirements cannot be complied with. State ex rel Mickey v. Reneau, 75 Neb. 1, 106 N.W. 451 (1905).

Provision for jury of less than twelve in inferior courts does not violate this section. Chicago, B. & Q. R. R. Co. v. Headrick, 49 Neb. 286, 68 N.W. 489 (1896); Moise v. Powell, 40 Neb. 671, 59 N.W. 79 (1894).

Sec. 7. Search and seizure.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Source: Neb. Const. art. I, sec. 7 (1875).

1. Search warrant
2. Evidence
3. Waiver of right
4. Action by private individual
5. Seizure, what constitutes
6. Miscellaneous

1. Search warrant

Provisions in warrants allowing no-knock search warrants offend neither U.S. Const. amend. IV nor this provision. State v. Eary, 235 Neb. 254, 454 N.W.2d 685 (1990).

A valid search as incident to an arrest without a warrant necessarily depends on the legality of the arrest itself. State v. Wickline, 232 Neb. 329, 440 N.W.2d 249 (1989).

When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect has committed a crime, the officer has probable cause to arrest without a warrant. State v. Wickline, 232 Neb. 329, 440 N.W.2d 249 (1989).

A search pursuant to a warrant is presumed valid. If police have acted pursuant to a search warrant, the defendant bears the burden of proof that the search or seizure is unreasonable; but, if police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. State v. Vrtiska, 225 Neb. 454, 406 N.W.2d 114 (1987).

Seizure of theater owner's films without a warrant is not justified under this provision in the absence of probable cause and exigent circumstances or some other recognized exception. State v. Skolnik, 218 Neb. 667, 358 N.W.2d 497 (1984).

A warrant to search a house also covers the land around the house and associated outbuildings used by the inhabitants of the house. State v. Vicars, 207 Neb. 325, 299 N.W.2d 421 (1980).

Items not listed on a search warrant but in plain view of officers searching an area described in the warrant for items listed on the warrant may be seized. State v. King, 207 Neb. 270, 298 N.W.2d 168 (1980).

This section not violated where law enforcement officers learning of attempted arson from trespassers inspected premises without entry or search to ascertain that no fire was in progress before obtaining search warrant. State v. Howard, 184 Neb. 274, 167 N.W.2d 80 (1969).

Law permitting search warrant to be issued upon information and belief is not in violation of this section. Watson v. State, 109 Neb. 43, 189 N.W. 620 (1922).

The right to a search warrant is in no instance authorized until a showing, on oath, of probable cause and particular description is given of place or premises to be searched and thing to be seized. Peterson v. State, 64 Neb. 875, 90 N.W. 964 (1902).

Law enforcement officers may search the entirety of a motor vehicle, including closed compartments and baggage, as a search incident to a lawful arrest. A warrantless search of containers within a motor vehicle is allowed where there exists probable cause to believe that contraband is located in the vehicle. State v. Claus, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

2. Evidence

Once a person is lawfully arrested, if the search is within the scope of a search which may be conducted incident to a lawful arrest, then the evidence obtained from the search is properly admitted. State v. Roberts, 261 Neb. 403, 623 N.W.2d 298 (2001).

Evidence obtained pursuant to an arrest by an officer who was without statutory or common-law authority to arrest should be suppressed. State v. Tingle, 239 Neb. 558, 477 N.W.2d 544 (1991).

The eyewitness report of a citizen informant may be self-corroborating; the fact that a citizen voluntarily came forward with information is itself an indicium of reliability. State v. King, 207 Neb. 270, 298 N.W.2d 168 (1980).

Evidence obtained as the result of an illegal arrest without a warrant is inadmissible in a criminal prosecution. State v. O'Kelly, 175 Neb. 798, 124 N.W.2d 211 (1963).

Evidence obtained as the result of an unlawful search is not rendered inadmissible. Haswell v. State, 167 Neb. 169, 92 N.W.2d 161 (1958).

Seizure by officer of property beyond scope and terms of search warrant, is a violation of this section; nevertheless

articles seized and information procured may be used as evidence. Billings v. State, 109 Neb. 596, 191 N.W. 721 (1923).

Taking prisoner's shoes while confined in jail and introducing same in evidence against him does not contravene prohibition against unreasonable seizure. Russell v. State, 66 Neb. 497, 92 N.W. 751 (1902).

Trooper's pat-down search, performed for an improper purpose, was unconstitutional, and evidence found was inadmissible. State v. Scovill, 9 Neb. App. 118, 608 N.W.2d 623 (2000).

Trooper's warrantless search of defendant's car, glove box, and items strewn about the scene of a vehicle accident lacked probable cause, and evidence found was inadmissible. State v. Scovill, 9 Neb. App. 118, 608 N.W.2d 623 (2000).

3. Waiver of right

The right to be free from search and seizure may be waived by consent of a citizen as long as such consent is given freely and is not the product of a will overborne. State v. Ready, 252 Neb. 816, 565 N.W.2d 728 (1997).

The right to be free from an unreasonable search and seizure may be waived by the consent of the citizen. State v. Graham, 241 Neb. 995, 492 N.W.2d 845 (1992).

The right to be free from unreasonable search and seizure can be waived by the citizen's consent. State v. Dixon, 237 Neb. 630, 467 N.W.2d 397 (1991).

The right under the federal and state Constitutions to be free from an unreasonable search and seizure may be waived by the consent of the citizen. Consent is an exception to the probable cause requirement of the Fourth Amendment; however, a consensual search may not exceed the scope of the consent given. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness, or in other words, what a typical reasonable person would have understood by the exchange between the officer and the suspect. State v. Claus, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

4. Action by private individual

The constitutional protection against unreasonable searches and seizures proscribes only governmental action and is inapplicable to searches or seizures effected by private individuals. State v. Dixon, 237 Neb. 630, 467 N.W.2d 397 (1991).

Under both the fourth amendment to the U.S. Constitution and this provision, whether a search by a private person is actually a search by the State depends on whether the private person must be regarded as having acted as an instrument or agent of the State. A private person's status as a state agent in a search is not restricted to a search ordered, requested, or initiated by a state official, but may include a search which is a joint endeavor between a private person and a state official. Some conduct by the police in advancement or inducement of a search by a private person must be proven to make out a joint endeavor. State v. Sardeson, 231 Neb. 586, 437 N.W.2d 473 (1989).

If a search is a joint endeavor involving a private person and a state or government official, the search is subject to the constitutional safeguard against an unreasonable search, prohibited by the fourth amendment to the U.S. Constitution and this provision. State v. Jolitz, 231 Neb. 254, 435 N.W.2d 907 (1989).

5. Seizure, what constitutes

A ''seizure'' of property occurs when there is some meaningful interference with an individual's possessory interests in that property. State v. Dixon, 237 Neb. 630, 467 N.W.2d 397 (1991).

A seizure for purposes of this provision requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority. State v. Cronin, 2 Neb. App. 368, 509 N.W.2d 673 (1993).

6. Miscellaneous

The exclusionary rule is inapplicable in child protection proceedings. In re Interest of Corey P. et al., 269 Neb. 925, 697 N.W.2d 647 (2005).

In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, sec. 7. To determine whether an individual has an interest protected by the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, sec. 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy in the place subjected to canine scrutiny. Ordinarily, two inquiries are required. First, the individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation is one that society is prepared to recognize as reasonable. By using a canine to sniff for illegal drugs in a hallway outside an apartment, the police have engaged an investigative technique by which they are able to obtain information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy, and while such investigative technique may be minimally intrusive, it nevertheless implicates the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, sec. 7, and requires independent reasonable suspicion. Under the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, sec. 7, an occupant has a legitimate expectation of some measure of privacy in the hallway immediately outside his or her apartment or at the threshold of his or her home. Given such constitutional protection, before a drug-detecting canine can be deployed to test the threshold of a home, police officers must possess at a minimum reasonable, articulable suspicion that the location to be tested contains illegal drugs. State v. Ortiz, 257 Neb. 784, 600 N.W.2d 805 (1999).

Under this provision, it is reasonable for the police to search the personal effects of a person under lawful arrest as part of the routine procedure incident to booking and jailing the suspect. There is no requirement that such inventory policies be established in writing. State v. Filkin, 242 Neb. 276, 494 N.W.2d 544 (1993).

A defendant is guaranteed the right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures. State v. Houser, 241 Neb. 525, 490 N.W.2d 168 (1992).

No new arrest occurred when correctional authorities allowed police officers to interview a person being held in jail on other charges, and thus there was no constitutional basis to challenge the officers' seizure of the person when he attempted to leave the interviewing room. State v. Green, 240 Neb. 639, 483 N.W.2d 748 (1992).

The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved. An officer is not required to wait until a crime has occurred before making an investigatory stop. It is sufficient if there is an objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. State v. Rein, 234 Neb. 917, 453 N.W.2d 114 (1990).

Neither the U.S. Constitution nor the Nebraska Constitution prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of the home. State v. Trahan, 229 Neb. 683, 428 N.W.2d 619 (1988).

A person's capacity to claim the protection of this section as to unreasonable searches and seizures, like its counterpart, U.S. Const. amend. IV, depends upon whether the person who claims such protection has a legitimate expectation of privacy in the invaded place. An unreasonable search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. Because the defendants had no reasonable expectation of privacy in the searched premises, they were without standing to claim a violation of U.S. Const. amend. IV in regard to the search of their former residence. State v. Hodge and Carpenter, 225 Neb. 94, 402 N.W.2d 867 (1987).

Seizure of property which is in plain sight in vehicle's completely open trunk while driving on a public thoroughfare is lawful under the plain view doctrine provided there is probable cause to associate the property which is in plain view with

criminal activity. State v. Holman, 221 Neb. 730, 380 N.W.2d 304 (1986).

The protections of sections 5 and 7 of this article intertwine when films are the ''things'' seized. State v. Skolnik, 218 Neb. 667, 358 N.W.2d 497 (1984).

An investigatory stop and search is not constitutionally permissible where the officer has no reasonable suspicion a person is committing, has committed, or is about to commit a crime. State v. Colgrove, 198 Neb. 319, 253 N.W.2d 20 (1977).

Sections 29-3301 to 29-3307 do not violate privilege against self-incrimination, are constitutional, and apply to physical evidence, not to oral communications or testimony. State v. Swayze, 197 Neb. 149, 247 N.W.2d 440 (1976).

In a ''stop and frisk'' situation, if after a patdown, officers had nothing more than a suspicion that vehicle contained controlled substances they did not have probable cause to arrest occupants or search vehicle. State v. Aden, 196 Neb. 149, 241 N.W.2d 669 (1976).

Statements and admissions by a defendant in proceedings under sexual psychopath law were not obtained in violation of this section. State v. Madary, 178 Neb. 383, 133 N.W.2d 583 (1965).

Statute requiring a warehouseman to furnish tax assessor a list of property stored in warehouse was not violative of this section. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N.W.2d 408 (1959).

Filiation proceedings are essentially civil in character. In re Application of Rozgall, 147 Neb. 260, 23 N.W.2d 85 (1946).

A citizen has the right to keep existence of his private papers and effects secret from the world unless required by due process of law to make disclosure. Clarke v. Neb. Nat. Bank, 49 Neb. 800, 69 N.W. 104 (1896).

Under section 84-106, a deputized railroad security officer is constrained by the Fourth Amendment like any sheriff or police officer. State v. Claus, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

Where a police officer had indicated, prior to searching the defendant's person, that he was looking for drugs and weapons, a reasonable person would have believed that consenting to the officer's request to search the vehicle would include the officer's examination of the contents of unlocked closed containers within the vehicle, and thus the defendant's authorization of the officer's search extended to the safety glasses bag lying in plain view on the front seat, in which bag the officer discovered marijuana and methamphetamine. State v. Claus, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

Whether one who consents later objects to an ongoing search is a significant inquiry determining whether there is a limitation placed on the scope of the consent that has been granted. State v. Claus, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

This provision does not foreclose an officer from making observations that lead to a reasonable suspicion of criminal activity during a caretaking encounter. State v. Smith, 4 Neb. App. 219, 540 N.W.2d 375 (1995).

Sec. 8. Habeas corpus.

The privilege of the writ of habeas corpus shall not be suspended.

Source: Neb. Const. art. I, sec. 8 (1875); Amended 1998, Laws 1997, LR 30CA, sec. 1.

Sec. 9. Bail; fines; imprisonment; cruel and unusual punishment.

All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Source: Neb. Const. art. I, sec. 9 (1875); Amended 1978, Laws 1978, LB 553, sec. 1.

1. Bail
2. Excessive bail
3. Fines and punishment
4. Miscellaneous

1. Bail

Pursuant to this provision, not all offenses are bailable offenses. State v. Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990).

Denial of bail on murder charge where proof is evident or presumption great is no basis for claim guilty plea involuntary. State v. Hamilton, 187 Neb. 359, 190 N.W.2d 862 (1971).

One charged with first degree murder has no absolute right to bail. State v. Pilgrim, 182 Neb. 594, 156 N.W.2d 171 (1968).

Throughout state history bail has been provided for and favored. State v. Seaton, 170 Neb. 687, 103 N.W.2d 833 (1960).

A fugitive from justice who is in custody by virtue of a rendition warrant issued by the Governor in an extradition proceeding is not entitled to bail pending appeal. In re Application of Campbell, 147 Neb. 382, 23 N.W.2d 698 (1946).

That all persons shall be ''bailable by sufficient sureties'' is a rule which should apply to one arrested in a ''children born out of wedlock'' proceeding, as well as to one charged with a felony or misdemeanor. State v. Noxon, 96 Neb. 843, 148 N.W. 903 (1914).

The use of term ''bail'' without limitation or qualification would seem to imply a bail as understood at common law before adoption of Constitution, and the court may admit to bail after sentence and pending appeal. Ford v. State, 42 Neb. 418, 60 N.W. 960 (1894).

2. Excessive bail

The issue of excessiveness of pretrial bail is not reviewable after a conviction and sentence. State v. Harig, 192 Neb. 49, 218 N.W.2d 884 (1974).

Habitual criminal statute does not contravene provision prohibiting excessive bail. Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82 (1940).

Excessive bail is not whether the amount of bail required is high but rather is the bail demanded per se unreasonable and

disproportionate to crime charged in indictment. In re Scott, 38 Neb. 502, 56 N.W. 1009 (1893).

Denying bail to persons charged with certain sexual offenses violates the ''excessive bail'' clause of the eighth amendment of the U.S. Constitution as incorporated in the fourteenth amendment. Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981).

3. Fines and punishment

Section 29-2203 does not violate either the U.S. or Nebraska Constitution. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

The death penalty may deter offenders, is not invariably disproportionate to the severity of the crime of murder, and is not per se cruel and unusual punishment. State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977).

Statute providing six months jail sentence plus two-year revocation of motor vehicle operator's license did not violate this section. State v. Tucker, 183 Neb. 577, 162 N.W.2d 774 (1968).

Provision for sterilization of feeble-minded persons as prerequisite to parole or release from state institution is not ''cruel and unusual punishment'' and is not repugnant to this section of the Constitution. In re Clayton, 120 Neb. 680, 234 N.W. 630 (1931).

Sentence under statute providing for ''bread and water'' diet for prisoner is not repugnant to this section. State ex rel. Carson v. Smith, 114 Neb. 661, 209 N.W. 330 (1926); State ex rel. Nelson v. Smith, 114 Neb. 653, 209 N.W. 328 (1926).

The return of the property or of the value thereof in embezzlement or larceny cases, in addition to the penal sentence, should not be considered as any part of the punishment as excessive or unusual. Everson v. State, 66 Neb. 154, 92 N.W. 137 (1902).

4. Miscellaneous

This constitutional provision does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime, provided the punishment is not grossly disproportionate to the crime. State v. Ruzicka, 218 Neb. 594, 357 N.W.2d 457 (1984).

A constitutional amendment adding first degree sexual assault to offenses for which bail may be denied is constitutional and is not violative of the fourteenth Amendment due process clause of the U.S. Constitution. Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106 (1979).

A sentence under a law not yet operative is null and void. State ex rel. Whitacre v. Smith, 114 Neb. 659, 209 N.W. 332 (1926).

Sec. 10. Presentment or indictment by grand jury; information.

No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; *Provided*, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system.

Source: Neb. Const. art. I, sec. 10 (1875).

1. Not violation of section
2. Miscellaneous

1. Not violation of section

Legislative act providing for filiation proceedings is not violative of this section. In re Application of Rozgall, 147 Neb. 260, 23 N.W.2d 85 (1946).

Trial under information by county attorney does not deprive of due process and is in accord with this section. Bolln v. State, 51 Neb. 581, 71 N.W. 444 (1897).

2. Miscellaneous

Prosecutions for misdemeanors are exempt from requirement of being brought only on indictment or information. Otte v. State, 172 Neb. 110, 108 N.W.2d 737 (1961).

Permitting prosecutions for felony by information does not conflict with Fourteenth Amendment to Constitution of the United States. Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124 (1946).

Legislature may provide for prosecution on information instead of indictment. Duggan v. Olson, 146 Neb. 248, 19 N.W.2d 353 (1945).

Where information charging grand larceny was signed by acting county attorney and not county attorney, the error, unless objected to before a plea to the merits, is waived. State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N.W. 497 (1940).

Assistant attorney general is not authorized to make and sign an information in his own name, and one so signed is a nullity. Lower v. State, 106 Neb. 666, 184 N.W. 174 (1921).

Legislature is not limited to exclusive choice between indictment or information as form of prosecution but may provide for both. Dinsmore v. State, 61 Neb. 418, 85 N.W. 445 (1901).

The proceeding by quo warranto is a civil remedy; it is the means employed by the state to cancel and recall a privilege which the corporation proceeded against has abused. State v. Standard Oil Co., 61 Neb. 28, 84 N.W. 413 (1900).

The filing of information by county attorney is the commencement of the criminal prosecution; filing of complaint before magistrate, in felony or other case which he has no jurisdiction to try, does not arrest running of statute of limitations and is not the beginning of the prosecution by the state. State v. Robertson, 55 Neb. 41, 75 N.W. 37 (1898).

Person appointed by court to act in county attorney's absence is authorized to sign information. Korth v. State, 46 Neb. 631, 65 N.W. 792 (1896).

Sec. 11. Rights of Accused.

In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation,

and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Source: Neb. Const. art. I, sec. 11 (1875).

1. Nature and cause of accusation

Defendant's right to demand the nature and cause of accusation does not require State to specify upon which aggravating circumstances of section 29-2523(1) the State intends to rely. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

A finding of guilt of an offense included within the charge of a greater offense does not violate this section. State v. McClarity, 180 Neb. 246, 142 N.W.2d 152 (1966).

It is sufficient if the information states the elements of the crime in the language of the statute. State v. Jarrett, 177 Neb. 459, 129 N.W.2d 259 (1964).

Failure to specify section of statute upon which charge in information was based was error without prejudice. State v. Easter, 174 Neb. 412, 118 N.W.2d 515 (1962).

Information attempting to charge disturbing the peace must set out the particular language or conduct on which the offense is predicated. State v. Coomes, 170 Neb. 298, 102 N.W.2d 454 (1960).

An information must inform the accused with such reasonable certainty of the charge against him that he may prepare his defense and plead the judgment as a bar to a later prosecution for the same offense. May v. State, 153 Neb. 369, 44 N.W.2d 636 (1950).

In prosecution for criminal trespass, complaint must describe locus definitely enough to notify defendant of charge against him. Kissinger v. State, 123 Neb. 856, 244 N.W. 794 (1932).

Embezzlement information must charge particular property with sufficient certainty to apprise defendant of facts relied upon for conviction. Davis v. State, 118 Neb. 828, 226 N.W. 449 (1929).

Amendment of information for larceny of sum of money, during trial, by inserting count for larceny of cream checks, violates constitutional rights of defendant. Stowe v. State, 117 Neb. 440, 220 N.W. 826 (1928).

Law abrogating distinction between principal and accessory does not violate constitutional right to demand nature and cause of accusation. State v. Girt, 115 Neb. 833, 215 N.W. 125 (1927); Scharman v. State, 115 Neb. 109, 211 N.W. 613 (1926).

Information need not negative statutory exceptions. Fitch v. State, 102 Neb. 361, 167 N.W. 417 (1918).

Object of information is to inform accused of precise offense for which he must answer. Moline v. State, 67 Neb. 164, 93 N.W. 228 (1903).

A person may not be informed against for one crime and convicted of another and different one. In re McVey, 50 Neb. 481, 70 N.W. 51 (1897).

2. Presence of accused

Accused has right to appear and defend in person. State v. Beasley, 183 Neb. 681, 163 N.W.2d 783 (1969).

In trial for manslaughter where trial court orally instructs jury while it is deliberating upon its verdict, in absence of and without notice to defendant or his counsel, such action is violation of constitutional rights of the accused. Strasheim v. State, 138 Neb. 651, 294 N.W. 433 (1940).

Accused cannot as a matter of right insist upon being present at time of filing, arguing or ruling upon motion for new trial. Davis v. State, 51 Neb. 301, 70 N.W. 984 (1897).

Accused cannot as a matter of right insist upon being present at time of interlocutory proceedings prior to the selection of the jury. Miller v. State, 29 Neb. 437, 45 N.W. 451 (1890).

Taking of testimony during voluntary and temporary absence of accused does not contravene Constitution. Hair v. State, 16 Neb. 601, 21 N.W. 464 (1884).

3. Meet witnesses face to face

The analysis of the right to confrontation under this provision is the same as that under the Sixth Amendment to the U.S. Constitution. State v. Jacob, 242 Neb. 176, 494 N.W.2d 109 (1993).

Both the federal and the state Constitutions guarantee a defendant the right to confront or meet the witnesses against him face to face. Implicit in confrontation is the right to cross-examine all witnesses. A limitation of the right of confrontation can only be necessitated by a showing of a compelling interest and any infringement must be as minimally obtrusive as possible. Record in case did not show a compelling need to protect the child witness from further injury and absent such a showing, the use of closed-circuit television did not withstand constitutional scrutiny. State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986).

Question of whether defendant could demand production as witness of inmate in penitentiary raised but not decided. Garcia v. State, 159 Neb. 571, 68 N.W.2d 151 (1955).

Death certificate was not admissible to show cause of death. Vanderheiden v. State, 156 Neb. 735, 57 N.W.2d 761 (1953).

Contempt proceedings based on hindrance to due administration of justice did not violate this section. Cornett v. State, 155 Neb. 766, 53 N.W.2d 747 (1952).

Constitutional right to meet witnesses face to face does not apply to contempt proceedings. State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937).

The guaranty of the Constitution of the right to meet the witnesses against him does not apply in disbarment proceedings in which depositions were taken by prosecution, as proceedings are civil, not criminal. State ex rel. Spillman v. Priest, 118 Neb. 47, 223 N.W. 635 (1929).

4. Process for witnesses

The accused in a criminal prosecution has a right to compulsory process to compel the attendance of witnesses in his behalf; however, a criminal defendant does not possess an absolute constitutional right to demand the personal attendance of a prisoner witness incarcerated outside the county of the venue of trial. As a result, section 25-1233 does not violate the compulsory process clauses of the U.S. and Nebraska Constitutions. State v. Stott, 243 Neb. 967, 503 N.W.2d 822 (1993).

Refusal to order compulsory process for witness whose testimony was immaterial was not prejudicial error. O'Rourke v. State, 166 Neb. 866, 90 N.W.2d 820 (1958).

Right to compel attendance of witness includes taking of depositions out of the state. Dolen v. State, 148 Neb. 317, 27 N.W.2d 264 (1947).

Constitution is not contravened by overruling of motion for continuance on ground of absence of material witnesses when it appears that witness was without process of court. Fanton v. State, 50 Neb. 351, 69 N.W. 953 (1897).

The county is not liable for defendant's witness costs, where he is indicted for a felony. Hewerkle v. Gage County, 14 Neb. 18, 14 N.W. 549 (1883).

5. Speedy trial

The constitutional right to a speedy trial is distinct from the provision for a speedy trial prescribed by the Nebraska speedy trial act. State v. Oldfield, 236 Neb. 433, 461 N.W.2d 554 (1990).

The right to a speedy trial applies only to criminal trials and, thus, does not apply to postconviction actions, which are civil in nature. State v. Bostwick, 233 Neb. 57, 443 N.W.2d 885 (1989).

If a trial court relies upon section 29-1207 (4)(f), R.R.S.1943, in excluding a period of delay from the six-month computation, a general finding of ''good cause'' will not suffice; there must be specific findings as to the good cause. State v. Kinstler, 207 Neb. 386, 299 N.W.2d 182 (1980).

It may be reasonably argued that the exclusionary period set forth in section 29-1207(4), R.R.S.1943, would cover the period from a defendant's commitment as a sexual sociopath to the court's opinion in State v. Shaw, 202 Neb. 766, 277 N.W.2d 106 (1979) or the Legislature's enactment of sections 29-2911 to 29-2921, R.R.S.1943. However, since this defendant was not brought to trial within six months of either date, the issue of when to begin computing the time will not be decided here. State v. Kinstler, 207 Neb. 386, 299 N.W.2d 182 (1980).

Trial within six months of date information filed was ''speedy public trial'' under this section. State v. Costello, 199 Neb. 43, 256 N.W.2d 97 (1977).

In all criminal proceedings, accused is entitled to have a speedy public trial. State v. Bruns, 181 Neb. 67, 146 N.W.2d 786 (1966).

Period of time within which retrial must be had after a mistrial rests in the sound discretion of the trial court. State v. Fromkin, 174 Neb. 849, 120 N.W.2d 25 (1963).

Preliminary proceedings before magistrate in filiation proceedings are in no sense a trial of the merits. In re Application of Rozgall, 147 Neb. 260, 23 N.W.2d 85 (1946).

Preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of this section. Roberts v. State, 145 Neb. 658, 17 N.W.2d 666 (1945).

The question of whether a defendant has had a speedy trial is to be determined by what is fair and reasonable under all the facts and circumstances in each particular case. Maher v. State, 144 Neb. 463, 13 N.W.2d 641 (1944).

Accused must be brought to trial in accordance with Constitution and statutes, or be discharged. Critser v. State, 87 Neb. 727, 127 N.W. 1073 (1910).

The Constitution does not entitle accused to demand to be brought before county judge, as such, and proceed with prosecution. In re Chenoweth, 56 Neb. 688, 77 N.W. 63 (1898).

6. Impartial jury

This provision provides that the accused in a criminal prosecution shall have the right to ''trial by an impartial jury'', and article I, section 3, provides that no person shall be deprived of liberty ''without due process of law''. These provisions are interconnected and require that criminal convictions rest upon a jury determination that a criminal defendant is guilty beyond a reasonable doubt of every element of the crime charged. State v. White, 249 Neb. 381, 543 N.W.2d 725 (1996).

If several juries are picked at one time from a single jury panel for a series of trials, examination must be allowed if requested for good reason in subsequent trials in the series to determine if any jurors should be excused for cause. State v. Myers, 190 Neb. 466, 209 N.W.2d 345 (1973).

Right to trial by jury may be waived by defendant in criminal case. State v. Carpenter, 181 Neb. 639, 150 N.W.2d 129 (1967).

Right to trial by an impartial jury was not violated by bet of juror on result of verdict. Fugate v. State, 169 Neb. 420, 99 N.W.2d 868 (1959).

To safeguard right of fair and impartial trial, Legislature has provided for peremptory challenges and challenges for cause of jurors. Oden v. State, 166 Neb. 729, 90 N.W.2d 356 (1958).

Denial of challenge of jury did not violate this section. Bell v. State, 159 Neb. 474, 67 N.W.2d 762 (1954).

Determination of sentence to be imposed by court instead of jury does not violate this section. Poppe v. State, 155 Neb. 527, 52 N.W.2d 422 (1952).

Disqualification of a juror to serve upon account of having sat as a juror in another trial of an offense arising out of the same incident may be waived. Bufford v. State, 148 Neb. 38, 26 N.W.2d 383 (1947).

Gambling places, being nuisances, may be enjoined in equity, without violating constitutional right of person accused of crime to a jury trial. State ex rel. Hunter v. The Araho, 137 Neb. 389, 289 N.W. 545 (1940).

Legislature may provide for trial of petty offenses without jury, where such offenses were not recognized as crimes when Constitution adopted. State v. Hauser, 137 Neb. 138, 288 N.W. 518 (1939).

Accused was guaranteed a fair trial by an impartial jury, and whether such a jury was obtainable in the jurisdiction must first be decided by the trial court. Kirchman v. State, 122 Neb. 30, 239 N.W. 207 (1931).

After a juror has denied on his voir dire that he has said he believed respondent to be guilty, it may be shown by other witnesses that the juror had made such statement. Trobough v. State, 119 Neb. 128, 227 N.W. 443 (1929).

It is not a violation of constitutional rights to try defendant for misdemeanor before jury of eleven, with his consent. Miller v. State, 116 Neb. 702, 218 N.W. 743 (1928).

When, on the trial of a criminal case, a motion to quash the venire because of alleged disqualifications of its several members is made by defendant and overruled by the court, error cannot be predicated on the ruling in the absence of a voir dire examination showing that the jurors against whom the motion was directed were challenged for cause, and that defendant exercised the peremptory challenges allowed under the statute. Kaufmann v. State, 112 Neb. 718, 200 N.W. 998 (1924).

Defendant waived right to object to disqualification of juror, who was not a resident of the county where offense was committed, by failing to interrogate him as to residence. Marino v. State, 111 Neb. 623, 197 N.W. 396 (1924); Seaton v. State, 109 Neb. 828, 192 N.W. 501 (1923).

Where two or more persons are jointly indicted or informed against for the commission of a single offense and sever in their trials, jurors who sat in trial of one are thereby disqualified to sit in trial of another. Seaton v. State, 106 Neb. 833, 184 N.W. 890 (1921).

Fact that juror has opinion which requires evidence to remove will not disqualify him if he can put aside opinion, and is otherwise qualified in accordance with statute. Whitcomb v. State, 102 Neb. 236, 166 N.W. 553 (1918); Lucas v. State, 75 Neb. 11, 105 N.W. 976 (1905).

7. County where offense committed

This provision grants to a criminal defendant the right to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, but does not grant a defendant a constitutional right to be tried in a

particular county. State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (1989).

Courts of county where offense is committed have jurisdiction to try accused for crime. State v. Furstenau, 167 Neb. 439, 93 N.W.2d 384 (1958).

Defendant has right to be tried in county where the alleged offense was committed. Gates v. State, 160 Neb. 722, 71 N.W.2d 460 (1955).

Where a person in one county procures the commission of a crime in another through the agency of an innocent person, he is subject to prosecution in the county where the acts were done by the agent. Robeen v. State, 144 Neb. 910, 15 N.W.2d 69 (1944).

The constitutional right to a trial before a jury of the county where the offense is alleged to have been committed is a mere personal privilege of the accused which he may waive. Marino v. State, 111 Neb. 623, 197 N.W. 396 (1924); Kennison v. State, 83 Neb. 391, 119 N.W. 768 (1909).

The right to a trial, anywhere or under any conditions, may be waived and in practice is waived when the accused makes a judicial confession of his guilt. The right to jury from the vicinage may be waived by judicial finding of guilt. McCarty v. Hopkins, 61 Neb. 550, 85 N.W. 540 (1901).

The offense of larceny is committed in every county into which stolen goods are carried, and prosecution may be in any such county. Hurlburt v. State, 52 Neb. 428, 72 N.W. 471 (1897).

The constitutional right to a trial before a jury of the county or district where the crime is alleged to have been committed is a mere personal privilege of the accused, and not conferred upon him from any consideration of public policy; that privilege may be waived by accused. State ex rel. Scott v. Crinklaw, 40 Neb. 759, 59 N.W. 370 (1894).

County where crime committed means precise portion of territory or division of state over which court may exercise power in criminal matters, and limited to that from which a jury for the particular term may legally be drawn. Olive v. State, 11 Neb. 1, 7 N.W. 444 (1881).

8. Testimony at former trial

Evidence of a witness at former trial may be read at later trial, where witness cannot be found after diligent search. Davis v. State, 171 Neb. 333, 106 N.W.2d 490 (1960).

Testimony of a witness under oath face to face with defendant at preliminary hearing, with opportunity for cross-examination, is admissible upon subsequent trial for same offense where attendance of the witness cannot be had. Jackson v. State, 133 Neb. 786, 277 N.W. 92 (1938).

Testimony at former trial is admissible where witness was cross-examined in open court, if attendance at second trial cannot be procured. Koenigstein v. State, 103 Neb. 580, 173 N.W. 603 (1919).

Where a deceased witness testified upon a former trial of the same party for the same offense, being brought ''face to face'' with the accused and cross-examined by him, it is competent upon a subsequent trial to prove the testimony of such deceased witness and such proof does not violate this section of Constitution. Hair v. State, 16 Neb. 601, 21 N.W. 464 (1884).

9. Representation by counsel

A criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel. State v. Shepard, 239 Neb. 639, 477 N.W.2d 567 (1991).

An accused is entitled to be represented by counsel at all critical stages of criminal proceedings against him, including sentencing. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

Neither the U.S. nor Nebraska Constitution requires that two attorneys be appointed to represent a criminal defendant in a capital case. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

The exercise of sixth amendment rights to counsel is subject to the necessities of judicial discretion. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

Under both the state and federal Constitutions, a defendant in a criminal trial has a right to represent himself and proceed without counsel if he voluntarily and intelligently elects to do so. State v. Kirby, 198 Neb. 646, 254 N.W.2d 424 (1977).

The right to counsel does not apply as a matter of absolute right to a lineup or showup by the police previous to the initiation of adversary judicial criminal proceedings. State v. Sanchell, 191 Neb. 505, 216 N.W.2d 504 (1974).

There is no requirement that counsel be furnished accused prior to preliminary hearing. State v. O'Kelly, 175 Neb. 798, 124 N.W.2d 211 (1963).

Accused has right to counsel and opportunity to make due preparation for trial. Stagemeyer v. State, 133 Neb. 9, 273 N.W. 824 (1937).

10. Miscellaneous

A defendant may waive his or her rights under this provision through his or her knowing and voluntary absence at trial. State v. Zlomke, 268 Neb. 891, 689 N.W.2d 181 (2004).

In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and this provision of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. Buckman, 259 Neb. 924, 613 N.W.2d 463 (2000).

In considering a claim of ineffective assistance of counsel, prejudice should not be presumed for derogatory comments made during final arguments. In considering a claim of ineffective assistance of counsel, prejudice should not be presumed when a tactical decision has been made to concede the elements of a lesser-included offense to avoid a conviction for a greater offense. State v. Hunt, 254 Neb. 865, 580 N.W.2d 110 (1998).

To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. Boppre, 252 Neb. 935, 567 N.W.2d 149 (1997).

Notwithstanding constitutional mandates regarding a jury trial, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less. State v. Kennedy, 224 Neb. 164, 396 N.W.2d 722 (1986).

The failure of the accused to object to the setting of a trial date more than six months after charges were filed did not constitute a waiver of his rights under this section. State v. Kinstler, 207 Neb. 386, 299 N.W.2d 182 (1980).

Jury sentencing is not required in a capital case. Nebraska's procedure of having a three-judge panel impose sentence meets the requirements of this section and of the U.S. Constitution. State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980).

Venue may be proven like any fact, by testimony or by conclusion reached as the only logical inference under the facts. State v. Liberator, 197 Neb. 857, 251 N.W.2d 709 (1977).

Permitting amendment as to date of prior felony alleged in information in habitual criminal charge was not error. State v. Harig, 192 Neb. 49, 218 N.W.2d 884 (1974).

Hearsay testimony of prosecution witness violated this section. State v. Davis, 185 Neb. 433, 176 N.W.2d 657 (1970).

Section of Uniform Reciprocal Enforcement of Support Act sustained as constitutional. State ex rel. Brito v. Warrick, 176 Neb. 211, 125 N.W.2d 545 (1964).

A preliminary hearing before a magistrate is not a criminal prosecution or trial. Wilson v. Solomon, 172 Neb. 616, 111 N.W.2d 372 (1961).

Rights guaranteed under this section are personal privileges which may be waived. Johnson v. State, 169 Neb. 783, 100 N.W.2d 844 (1960); Hawk v. State, 151 Neb. 717, 39 N.W.2d 561 (1949).

A proceeding for contempt is not a criminal prosecution. State ex rel. Beck v. Lush, 168 Neb. 367, 95 N.W.2d 695 (1959).

Preliminary hearing is not a criminal prosecution or trial. Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955).

Rights guaranteed by this section are personal privileges and may be waived by a judicial confession of guilt. Kissinger v. State, 147 Neb. 983, 25 N.W.2d 829 (1947).

A person charged with a crime waives constitutional rights by judicial confession of guilt. In re Application of Tail, Tail v. Olson, 145 Neb. 268, 16 N.W.2d 161 (1944); In re Application of Carper, Tesar v. Bowley, 144 Neb. 623, 14 N.W.2d 225 (1944).

Habitual criminal law, defining habitual criminal and providing punishment therefor, is not violative of this section. Rains v. State, 142 Neb. 284, 5 N.W.2d 887 (1942).

Rights may be waived by a judicial confession of guilt. Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82 (1940); Alexander v. O'Grady, 137 Neb. 645, 290 N.W. 718 (1940).

Constitutionality of statute forbidding picketing cannot be determined where information on which defendant was convicted was insufficient to charge offense. Dutiel v. State, 135 Neb. 811, 284 N.W. 321 (1939).

Refusal to allow accused to cross-examine state's witness for bias and prejudice violated this section. Flannigan v. State, 124 Neb. 748, 248 N.W. 92 (1933).

Separate causes consolidated and tried simultaneously on stipulation, does not violate this section. Luke v. State, 123 Neb. 101, 242 N.W. 265 (1932).

Magistrates and police courts are vested with jurisdiction to try without jury all violations of liquor act and of all of such ordinances wherein the penalty does not exceed a fine of one hundred dollars or imprisonment for a period of three months. State v. Kacin, 123 Neb. 64, 241 N.W. 785 (1932).

Statute prohibiting granting of new trial if Supreme Court considers no substantial miscarriage of justice has actually occurred, does not justify court in denying new trial where accused's right to fair trial was violated. Scott v. State, 121 Neb. 232, 236 N.W. 608 (1931).

The showing of prior convictions for violating liquor laws, by cross-examining defendant and wife, in prosecution for larceny is a violation of this section. Kleinschmidt v. State, 116 Neb. 577, 218 N.W. 384 (1928).

The Constitution guarantees a fair and impartial trial to every person accused of crime, and that no person shall be compelled in any criminal case to be a witness against himself, nor shall he be deprived of life, liberty or property without due process of law. Coxbill v. State, 115 Neb. 634, 214 N.W. 256 (1927).

Order of court excluding spectators from courtroom is a violation of this section. Rhoades v. State, 102 Neb. 750, 169 N.W. 433 (1918).

No instruction should be given the jury which would impose upon defendant a burden to which he was not legally subject, and the effect of which would be to prevent him from having a fair and impartial trial under the law of the land. Kennison v. State, 80 Neb. 688, 115 N.W. 289 (1908).

Accused cannot waive jury in felony case and sentence is void in trial by court alone. Michaelson v. Beemer, 72 Neb. 761, 101 N.W. 1007 (1904).

The proceeding by quo warranto is a civil remedy; it is the means employed by the state to cancel and recall a privilege which the corporation proceeded against has abused. State v. Standard Oil Co., 61 Neb. 28, 84 N.W. 413 (1900).

In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and this provision, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. Cardona, 10 Neb. App. 815, 639 N.W.2d 653 (2002).

Sec. 12. Evidence against self; double jeopardy.

No person shall be compelled, in any criminal case, to give evidence against himself, or be twice put in jeopardy for the same offense.

Source: Neb. Const. art. I, sec. 12 (1875).

1. Giving evidence against self
2. Jeopardy

1. Giving evidence against self

Defendant's statement to television representative was not the type of official questioning to which this section applies. State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992).

A defendant is not required to make a statement of any kind under his constitutional right not to be compelled in any criminal case to be a witness against himself. State v. Houser, 241 Neb. 525, 490 N.W.2d 168 (1992).

A suspect's awareness of all possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived the privilege against self-incrimination. State v. Dixon, 237 Neb. 630, 467 N.W.2d 397 (1991).

In an opening statement for a jury trial, a prosecutor's comment concerning the necessity of the defendant's testimony or an expression concerning the plausibility or credibility of anticipated testimony from a defendant violates an accused's right to remain silent at trial. State v. Pierce, 231 Neb. 966, 439 N.W.2d 435 (1989).

If the State calls a defendant as a witness at a hearing for revocation of the defendant's probation, the defendant's constitutional right to remain silent is not violated, since a revocation of probation is not a stage of prosecuting a defendant on a criminal charge and because the defendant's admission of a probation violation is not necessarily admission of a crime committed by the defendant. State v. Sites, 231 Neb. 624, 437 N.W.2d 166 (1989).

Probation revocation proceedings are not criminal in nature; the privilege against giving evidence against oneself does not arise. State v. Burow, 223 Neb. 867, 394 N.W.2d 665 (1986).

Trial court's determination that defendant's incriminating statements were made in a non-custodial setting was not clearly wrong; thus, police did not violate defendant's constitutional right against self-incrimination. State v. Saylor, 223 Neb. 694, 392 N.W.2d 789 (1986).

Constitutional privilege against self-incrimination invoked by wife in a dissolution action in response to questions by husband regarding extramarital relations with another man. Ritchey v. Ritchey, 208 Neb. 100, 302 N.W.2d 372 (1981).

Sections 29-3301 to 29-3307 do not violate privilege against self-incrimination, are constitutional, and apply to physical evidence, not to oral communications or testimony. State v. Swayze, 197 Neb. 149, 247 N.W.2d 440 (1976).

In determining whether the testimony of a witness who had pleaded guilty to a similar charge but had not been sentenced, who invoked the privilege on self-incrimination during the cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. State v. Bittner, 188 Neb. 298, 196 N.W.2d 186 (1972).

In order to deny a claim to the privilege against self-incrimination by a witness, it must be perfectly clear to the judge from a careful consideration of all of the circumstances in the case that the witness is mistaken and that the answer or answers cannot possibly have a tendency to incriminate. State v. Holloway, 187 Neb. 1, 187 N.W.2d 85 (1971).

Photographs taken of defendant without his permission do not violate this section. State v. Blackwell, 184 Neb. 121, 165 N.W.2d 730 (1969).

Constitutional privilege against self-incrimination is restricted to oral testimony, and does not apply to chemical analysis of body fluids. Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961).

This section does not apply to one charged with contempt of court and one so charged may be required to testify the same as any other competent witness. State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937).

Physician's testimony as to sanity of accused, based on examination without court order or attorney's consent, but without objection at time, is not compelling him to give evidence against self. Wehenkel v. State, 116 Neb. 493, 218 N.W. 137 (1928).

Requiring defendant to answer questions on cross-examination as to previous convictions for misdemeanor violates the provisions of this section. Coxbill v. State, 115 Neb. 634, 214 N.W. 256 (1927).

2. Jeopardy

The concept of double jeopardy applies only in successive prosecution cases and does not apply to a single trial where the defendant has been put in jeopardy only once. State v. Furrey, 270 Neb. 965, 708 N.W.2d 654 (2006).

Whether an amended complaint or information constitutes a continuation of a single trial depends on the nature of the amendment. State v. Furrey, 270 Neb. 965, 708 N.W.2d 654 (2006).

An administrative disciplinary proceeding in which a prisoner loses good time does not place him in jeopardy. A conviction and sentence in a criminal prosecution following an administrative disciplinary proceeding do not constitute double jeopardy. State v. Lynch, 248 Neb. 234, 533 N.W.2d 905 (1995).

Second trial after appellate reversal because of procedural error does not place a defendant in double jeopardy where there is sufficient circumstantial evidence to submit case to jury and to convict defendant. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Prosecution for traffic infraction held to be a criminal offense within the meaning of double jeopardy herein. State v. Knoles, 199 Neb. 211, 256 N.W.2d 873 (1977).

This Article does not preclude successive prosecutions by federal and Nebraska governments. State v. Pope, 190 Neb. 689, 211 N.W.2d 923 (1973).

Successive prosecutions by federal and state governments in the exercise of concurrent jurisdiction over substantially the same offense are not prohibited by this section. State v. Pope, 186 Neb. 489, 184 N.W.2d 395 (1971).

The conviction of a defendant for intoxication does not bar a subsequent prosecution for offense of operating a motor vehicle while under the influence of intoxicating liquor. State v. Eckert, 186 Neb. 134, 181 N.W.2d 264 (1970).

Order of trial court to set aside verdict and order a new trial did not contravene double jeopardy provision of Constitution. State v. Houp, 182 Neb. 298, 154 N.W.2d 465 (1967).

Sexual psychopath law did not place accused who had been previously convicted of sexual offense in double jeopardy. State v. Madary, 178 Neb. 383, 133 N.W.2d 583 (1965).

A proceeding for contempt is not a criminal case. State ex rel. Beck v. Lush, 168 Neb. 367, 95 N.W.2d 695 (1959).

Determination of sentence to be imposed by court instead of jury does not violate this section. Poppe v. State, 155 Neb. 527, 52 N.W.2d 422 (1952).

Where two persons were killed in automobile collision, acquittal on charge of manslaughter for killing one did not bar prosecution for killing of the other. Jeppesen v. State, 154 Neb. 765, 49 N.W.2d 611 (1951).

Where a jury in a criminal case disagrees and is properly discharged, a second trial upon original charge, even though one or more degrees of the offense have been withdrawn, does not violate this section. State v. Hutter, 145 Neb. 798, 18 N.W.2d 203 (1945).

Habitual criminal statute does not contravene this section. Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82 (1940).

Discharge of jury and retrial of defendant does not violate constitutional guaranty under this section. Shaffer v. State, 123 Neb. 121, 242 N.W. 364 (1932).

Court, after sentence for less than minimum term prescribed by statute had been served, was without power to vacate it and impose greater penalty. Hickman v. Fenton, 120 Neb. 66, 231 N.W. 510 (1930).

Where offense charged in information upon which defendant was previously tried and acquitted was inclusive of the offense for which she is being held for trial, jeopardy attached by virtue of the former trial, and habeas corpus will lie. In re Resler, 115 Neb. 335, 212 N.W. 765 (1927).

Where jury is discharged after deliberating so long that there is no probability of agreeing and the accused held to a further trial, it is without any infringement of this section. Sutter v. State, 105 Neb. 144, 179 N.W. 414 (1920).

If during a trial of a misdemeanor before a magistrate, it appears that defendant should be put upon his trial for a felony and the magistrate orders a new complaint to be filed and proceeds to sit as examining magistrate, finds probable cause and binds accused over to district court to answer to the felony, this is not violation of this section. Larson v. State, 93 Neb. 242, 140 N.W. 176 (1913).

Where one accused of a felony is put upon trial under an information defective upon its face, and after trial begun, information is amended and the trial proceeded with, there being no change in the offense charged, the accused is not thereby placed in jeopardy a second time. McKay v. State, 91 Neb. 281, 135 N.W. 1024 (1912).

If complaint does not contain necessary averments to constitute criminal charge, there is no former jeopardy. Roberts v. State, 82 Neb. 651, 118 N.W. 574 (1908).

Where the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act. Warren v. State, 79 Neb. 526, 113 N.W. 143 (1907).

Judgment of court having no jurisdiction over subject matter is void and does not constitute a bar to further proceedings on same charge. Peterson v. State, 79 Neb. 132, 112 N.W. 306 (1907).

To constitute former jeopardy it must appear that party was put upon trial before court having jurisdiction, upon indictment or information sufficient in form and substance to sustain conviction and that the jury was impaneled and sworn, and thus

charged with his deliverance. Steinkuhler v. State, 77 Neb. 331, 109 N.W. 395 (1906).

Confinement of accused under void or erroneous sentence is not a bar to rendition of legal sentence under verdict. McCormick v. State, 71 Neb. 505, 99 N.W. 237 (1904).

Statute directing the assessment of a fine in double the amount embezzled, in addition to the imprisonment imposed in case of conviction is not open to objection that it inflicts a double penalty. Everson v. State, 66 Neb. 154, 92 N.W. 137 (1902).

The proceeding by quo warranto is a civil remedy; it is the means employed by the state to cancel and recall a privilege which the corporation proceeded against has abused. State v. Standard Oil Co., 61 Neb. 28, 84 N.W. 413 (1900).

By appealing, accused thereby waives right to object to further prosecution on reversal, on ground that he has been once put in jeopardy. McGinn v. State, 46 Neb. 427, 65 N.W. 46 (1895).

The constitutional provision against placing accused twice in jeopardy does not apply to mere civil actions for recovery of penalties. Mitchell v. State, 12 Neb. 538, 11 N.W. 848 (1882).

Sec. 13. Justice administered without delay; Legislature; authorization to enforce mediation and arbitration.

All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.

Source: Neb. Const. art. I, sec. 13 (1875); Amended 1996, Laws 1995, LR 1CA, sec. 1.

1. Not unconstitutional
2. Unconstitutional
3. Miscellaneous

1. Not unconstitutional

The court's incorporation by reference of the conditions of confinement set forth in a doctor's report did not deny access to the district court. State v. Hayden, 233 Neb. 211, 444 N.W.2d 317 (1989).

The exclusive remedy provided by the Workers' Compensation Act satisfies the due process requirements of Neb. Const. art. I, section 3, as well as the requirements of this provision, that every person shall have a remedy by due course of law for any injury done to him or her. Abbott v. Gould, Inc., 232 Neb. 907, 443 N.W.2d 591 (1989).

Statute allowing drainage district two years from ascertainment of compensation by appraisers, within which to enter upon and appropriate the land, does not violate this section. Drainage Dist. No. 1 of Pawnee County v. Chicago, B. & Q. R. R. Co., 96 Neb. 1, 146 N.W. 1055 (1914).

Ruling of district court refusing to allow plaintiff in divorce to proceed with trial without first complying with order for payment of temporary alimony does not contravene Constitution. Reed v. Reed, 70 Neb. 779, 98 N.W. 73 (1904).

Drainage proceedings do not contravene Constitution, because party aggrieved has right of appeal to courts. Dodge County v. Acom, 61 Neb. 376, 85 N.W. 292 (1901).

2. Unconstitutional

Section 25-2602 violates this article to the extent that it provides for arbitration of future disputes. State v. Nebraska Assn. of Pub. Employees, 239 Neb. 653, 477 N.W.2d 577 (1991).

Existence of an emergency does not impair or destroy constitutional limitations, and the mortgage moratorium act is unconstitutional as it contravenes the spirit and terms of this section. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938); Strehlow v. Krings, 134 Neb. 82, 277 N.W. 784 (1938).

Nonsuiting of plaintiff at close of opening statements to jury violates this section. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N.W. 349 (1934).

Order of district court in divorce suit, striking out answer of defendant as to dissolution of marriage, and refusing to allow him to defend, except as to the amount of alimony, on account of his failure to comply with order for the payment of temporary alimony, violates the Constitution. McNamara v. McNamara, 86 Neb. 631, 126 N.W. 94 (1910).

County judge cannot require party to pay fees or costs in advance as condition to ''performing those services which would be necessary to enable the defendant to press his defense.'' Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N.W. 1058 (1908).

Dismissal of action by district judge without determination of merits because of fraud or imposition on the court by one of the parties is denial of constitutional rights. Fitch v. Martin, 80 Neb. 60, 113 N.W. 796 (1907).

Statute providing for impaneling of juries which is so incomplete as to render it incapable of accomplishing its purpose, contravenes Constitution and is void. State ex rel. Mickey v. Reneau, 75 Neb. 1, 106 N.W. 451 (1905).

Stipulation in insurance contract which provides that no suit shall be maintained but that all differences shall be adjusted by arbitration is void as contravening this section. Phoenix Ins. Company v. Zlotky, 66 Neb. 584, 92 N.W. 736 (1902); Hartford Fire Ins. Co. v. Hon, 66 Neb. 555, 92 N.W. 746 (1902).

3. Miscellaneous

This provision does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy, but where no right or remedy exists under either common law or statute, this constitutional provision creates none. Paulk v. Central Lab. Assocs., 262 Neb. 838, 636 N.W.2d 170 (2001).

This constitutional provision does not provide a remedy for ex parte communications. State v. Lotter, 255 Neb. 456, 586 N.W.2d 591 (1998).

Based on this provision, Nebraska courts have held that predispute arbitration agreements are unenforceable; however, this rule cannot be enforced when it conflicts with the laws of the United States. Dowd v. First Omaha Sec. Corp., 242 Neb. 347, 495 N.W.2d 36 (1993).

Legislature may direct claimant to comply with the Nebraska Hospital-Medical Liability Act prior to exercise of court remedy. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

Pursuant to this section, right of member to sue his union is not dependent upon prior exhaustion of administrative remedies. Poppert v. Brotherhood of R.R. Trainmen, 187 Neb. 297, 189 N.W.2d 469 (1971).

Rule of prior cases, that any change in law exempting charitable hospitals from liability should be made by Legislature, was in violation of this section. Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966).

This section does not create any new rights but is merely a declaration of a general fundamental principle. Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959).

Right of action against charitable institution was not created. Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N.W.2d 86 (1955).

Right to trial without unreasonable and unnecessary delay is guaranteed. Sullivan v. Storz, 156 Neb. 177, 55 N.W.2d 499 (1952).

Party who invoked special proceeding could not question constitutionality thereof under this section. Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950).

Remedy is afforded unaffected by subsequent death of wrongdoer. Rehn v. Bingaman, 151 Neb. 196, 36 N.W.2d 856 (1949).

Litigants are entitled to access to the courts when they have probable cause for believing an injury has been done to their lands, goods, person or reputation. Fender v. Waller, 139 Neb. 612, 298 N.W. 349 (1941).

Damages to land caused by seepage from a reservoir is an injury to land as set out in this section. Applegate v. Platte Valley Public Power & Irr. Dist., 136 Neb. 280, 285 N.W. 585 (1939).

Guest law does not deprive motorist's guest of protection of constitutional provision but merely changes degree of proof essential to recovery. Clarke v. Weatherly, 131 Neb. 816, 270 N.W. 316 (1936); Rogers v. Brown, 129 Neb. 9, 260 N.W. 794 (1935); Howard v. Gerjevic, 128 Neb. 795, 260 N.W. 273 (1935); Gilbert v. Bryant, 125 Neb. 731, 251 N.W. 823 (1933).

Administrator may bring action for damages after death of intestate for pain and suffering inflicted on deceased, by virtue of self-executing provisions of this section. Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600, 262 N.W. 537 (1935).

The writ of error coram nobis provides a corrective judicial process that the Constitution guarantees shall not be denied. Carlsen v. State, 129 Neb. 84, 261 N.W. 339 (1935).

Contract of employment providing for arbitration of disputes does not deprive employee of right to seek redress in courts. Rentscheler v. Missouri P. R. R. Co., 126 Neb. 493, 253 N.W. 694 (1934).

Provisions of this section are self-executing in their nature and mandatory upon all courts of this state. Burnham v. Bennison, 121 Neb. 291, 236 N.W. 745 (1931).

In a tax foreclosure proceeding by a county to recover delinquent taxes on land without making purchaser at a prior administrative sale a party, the purchaser at the foreclosure sale buys subject to the right of one having a valid lien upon the premises to redeem from such sale, and the one claiming a lien cannot be barred without a hearing. Smith v. Potter, 92 Neb. 39, 137 N.W. 854 (1912).

A mortgagor should not be permitted, in person or by his will, to raise a controversy over the mortgaged property which will delay enforcement of the mortgage in the event of default in payment thereof. Shackley v. Homer, 87 Neb. 146, 127 N.W. 145 (1910).

Where a party has, without fault or neglect on his part or his attorneys', failed to obtain a transcript for a review on error in this court, a new trial will be granted, if necessary, to secure him his constitutional right. Zweibel v. Caldwell, 72 Neb. 47, 99 N.W. 843 (1904).

This section guarantees a remedy only for such as result from an invasion or infringement of a legal right, or the failure to discharge a legal duty or obligation, and is not a guarantee of a remedy for every species of injury in respect of such matters. Goddard v. City of Lincoln, 69 Neb. 594, 96 N.W. 273 (1903).

Sec. 14. Treason.

Treason against the state shall consist only in levying war against the state, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Source: Neb. Const. art. I, sec. 14 (1875).

Sec. 15. Penalties; corruption of blood; transporting out of state prohibited.

All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the state.

Source: Neb. Const. art. I, sec. 15 (1875).

Unconstitutionality of tax statute under this section raised but not decided. Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

Permitting recovery of money paid on void contract was not the imposition of a penalty within the meaning of this section. Arthur v. Trindel, 168 Neb. 429, 96 N.W.2d 208 (1959).

Conviction of felony does not deprive party of civil rights, including right to maintain action for damages for personal injury. Bosteder v. Duling, 115 Neb. 557, 213 N.W. 809 (1927).

Sentence to penitentiary does not corrupt the blood nor prevent legal representative of accused, who died pending appeal, from succeeding to property rights of accused. Stanisics v. State, 90 Neb. 278, 133 N.W. 412 (1911).

Penalty imposed by statute is not unconstitutional unless so excessive as to shock sense of mankind. McMahon v. State, 70 Neb. 722, 97 N.W. 1035 (1904).

Enforcement of penalty after proper notice and failure to remove fence or other obstruction from line of newly established highway does not contravene Constitution. Black v. Stein, 23 Neb. 302, 36 N.W. 548 (1888).

Sec. 16. Bill of attainder; retroactive laws; contracts; special privileges.

No bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed.

Source: Neb. Const. art. I, sec. 16 (1875).

1. Ex post facto law
2. Obligation of contract
3. No irrevocable grant of special privilege
4. Miscellaneous

1. Ex post facto law

The ex post facto clause does not prohibit retroactive application for civil disabilities and sanctions; only retroactive criminal punishment for past acts is prohibited. State v. Worm, 268 Neb. 74, 680 N.W.2d 151 (2004).

The registration requirement for an offender convicted of an aggravated offense under Nebraska's Sex Offender Registration Act is not a criminal punishment. State v. Worm, 268 Neb. 74, 680 N.W.2d 151 (2004).

Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime already committed, nor provide greater punishment, nor do they alter the degree of proof needed to convict. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Act reducing penalty for violation of Installment Loan Act did not violate this section. Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N.W.2d 907 (1964).

Change in point system law for revocation of license to operate motor vehicle was not ex post facto legislation. Durfee v. Ress, 163 Neb. 768, 81 N.W.2d 148 (1957).

Constitutional prohibition against ex post facto laws applies only to penal or criminal matters, and does not apply to civil penalties imposed for failure to pay taxes. In re Estate of Rogers, 147 Neb. 1, 22 N.W.2d 297 (1946).

Law making an act criminal which was innocent when done, or making crime greater than when committed, or which alters situation of party to his disadvantage, or inflicts greater punishment than law annexed to crime when committed, is ex post facto and exceeds the power granted Legislature in the Constitution. State v. McCoy, 87 Neb. 385, 127 N.W. 137 (1910); Marion v. State, 20 Neb. 233, 29 N.W. 911 (1886); Marion v. State, 16 Neb. 349, 20 N.W. 289 (1884).

A criminal law is not retroactive in its operation. State v. Hoon, 78 Neb. 618, 111 N.W. 462 (1907).

Law intended to affect transactions which occurred, or rights accrued, before it became operative, and which ascribed to them effects not inherent in their nature, in view of the law enforced at time of occurrence, is retrospective. Chicago, B. & Q. R. R. Co. v. State ex rel. City of Omaha, 47 Neb. 549, 66 N.W. 624 (1896).

2. Obligation of contract

Allowance of credit against malpractice judgment for any nonrefundable benefits claimant receives is not an unconstitutional impairment of contract. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

The Legislature may abrogate a right of action for a tort to happen in the future. State Securities Co. v. Norfolk Livestock Sales Co., Inc., 187 Neb. 446, 191 N.W.2d 614 (1971).

Retrospective statute distinguishing judgment liens for alimony and child support held to be constitutional. Hidy v. Hidy, 184 Neb. 527, 169 N.W.2d 285 (1969).

Statute creating Nebraska Power Review Board did not violate this section. City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N.W.2d 629 (1965).

Contract to sell school lands could not be impaired by subsequent legislation. Pfeifer v. Ableidinger, 166 Neb. 464, 89 N.W.2d 568 (1958).

Charter of public corporation does not constitute contract with state. United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).

Nonsigner provision of Fair Trade Act violated this section. McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N.W.2d 608 (1955).

This section is a binding limitation on the exercise of governmental powers, legislative, executive or judicial, which ''emergency'' may not impair, destroy or modify, and the mortgage moratorium act violates constitutional provision on cessation of emergency for which enacted. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938); Strehlow v. Krings, 134 Neb. 82, 277 N.W. 784 (1938).

Disconnecting of lands from village is not impairment of contract of holder of village bonds. Hustead v. Village of Phillips, 131 Neb. 303, 267 N.W. 919 (1936); Hardin v. Pavlat, 130 Neb. 829, 266 N.W. 637 (1936).

This provision of Constitution does not conflict with Article XII, section 7, of Constitution, providing for double liability of stockholders of state banks. Luikart v. Higgins, 130 Neb. 395, 264 N.W. 903 (1936).

Statute may not operate retrospectively where it would impair obligation of contracts or interfere with vested rights. Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N.W. 449 (1929).

Generally, the laws in force at the time a contract is entered into form a part of it and enter into its obligation, but the law then in force affording a remedy for a breach of the contract may be modified or changed without impairing the obligation of the contract, provided that an adequate remedy is left. Norris v. Tower, 102 Neb. 434, 167 N.W. 728 (1918).

Contracts between an irrigation company and consumers under the ditch, with reference to annual rates which should be charged for the use of water, were entered into with the law forming a part of the contract and subject to legislative control. McCook Irr. & Water Power Co. v. Burtless, 98 Neb. 141, 152 N.W. 334 (1915).

Curative acts, which attempt to take away property rights already vested, violate the Constitution. Draper v. Clayton, 87 Neb. 443, 127 N.W. 369 (1910); Helming v. Forrester, 87 Neb. 438, 127 N.W. 373 (1910).

Anti-pass laws, prohibiting free transportation by railroads, do not impair contracts. State v. Martyn, 82 Neb. 225, 117 N.W. 719 (1908).

An act which in effect takes away from counties any cause of action which they might have against persons who have been treasurers, for money which they have been allowed by the county board to retain as commissions on money received, impairs contract obligations of county. Kearney County v. Taylor, 54 Neb. 542, 74 N.W. 965 (1898).

Obligation is impaired whenever remedy is taken away or abolished, or legal obligations diminished, suspended or destroyed by abolishing remedy, or when enforcement burdened by new or unreasonable conditions or restrictions. American Bldg. & Loan Assn. v. Rainbolt, 48 Neb. 434, 67 N.W. 493 (1896).

Lease of public lands providing that lessor shall have right to choose one of the arbitrators for every five years for purpose of valuation, is indispensable contract right and cannot thereafter be changed by subsequent legislation. State ex rel. Brown v. McPeak, 31 Neb. 139, 47 N.W. 691 (1891).

Statute merely changing remedy or mode of enforcing contract is not impairment so as to violate this section. Henry O. Jones v. Elizabeth Davis, 6 Neb. 33 (1877).

Act requiring holder of over-due county warrant drawing 10 per cent to surrender same to county for bonds drawing 7 per cent is void as impairing contract obligation. Brewer v. Otoe County, 1 Neb. 373 (1871).

Reorganization of insolvent state bank under Bank Act of 1929 held to impair obligation of contract as to nonconsenting depositor. Hessen Siak Shams v. Nebraska State Bank of Bloomfield, 48 F.2d 894 (D. Neb. 1931).

3. No irrevocable grant of special privilege

Provisions of Grid System Act constituted a grant of special privileges and an unlawful splitting of a class, and was unconstitutional. Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966).

Installment Sales Act of 1965 did not violate this section. Engelmeyer v. Murphy, 180 Neb. 295, 142 N.W.2d 342 (1966).

Legislative Bill 11 of the 1963 Special Session violated this section and was unconstitutional in its entirety. State Securities Co. v. Ley, 177 Neb. 251, 128 N.W.2d 766 (1964).

Legislative act permitting higher rate of interest to be charged by retailers of motor vehicles was a grant of special privilege in violation of this section. Stanton v. Mattson, 175 Neb. 767, 123 N.W.2d 844 (1963).

Constitutionality of Installment Sales Act of 1959 under this section raised, but case decided under another section of the Constitution. Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963).

Levy of tax for municipal university did not violate special privileges clause. Ratigan v. Davis, 175 Neb. 416, 122 N.W.2d 12 (1963).

Imposition of liability for reimbursement on estate of recipient of old age assistance does not violate this section. Boone County Old Age Assistance Board v. Myhre, 149 Neb. 669, 32 N.W.2d 262 (1948).

A private employment agency is not a business in which the public has such an interest that price fixing may properly be included as a method of regulation. Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507 (1943).

Statutes creating housing authorities for slum clearance sustained against claim of violation of this section. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Statutory provision limiting issuance of motor vehicle dealer's license for sale of new cars to persons enfranchised by the manufacturers is an unlawful restriction on right to follow a lawful pursuit. Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939).

The Legislature is not prohibited from dictating how county road funds shall be used or allocated. City of Fremont v. Dodge County, 130 Neb. 856, 266 N.W. 771 (1936).

Provisions of irrigation act providing for granting by irrigation board of priority of right to use of water does not contravene this section of the Constitution. Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).

Municipal grant of franchise for distribution of electric current, if not exclusive, and in the absence of specific limitation or duration, was in perpetuity and conveyed rights of property within the provisions of this section. Old Colony Trust Co. v. Omaha, 230 U.S. 100 (1913).

Statute authorizing city to make irrevocable contract with gas and electric company for maximum rates for twenty-year term is not a violation of this section forbidding Legislature to make ''any irrevocable grant of special privileges.'' Nebraska Gas & Electric Co. v. City of Stromsburg, 2 F.2d 518 (8th Cir. 1924).

4. Miscellaneous

Constitutionality of Municipal Ground Water Act raised, but not decided. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966).

Sec. 17. Military subordinate.

The military shall be in strict subordination to the civil power.

Source: Neb. Const. art. I, sec. 17 (1875).

Sec. 18. Soldiers quarters.

No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war except in the manner prescribed by law.

Source: Neb. Const. art I, sec. 18 (1875).

Sec. 19. Right of peaceable assembly and to petition government.

The right of the people peaceably to assemble to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.

Source: Neb. Const. art. I, sec. 19 (1875).

A political meeting or convention is an assemblage within the meaning of the Constitution that the right of the people to assemble and consult for common good shall never be abridged. With good motives and for justifiable ends the membership of such a body may jointly speak and publish the truth about candidates for office and this right extends to aspirants for judicial and educational offices. State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N.W. 473 (1909).

The people have the right to petition the Governor on the subject of proposed legislation. Weis v. Ashley, 59 Neb. 494, 81 N.W. 318 (1899).

Sec. 20. Imprisonment for debt prohibited.

No person shall be imprisoned for debt in any civil action on mesne or final process.

Source: Neb. Const. art. I, sec. 20 (1875); Amended 1998, Laws 1997, LR 26CA, sec. 1.

1. Cases involving fraud
2. Debt
3. Miscellaneous

1. Cases involving fraud

Section 28-611(1), R.R.S.1943, the Nebraska ''bad check statute'', does not violate this section of the Constitution because section 28-611(1), R.R.S.1943, contains the elements of fraud by its very definition. State v. Kock, 207 Neb. 731, 300 N.W.2d 824 (1981).

Section 69-109, R.S.Supp.,1980, held not to violate this section, since a requirement of fraud has been engrafted onto the statute by judicial interpretation and thereafter statute was reenacted in same form by Legislature, thus supplying the fraud requirement. State v. Hocutt, 207 Neb. 689, 300 N.W.2d 198 (1981).

Statute which permits criminal prosecution without requiring proof of fraud violates this section. State ex rel. Norton v. Janing, 182 Neb. 539, 156 N.W.2d 9 (1968).

2. Debt

Award of alimony, suit money and attorney's fees in divorce action does not create ''debt'' within meaning of this section. Jensen v. Jensen, 119 Neb. 469, 229 N.W. 770 (1930).

Order to pay temporary alimony is not a mere debt, and imprisonment for contempt in willfully refusing to obey such order does not violate this section. Cain v. Miller, 109 Neb. 441, 191 N.W. 704 (1922).

Fine for violation of liquor laws, one-fourth to be paid to complaining witness, is not a debt. Sothman v. State, 66 Neb. 302, 92 N.W. 303 (1902).

Judgment in ''children born out of wedlock'' proceeding is not debt. Ex parte Donahoe, 24 Neb. 66, 38 N.W. 28 (1888); Ex parte Cottrell, 13 Neb. 193, 13 N.W. 174 (1882).

3. Miscellaneous

Statute, making issuance of no-fund check a criminal offense, does not violate constitutional provision against imprisonment for debt. White v. State, 135 Neb. 154, 280 N.W. 433 (1938).

Act providing for prosecution and punishment by imprisonment of husband for refusal to pay alimony for support of minor child is not violative of this section. Fussell v. State, 102 Neb. 117, 166 N.W. 197 (1918).

This section has no application to the case of a license tax imposed upon peddlers, if the object is the raising of revenue and its enactment was an exercise of the taxing power and not the police power. Rosenbloom v. State, 64 Neb. 342, 89 N.W. 1053 (1902).

Sec. 21. Private property compensated for.

The property of no person shall be taken or damaged for public use without just compensation therefor.

Source: Neb. Const. art. I, sec. 21 (1875).

1. Property, what constitutes
2. Public use
3. Public improvements
4. Damages
5. Just compensation
6. Compensation, payment
7. Miscellaneous

1. Property, what constitutes

A Nebraska Public Service Commission order which directed incumbent local exchange carriers to comply with an order establishing multidwelling unit regulations and a statewide policy for access to multidwelling units by competitive local exchange carriers did not constitute a taking. In re Application of Neb. Pub. Serv. Comm., 260 Neb. 780, 619 N.W.2d 809 (2000).

Recovery may be had for damages to property occasioned by temporary takings. Whitehead Oil Co. v. City of Lincoln, 245 Neb. 680, 515 N.W.2d 401 (1994).

Lawful covenants restricting the use of land and binding upon successors in title constitute an interest in the land and property in the constitutional sense. Horst v. Housing Authority, 184 Neb. 215, 166 N.W.2d 119 (1969).

A tenant for a term of years has a property right in land which is protected by this section. Johnson v. City of Lincoln, 174 Neb. 837, 120 N.W.2d 297 (1963).

Unexercised option to purchase real estate need not be compensated for in eminent domain proceedings. Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N.W.2d 727 (1960).

Legislature could not lawfully deprive lessee of school land lease of option to purchase. Pfeifer v. Ableidinger, 166 Neb. 464, 89 N.W.2d 568 (1958).

City is not liable to adjacent property owner for destruction of shade trees in street. Weibel v. City of Beatrice, 163 Neb. 183, 79 N.W.2d 67 (1956).

Claim made and rejected that appropriation of surface and ground waters without compensation violated this section. Dischner v. Loup River P. P. Dist., 147 Neb. 949, 25 N.W.2d 813 (1947).

Property rights of a lessee under school land lease are protected from invasion under the power of eminent domain. State v. Platte Valley P. P. & I. Dist., 147 Neb. 289, 23 N.W.2d 300 (1946).

The right to use water for a beneficial purpose is a property right, subject to the constitutional provisions regulating the taking of private property for public use. Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

Accretions are property within the meaning of this section. Thies v. Platte Valley Public Power & Irr. Dist., 137 Neb. 344, 289 N.W. 386 (1939).

Right of irrigation district to appropriate water is property and this right is protected by way of damages when water is diverted. Nine Mile Irr. Dist. v. State, 118 Neb. 522, 225 N.W. 679 (1929).

Riparian rights under an appropriation of water are property. McCook Irr. & Water Power Co. v. Crews, 70 Neb. 115, 102 N.W. 249 (1905).

A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil and such right is entitled to protection as such, the same as private property rights. Crawford Company v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

Mortgagee's interest in property taken for public use is property, and requires notice to mortgagee in eminent domain proceedings. Dodge v. Omaha & S. W. R. R. Co., 20 Neb. 276, 29 N.W. 936 (1886).

2. Public use

Private property may not be taken under the power of eminent domain for a private use. Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967).

Acquisition of aviation easement was a damage for public use, for which compensation could be recovered. Johnson v. Airport Authority, 173 Neb. 801, 115 N.W.2d 426 (1962).

Where land is taken outside the boundaries of right-of-way condemned, it constitutes a second taking of private property for public use. Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N.W.2d 781 (1960).

Recovery on behalf of city by taxpayer of amount paid on void contract was not a taking of defendant's property for public use without compensation. Arthur v. Trindel, 168 Neb. 429, 96 N.W.2d 208 (1959).

Where land is taken outside the boundaries of right-of-way condemned, liability attaches for a second taking of private property for public use. McGree v. Stanton-Pilger Drainage Dist., 164 Neb. 552, 82 N.W.2d 798 (1957).

City ordinance imposing license fee on taxicabs is not taking of private property for public use. Richter v. City of Lincoln, 136 Neb. 289, 285 N.W. 593 (1939).

An individual does not have the right of eminent domain for the use and benefit of himself or his estate under the statute for the irrigation of his own land. Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N.W. 556 (1935).

The furnishing of water to the inhabitants of a city for the purpose of health, convenience, and comfort is a public use of such water. Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304 (1933).

Statute authorizing private individuals to create and fix boundaries of a district for public improvement, to be paid for by taxes levied on the property within the district, without a tribunal for determination whether owner's property was arbitrarily or unjustly included, violates this section. Elliott v. Wille, 112 Neb. 78, 200 N.W. 847 (1924).

Statutes providing for special assessments for paving, when not in excess of special benefits, are not invalid as taking private property for public use. Brown Real Estate Co. v. Lancaster County, 110 Neb. 665, 194 N.W. 897 (1923).

Statute making railroad company liable for one dollar per day per car for delay in forwarding, giving notices, or delivery, and in addition thereto imposes liability for actual damages caused by such delay, by necessary implication, violates this section. Sunderland Bros. Co. v. Chicago, B. & Q. R. R. Co., 104 Neb. 319, 177 N.W. 156 (1920).

Ordinance prohibiting removal of garbage except by city employee, is not taking of private property in violation of this section, though it prevents restaurant keeper from selling garbage as feed for swine. Urbach v. City of Omaha, 101 Neb. 314, 163 N.W. 307 (1917).

The use of water power to generate electricity to supply a city and its inhabitants with light and power is a public use and owners of riparian lands should be entitled to damages sustained. Lucas v. Ashland Light, Mill & Power Co., 92 Neb. 550, 138 N.W. 761 (1912).

Transferring unclaimed witness fees and costs to school fund is not taking of private property for public use. Douglas County v. Moores, 66 Neb. 284, 92 N.W. 199 (1902), overruling State ex rel. Broatch v. Moores, 52 Neb. 770, 73 N.W. 299 (1897).

Use of water for irrigation works, and establishment thereof, must be common and not to a particular individual to be a public use. Paxton & Hershey Irr. Canal & Land Co. v. Farmers & Merchants Irr. & Land Co., 45 Neb. 884, 64 N.W. 343 (1895).

Use need not be for benefit of whole public or state, but may be for benefit of small and restricted locality, provided use and benefit is common, not to particular individual or estate. Welton v. Dickson, 38 Neb. 767, 57 N.W. 559 (1894).

Where statute required railroad company to provide underground cattle pass partly at company expense, not as safety measure but to save farmer inconvenience, there was a taking of private property for public use. Chicago, St. P., M. & O. Ry. Co. v. Holmberg, 282 U.S. 162 (1930), reversing Holmberg v. Chicago, St. P., M. & O. Ry. Co., 115 Neb. 727, 214 N.W. 746 (1927).

Condemnation by drainage district in conformity with Nebraska statute was not for private purpose, where the enterprise had been adjudged by state court to be public utility. O'Neill v. Leamer, 239 U.S. 244 (1915).

Statute requiring property owners to destroy as public nuisance red cedar trees growing within two miles of orchards containing 1,000 or more apple trees is not void as taking of property for public or private use without compensation. Upton v. Felton, 4 F.Supp. 585 (D. Neb. 1932).

3. Public improvements

County and irrigation district were liable for damages caused by structure placed in drainage ditch. Baum v. County of Scotts Bluff, 169 Neb. 816, 101 N.W.2d 455 (1960).

Municipality would be held liable for damages resulting from construction and maintenance of flood control project. Gruntorad v. Hughes Bros. Inc., 161 Neb. 358, 73 N.W.2d 700 (1955).

The only foundation for a local assessment lies in the special benefits conferred upon the property assessed by the improvement, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation and therefore illegal. Loup River Public Power Dist. v. Platte County, 144 Neb. 600, 14 N.W.2d 210 (1944).

City is liable to abutting property owner for damages caused by paving street in accordance with established grade ordinance. Heflin v. City of Lincoln, 131 Neb. 484, 268 N.W. 364 (1936).

Property abutting on street is ''damaged'' within meaning of Constitution by changing grade from natural level. Stocking v. City of Lincoln, 93 Neb. 798, 142 N.W. 104 (1913).

Petition was insufficient to allege damages to adjacent property for erection of standpipe for city water supply. Bonge v. Village of Winnetoon, 90 Neb. 260, 133 N.W. 203 (1911).

Landowner is entitled to recover the damages he has actually sustained, less the special benefits to his property, if any, by subsequent change of street grade. Kavan v. South Omaha, 86 Neb. 469, 126 N.W. 77 (1910).

Owner of land is entitled to compensation for taking of part thereof for highway purposes. Johnson v. Peterson, 85 Neb. 83, 122 N.W. 683 (1909).

The construction and operation of railroad and closing of a public street entitles landowner to recover the difference between the value of the land before and its value after the road was constructed and put in operation. Chicago, R. I. & P. R. R. Co. v. O'Neill, 58 Neb. 239, 78 N.W. 521 (1899).

The placing of poles and wires in city street by an electric street railway is such interference with owner's enjoyment of property to entitle him to compensation commensurate with

injury sustained. Jaynes v. Omaha Street Ry. Co., 53 Neb. 631, 74 N.W. 67 (1898).

Owner of land is entitled to damages resulting from grading street or highway by either county or city. Douglas County v. Taylor, 50 Neb. 535, 70 N.W. 27 (1897).

A city is liable to a lot owner for the diminution in value of his property caused by construction of a sewer, built by the city near his lot, on which a brick building had been erected before the sewer grade was established. City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N.W. 167 (1891).

A city is liable to a lot owner for such damages as he may sustain by filling in the street in front of his lot above the level of the same, when the buildings were erected on the lot before any grade was established or by reason of filling in street. Hammond v. City of Harvard, 31 Neb. 635, 48 N.W. 462 (1891); Harmon v. City of Omaha, 17 Neb. 548, 23 N.W. 503 (1885).

Depreciation in value in construction of public improvements entitles abutting owner to just compensation therefor. Chicago, K. & N. Ry. Co. v. Hazels, 26 Neb. 364, 42 N.W. 93 (1889).

Before section line road can be opened and worked, the damages suffered by the owners whose lands are taken must be ascertained and paid. Chicago, B. & Q. R. R. Co. v. Douglas County, 1 Neb. Unof. 247, 95 N.W. 339 (1901).

4. Damages

The diminution in market value establishes the damages in an eminent domain case, and the term ''consequential damage'' only defines the kinds of damages which are compensable. Walkenhorst v. State, Dept. of Roads, 253 Neb. 986, 573 N.W.2d 474 (1998).

When private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under this constitutional provision, regardless of whether the plaintiff could have sued in tort under the Political Subdivisions Tort Claims Act. Uhing v. City of Oakland, 236 Neb. 58, 459 N.W.2d 187 (1990).

Where cropland, no part of which is taken, temporarily suffers compensable damage, the measure of compensation is not the market value, but the value of the use for the period damaged, i.e., the value of the crops which could and would have been grown upon the land. Kula v. Prososki, 228 Neb. 692, 424 N.W.2d 117 (1988).

When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in an action for inverse condemnation under the provisions of sections 76-701 to 76-725, or in an action under the language of this provision. Slusarski v. County of Platte, 226 Neb. 889, 416 N.W.2d 213 (1987).

When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under this section. Parriott v. Drainage District No. 6 of Peru, 226 Neb. 123, 410 N.W.2d 97 (1987).

An irrigation district may be liable for damage due to seepage without proof of negligence if the district's activities caused the seepage. Wood v. Farwell Irr. Dist., 217 Neb. 511, 349 N.W.2d 633 (1984).

Under this section, an irrigation district is strictly liable for seepage damage. Lindgren v. City of Gering, 206 Neb. 360, 292 N.W.2d 921 (1980).

Damages caused by fire spreading from municipal dump onto land of plaintiff is within protection of this section. Colburn v. City of Valentine, 183 Neb. 391, 160 N.W.2d 203 (1968).

An abutting property owner is entitled to recover damages resulting from material impairment of his right of access to an existing highway. Swanson v. State, 178 Neb. 671, 134 N.W.2d 810 (1965).

Recovery could be had where prohibition was imposed by statute upon use of land for display of highway signs. Fulmer v. State, 178 Neb. 20, 131 N.W.2d 657 (1964), opinion withdrawn, 178 Neb. 664, 134 N.W.2d 798 (1965).

All actual damages resulting from exercise of power of eminent domain which diminish market value of property not taken may be recovered. Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N.W.2d 865 (1964).

Tenant was entitled to recover damages for deprivation of right to produce crop. State v. Dillon, 175 Neb. 350, 121 N.W.2d 798 (1963).

The words ''or damaged'' include all actual damages resulting from the exercise of the power of eminent domain. Leffelman v. City of Hartington, 173 Neb. 259, 113 N.W.2d 107 (1962).

Constitutional provision does not change measure of damages in taking of leasehold. Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N.W.2d 486 (1962).

Agreement by city to construct median and barrier curbs in street did not violate this section. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N.W.2d 76 (1957).

Temporary damage created by maintenance of a public city dump was recoverable. Patrick v. City of Bellevue, 164 Neb. 196, 82 N.W.2d 274 (1957).

All actual damages resulting from exercise of power of eminent domain may be recovered. Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N.W.2d 200 (1955).

Injury to entire property consisting of several city lots could be considered. Rath v. Sanitary District No. One of Lancaster County, 156 Neb. 444, 56 N.W.2d 741 (1955).

All damages which diminish market value of private property may be recovered. Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N.W.2d 417 (1952).

Landowner is assured of recovery in one action of the whole damage sustained. Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N.W.2d 261 (1949).

Proof of negligence or the commission of a wrongful act is not necessary to a recovery. Wagner v. Loup River Public Power Dist., 150 Neb. 7, 33 N.W.2d 300 (1948).

Damages from seepage caused by public power and irrigation districts can be recovered under this provision without regard to negligence. Halligan v. Elander, 147 Neb. 709, 25 N.W.2d 13 (1946).

Suit may be maintained against state under this section for improper construction of state highway. Schmutte v. State, 147 Neb. 193, 22 N.W.2d 691 (1946).

The words ''or damaged'' include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. Robinson v. Central Nebraska Public Power & Irr. Dist., 146 Neb. 534, 20 N.W.2d 509 (1945).

Legislative act conditionally destroying right to recover damages arising from flooding of lands by drainage district violated this section. Cooper v. Sanitary Dist. No. 1 of Lancaster County, 146 Neb. 412, 19 N.W.2d 619 (1945).

Damages sustained by all property owners alike arising from removal and relocation of railroad cannot be recovered under this provision of the Constitution. Scully v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 184, 9 N.W.2d 207 (1943).

Measure of damages for land taken for public use is the fair and reasonable market value of the land actually taken and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. Schultz v. Central Nebraska Public Power & Irr. Dist., 138 Neb. 529, 293 N.W. 409 (1940).

In action for damages to land caused by seepage from reservoir, recovery for loss of crops for 1936 and 1937, and for depreciation of land at time of trial was proper. Applegate v. Platte Valley Public Power & Irr. Dist., 136 Neb. 280, 285 N.W. 585 (1939).

The words ''or damaged'' include all damages arising from the exercise of right of eminent domain which cause a diminution in value of a leasehold. James Poultry Co. v. Nebraska City, 135 Neb. 787, 284 N.W. 273 (1939).

A city is liable to owner of abutting real estate for damages caused by changing the grade of street. Quivey v. City of Mitchell, 133 Neb. 727, 277 N.W. 50 (1938).

Rule of damages is value of land actually taken and also depreciation in value of remainder of tract, exclusive of general benefits. Regouby v. Dawson County Irr. Co., 126 Neb. 711, 254 N.W. 389 (1934).

Subsequent change in highway grade to facilitate travel is not basis for action for additional damages. Psota v. Sherman County, 124 Neb. 154, 245 N.W. 405 (1932).

Organizer of irrigation district under the statutes waives right to compensation under this section for damages to property and accepts in lieu thereof the statutory remedy. Omaha Life Ins. Co. v. Gering & Ft. Laramie Irr. Dist., 123 Neb. 761, 244 N.W. 296 (1932).

One whose land is damaged temporarily for public use by the construction of a public improvement by the state suffers such a damage as requires compensation under this section. Gledhill v. State, 123 Neb. 726, 243 N.W. 909 (1932).

Seepage from irrigation ditches does not entitle adjoining landowners to damages for taking or damaging property for public use. Livanis v. Northport Irr. Dist., 121 Neb. 777, 238 N.W. 757 (1931); Spurrier v. Mitchell Irr. Dist., 119 Neb. 401, 229 N.W. 273 (1930), overruled in Snyder v. Platte Valley P. P. & I. Dist., 144 Neb. 308, 13 N.W.2d 160 (1944).

Liability of drainage district extends to damages caused by reason of volume of water passed on plaintiff's land. Compton v. Elkhorn Valley Drainage Dist., 120 Neb. 94, 231 N.W. 685 (1930).

The words ''or damaged'' include all damages causing diminution in value by reason of vacating public highway. Lowell v. Buffalo County, 119 Neb. 776, 230 N.W. 842 (1930).

Construction of drainage ditches across public highway does not damage abutting property within meaning of Constitution. Douglas County v. Papillion Drainage Dist., 92 Neb. 771, 139 N.W. 718 (1913).

Where in the performance of duty railroads may be required, when necessary, to construct viaducts over and across their tracks, they are liable for damages to any person whose property is injured by such construction. Phoenix Mutual Life Ins. Co. v. City of Lincoln, 91 Neb. 150, 135 N.W. 445 (1912).

In the taking or damaging of private property by a drainage district corporation in carrying out the purposes of its organization, landowner is entitled to damages for the location of a highway or the construction of a railroad. Nemaha Valley Drainage Dist. No. 2 v. Marconnit, 90 Neb. 514, 134 N.W. 177 (1912).

Measure of damages for lowering the surface of street in front of lots was the difference between market value of the real estate immediately before and after the grading. Whelan v. City of Plattsmouth, 87 Neb. 824, 128 N.W. 520 (1910).

Granting of right-of-way for construction and maintenance of poles and wires does not permit the trimming of trees without responding in damages. Slabaugh v. Omaha Electric Light & Power Co., 87 Neb. 805, 128 N.W. 505 (1910).

One whose land is traversed by a drainage ditch is entitled to recover the value of the land actually taken therefor, together with special damages, if any, to the remainder, but not in such proceedings the damages sustained for neglect of county board to keep a previously established ditch free from silt and debris. Gutschow v. Washington County, 81 Neb. 275, 116 N.W. 46 (1908).

Where city partially vacates a street and builds a viaduct thereon opposite landowner's real estate abutting on such street, thereby diminishing the convenience of access to such property, the true measure of damages is the difference in value of property before and immediately after the improvement, unaffected by increase or decrease of property values generally in same vicinity. Gillespie v. South Omaha, 79 Neb. 441, 112 N.W. 582 (1907).

The words ''or damaged'' include smoke, soot, noise, and convenience of ingress and egress. Stehr v. Mason City & Fort Dodge Ry. Co., 77 Neb. 641, 110 N.W. 701 (1906).

A person whose property has been taken for a highway is entitled not only to the fair market value of the land actually taken, but also such additional damages as accrue to the remainder of the tract by reason of the opening of the road. Scace v. Wayne County, 72 Neb. 162, 100 N.W. 149 (1904).

The words ''or damaged'' include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property. City of Omaha v. Kramer, 25 Neb. 489, 41 N.W. 295 (1889).

The insertion of the words ''or damaged'' was intended to give a right of recovery which did not previously exist, and was not intended to limit or restrict any remedy previously existing. Omaha & R. V. R. R. Co. v. Standen, 22 Neb. 343, 35 N.W. 183 (1887).

The words ''or damaged'' were added to Constitution to grant relief in cases where no direct injury to the real estate, but some physical disturbance of a right possessed by owner in connection therewith. Gottschalk v. C., B. & Q. R. R., 14 Neb. 550, 16 N.W. 475 (1883), 17 N.W. 120 (1883).

Where damages for original construction have been settled or barred, railroad company is not liable to neighboring property owners for damages from smoke. Thompson v. Kimball, 165 F.2d 677 (8th Cir. 1948).

Operator of irrigation canal under state authority is liable for incidental damage to private property. Hooker v. Farmers Irr. Dist., 272 F. 600 (8th Cir. 1921).

5. Just compensation

The Nebraska Constitution limits the sovereign's absolute power to take private property by requiring that property owners whose property has been taken or damaged for public use under the eminent domain authority be compensated. Burlington Northern and Santa Fe Ry. Co. v. Chaulk, 262 Neb. 235, 631 N.W.2d 131 (2001).

Payment of just compensation applies only to vested property rights. Tracy v. City of Deshler, 253 Neb. 170, 568 N.W.2d 903 (1997).

Where city of Fairbury obtained an easement by prescription across plaintiffs' land for public sewer, compensation of plaintiffs referred to in this section not required. Beach v. City of Fairbury, 207 Neb. 836, 301 N.W.2d 584 (1981).

Right of landowner to just compensation for property taken or damaged for public use is guaranteed by this section. W.E.W. Truck Lines, Inc. v. State, 178 Neb. 218, 132 N.W.2d 782 (1965).

Right of landowner or lessee to just compensation for property taken or damaged for public use is guaranteed by this section. Balog v. State, 177 Neb. 826, 131 N.W.2d 402 (1964).

Landowner could not be deprived without compensation of right to reversion of property upon vacation of street. Dell v. City of Lincoln, 170 Neb. 176, 102 N.W.2d 62 (1960).

Exercise of power of eminent domain has been limited only insofar as it is required that just compensation shall be paid for all property taken or damaged. Burnett v. Central Neb. P. P. & I. Dist., 147 Neb. 458, 23 N.W.2d 661 (1946).

Owner is entitled to recover full compensation for land actually taken and such damages to the remainder as are equivalent to diminution in the fair market value thereof. Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N.W.2d 168 (1944).

Condemner is required to compensate for property taken, and also for consequential damage to other property in excess of damage sustained by the public at large. Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N.W.2d 160 (1944).

Temporary damage caused by acquisition of an easement for construction of electric transmission line requires payment of compensation. Pierce v. Platte Valley Public Power & Irr. Dist., 143 Neb. 898, 11 N.W.2d 813 (1943).

Section cited in stating contention of public power and irrigation district that assessments for drainage ditch were beyond the benefits conferred, and operated to take property without compensation in violation of this section. Loup River Public Power Dist. v. County of Platte, 141 Neb. 29, 2 N.W.2d 609 (1942).

In a proceeding to condemn riparian land for public use, consequential damages to other land in the same tract are not limited to governmental section a part of which is included in the land actually taken, where depreciation in the value of the remainder extends beyond those sections. McGinley v. Platte Valley Public Power & Irr. Dist., 133 Neb. 420, 275 N.W. 593 (1937). (Syllabus No. 2, McGinley v. Platte Valley Dist., 132 Neb. 292, 271 N.W. 864 (1937), withdrawn.)

A public power and irrigation district is not authorized to condemn and take private property for public use without just compensation. State ex rel. Loseke v. Fricke, 126 Neb. 736, 254 N.W. 409 (1934).

The compensation for land taken by eminent domain is measured by its market value at the time taken, and no evidence is admissible of its peculiar value for special reasons to its owner. Wiles v. Department of Public Works, 120 Neb. 689, 234 N.W. 918 (1931).

''Just compensation'' means market value at time of taking, and includes interest from time owner deprived of use pending appeal. Sioux City R. R. Co. v. Brown, 13 Neb. 317, 14 N.W. 407 (1882).

Compensation shall be made for the fair market value of the land actually taken, while special benefits may be set off against any local or incidental injury. Wagner v. Gage County, 3 Neb. 237 (1874).

Statute requiring railroads to construct sidetracks to elevators along right-of-way of railway company is taking property without just compensation. Missouri Pacific Railway Co. v. State, 217 U.S. 196 (1910), reversing State No. Missouri Pacific Railway Co., 81 Neb. 15, 115 N.W. 614 (1908).

Loss of market place by landowner, due to removal of town occasioned by condemnation for reservoir site, is a damage common to all of the inhabitants around it, and does not deprive the landowner of property without just compensation. Feltz v. Central Nebraska Public Power & Irr. Dist., 124 F.2d 578 (8th Cir. 1942).

6. Compensation, payment

Change from a two-way street to a one-way street is not ordinarily compensable in eminent domain proceedings. Painter v. State, 177 Neb. 905, 131 N.W.2d 587 (1964).

Restricting funds from which a public power and irrigation district may pay for private property taken or damaged solely to revenue derived from operation, does not violate constitutional provision. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

Public utility property cannot be acquired by a city by condemnation without paying for it. City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N.W. 484 (1933).

Though claim for damages not filed by owner in time, county cannot appropriate land for road without paying damages. Weinel v. Box Butte County, 108 Neb. 293, 187 N.W. 939 (1922).

Lessee of school land is entitled to damages before road opened. Beste v. Cedar County, 87 Neb. 689, 128 N.W. 29 (1910).

Payment need not, unless so provided by law, precede actual taking; it is for the Legislature to determine manner of taking and time and manner of payment. State v. Several Parcels of Land, 79 Neb. 638, 113 N.W. 248 (1907).

Object of section is to stay the hand of the sovereign from the property of the individual until proper compensation has been made. Hopper v. Douglas County, 75 Neb. 329, 106 N.W. 330 (1905).

Until compensation of the landowner has been made sure and certain, he may not be compelled to give up his property, and the public use of the same may be enjoined. Morris v. Washington County, 72 Neb. 174, 100 N.W. 144 (1904).

Statute for depositing award with county judge is only intended as security and does not constitute payment. Brown v. Chicago, R. I. & P. Ry. Co., 66 Neb. 106, 92 N.W. 128 (1902).

Owner of property taken by eminent domain proceedings is not compensated until the sum to which he is entitled is paid or tendered to him or to someone authorized by him to receive it. Brown v. Chicago, R. I. & P. Ry. Co., 64 Neb. 62, 89 N.W. 405 (1902).

A landowner cannot be required to surrender his land for a public use until his damages are first ascertained, and either paid or proper provision made for their payment. Lewis v. City of Lincoln, 55 Neb. 1, 75 N.W. 154 (1898); Hodges v. Board of Supervisors of Seward County, 49 Neb. 666, 68 N.W. 1027 (1896); Hogsett v. Harlan County, 4 Neb. Unof. 310, 97 N.W. 316 (1903).

The just compensation required to be made for taking private property for public use, must, before such taking, be ascertained and payment made accordingly, whether the appropriation of such property is by a municipal or other corporation. Livingston v. County Commissioners of Johnson County, 42 Neb. 277, 60 N.W. 555 (1894).

7. Miscellaneous

The Nebraska Constitution's limit on the sovereign power of eminent domain set forth in this provision applies to temporary as well as permanent takings. Burlington Northern and Santa Fe Ry. Co. v. Chaulk, 262 Neb. 235, 631 N.W.2d 131 (2001).

As this provision is self-executory, a petition alleging that one's property was damaged for a public use is sufficient as against a general demurrer, notwithstanding the fact that the petition refers neither to this article and section nor to the pertinent constitutional language. Slusarski v. County of Platte, 226 Neb. 889, 416 N.W.2d 213 (1987).

To recover damages for loss of or damage to land taken for a public use under this section, it is not necessary that the constitutional provision be set out or its existence alleged in the petition stating the cause of action. It is sufficient for the litigant to allege and prove facts constituting a cause of action because of the loss. Kula v. Prososki, 219 Neb. 626, 365 N.W.2d 441 (1985).

A city may not require a property owner to dedicate private property for some future public purpose as a condition for receiving a building permit unless such future use is directly occasioned by the construction for which the permit is sought. In other cases, eminent domain proceedings are required and compensation must be paid. Simpson v. City of North Platte, 206 Neb. 240, 292 N.W.2d 297 (1980).

When construing eminent domain statutes fundamental concept of this section must be considered. Keller v. State, 184 Neb. 853, 172 N.W.2d 782 (1969).

Cited in a reverse condemnation action. Dietloff v. City of Norfolk, 183 Neb. 648, 163 N.W.2d 586 (1968).

Act of Legislature authorizing city of primary class to annex contiguous or adjacent lands did not violate this section. Campbell v. City of Lincoln, 182 Neb. 459, 155 N.W.2d 444 (1968).

Airport Authority Act did not violate this section. Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 105 (1967).

Constitutionality of Municipal Ground Water Act raised, but not decided. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966).

An owner of land is not entitled to recover damages for barricade of a county road where he does not suffer an injury different in kind from the public at large. Fougeron v. County of Seward, 174 Neb. 753, 119 N.W.2d 298 (1963).

This section is self-executing. Legislative action is not necessary to make it available. Gentry v. State, 174 Neb. 515, 118 N.W.2d 643 (1962).

Rural Cemetery District Act violated this provision of the Constitution. Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961).

Weather Control Act of 1957 violated this section. Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N.W.2d 748 (1960).

Filing of claim for damages under statute is not a condition precedent to maintenance of action. Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N.W.2d 56 (1957).

Statute providing for appointment of district judges as appraisers in condemnation proceedings meets all the requirements of due process. May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945).

Zoning ordinance sustained as constitutional. Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N.W.2d 634 (1944).

A private employment agency is not a business in which the public has such an interest that price fixing may properly be included as a method of regulation. Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507 (1943).

Provision is self-executing and no waiver of immunity of state from suit is required. Bordy v. State, 142 Neb. 714, 7 N.W.2d 632 (1943).

Where a party having the right to condemn lands takes possession without instituting condemnation proceedings, the owner may waive this feature and recover compensation. Dawson County Irr. Dist. v. Stuart, 142 Neb. 435, 8 N.W.2d 507 (1943).

In action against city for taking and damaging realty for public use without just compensation, it is not necessary that property owner plead or prove that she filed claim with city as provided by city charter. Bridge v. City of Lincoln, 138 Neb. 461, 293 N.W. 375 (1940).

Statute imposing restrictions regarding automobile brake and light equipment and providing for inspection, was not violative of constitutional provision. Beisner v. Cochran, 138 Neb. 445, 293 N.W. 289 (1940).

Housing authority acts did not violate constitutional provision prohibiting taking or damaging private property for public use without compensation. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

The Legislature cannot waive sovereignty of state in favor of a particular person or persons to permit suit against state for negligence of its agents and servants. Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938).

Noisome odors from city sewage is not damaging of private property entitling owner to injunction where nuisance may be corrected by chemical treatment of sewage. Hall v. City of Friend, 134 Neb. 652, 279 N.W. 346 (1938).

Moratorium Law provided for the taking of private property for public use without just compensation. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938).

Where the state acquired legal title to mortgaged real estate it cannot be made defendant in foreclosure suit without its consent. Northwestern Mutual Life Ins. Co. v. Nordhues, 129 Neb. 379, 261 N.W. 687 (1935).

Suit against state for infringement of patent can not be brought in state court on theory that plaintiff's property is taken for public use without compensation. Thimgan v. State, 125 Neb. 696, 251 N.W. 837 (1933).

Where employees of the state enter upon land, against the will of the owner, under a void appraisement for damages and attempt to use his land for highway purposes without compensation paid or tendered, they may be restrained by injunction. Goergen v. Department of Public Works, 123 Neb. 648, 243 N.W. 886 (1932).

The Legislature has power to formulate, prescribe, enlarge, modify and alter remedies; provided, however, it does not, under the guise of a statute relating to procedure, attempt to deprive any person of a right secured by the Constitution. Croft v. Scotts Bluff County, 121 Neb. 343, 237 N.W. 149 (1931).

Zoning ordinance was valid under the police power, having substantial relation to the public health, safety and general welfare. City of Lincoln v. Foss, 119 Neb. 666, 230 N.W. 592 (1930).

Owner standing by and neglecting to assert constitutional rights while paving construction is going on, cannot enforce his constitutional rights by means of injunction in a court of equity when he has an adequate remedy at law. Meyer v. City of Alma, 117 Neb. 511, 221 N.W. 438 (1928).

The right of eminent domain cannot be exercised to take land against landowners consent as a site for a reservoir from which to irrigate private property. Vetter v. Broadhurst, 100 Neb. 356, 160 N.W. 109 (1916).

This section is self-executing, and it requires no legislation to prevent private property from being taken or damaged for public use without just compensation. Hopper v. Douglas County, 75 Neb. 329, 106 N.W. 330 (1905); Douglas County v. Taylor, 50 Neb. 535, 70 N.W. 27 (1897).

Mere passive acquiescence by landowner, unaccompanied by conduct indicating affirmative assent, is not waiver of right to compensation. Kime v. Cass County, 71 Neb. 677, 99 N.W. 546 (1904), affirmed on rehearing 71 Neb. 680, 101 N.W. 2 (1904).

Levying special assessments upon tracts of land adjacent to proposed drainage ditch for special benefits received does not violate this section. Dodge County v. Acom, 61 Neb. 376, 85 N.W. 292 (1901).

It is not incumbent upon property owner to take affirmative action as condition precedent to protecting his rights. Propst v. Cass County, 51 Neb. 736, 71 N.W. 748 (1897).

Land is appropriated when its corpus is seized and devoted to an improvement so as to deprive owner of use, and it is not necessary that owner be divested of fee. Martin v. Fillmore County, 44 Neb. 719, 62 N.W. 863 (1895).

Legislature may regulate remedy and prescribe forms to be observed to enforce law, but such regulation must be reasonable and by general laws of uniform operation. City of Lincoln v. Grant, 38 Neb. 369, 56 N.W. 995 (1893).

Legislature has no power to take property of one citizen and transfer it to another, even when full compensation made. Jenal v. Green Island Draining Co., 12 Neb. 163, 10 N.W. 547 (1881).

Public cannot, by means of assessment of benefits against abutting property, reimburse itself for payment of damages occasioned by changing of street grade. Goodrich v. City of Omaha, 10 Neb. 98, 4 N.W. 424 (1880).

Sec. 22. Elections to be free.

All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.

Source: Neb. Const. art. I, sec. 22 (1875).

1. Nominations
2. Miscellaneous

1. Nominations

Legislature is authorized to establish different qualifications for voters in a school district election. Farrell v. School Dist. No. 54 of Lincoln County, 164 Neb. 853, 84 N.W.2d 126 (1957).

Statute prohibiting state and federal officers and employees from being delegates to county, district, and state political conventions did not violate this section. State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950).

This provision does not operate to circumscribe power of Legislature to define the method of effecting the appointment of presidential electors. State ex rel. Beeson v. Marsh, 150 Neb. 233, 34 N.W.2d 279 (1948).

Statutes regulating nomination and election of candidates and prescribing formation of new party are constitutional, if elections are left free and open to all electors. State ex rel. Nelson v. Marsh, 123 Neb. 423, 243 N.W. 277 (1932).

Statute providing for nomination of delegates to constitutional convention by petition only, does not infringe this section, which applies to elections and not to method of nomination. Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430 (1919).

Legislature may regulate nomination of candidates provided regulations are reasonable and do not unnecessarily hamper or impede right of voter to vote for whomsoever he pleases. Morrissey v. Waite, 92 Neb. 271, 138 N.W. 186 (1912).

Statute describing form of official ballot but limiting candidates named thereon to nominees by petition, which has effect of depriving all electors excepting five hundred in each county of right to take part in nominating, violates Constitution. State ex rel Ragan v. Junkin, 85 Neb. 1, 122 N.W. 473 (1909).

Statute requiring candidates for primary elections to pay fee for filing nomination papers, computed at 1 per cent of emoluments received as salary by that officer, is in conflict with Constitution. State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N.W. 174 (1905).

2. Miscellaneous

This section has no application to a public corporation or political subdivision where it operates in a proprietary capacity. Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966).

The second reapportionment act enacted by the 1965 Legislature did not impede the right of a voter to exercise the elective franchise. Carpenter v. State, 179 Neb. 628, 139 N.W.2d 541 (1966).

Levy of tax for municipal university did not violate free elections clause. Ratigan v. Davis, 175 Neb. 416, 122 N.W.2d 12 (1963).

Holding an election shortly after a blizzard did not operate as a hindrance or impediment to the right to vote. Peterson v. Cook, 175 Neb. 296, 121 N.W.2d 399 (1963).

Requirement that candidate for office of member of State Railway Commission be not less than thirty years of age does not violate this section. State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N.W.2d 892 (1942).

Offer of federal government to aid in remodeling of schoolhouse does not invalidate school district election to vote bonds for that purpose. Taxpayers League v. Benthack, 136 Neb. 277, 285 N.W. 577 (1939).

Requirement of Australian Ballot Law that signatures of two judges of election shall be on back of each ballot, is not inimical to constitutional provisions. Swan v. Bowker, 135 Neb. 405, 281 N.W. 891 (1938).

A statute substituting a municipal court for justice of peace courts which excludes electors outside of city but within jurisdiction of municipal court from voting for municipal judge, contravenes constitutional provision. State ex rel. Wright v. Brown, 131 Neb. 239, 267 N.W. 466 (1936).

Statute prohibiting candidate defeated at primary from filing by petition in general election next following is constitutional. State ex rel. Driscoll v. Swanson, 127 Neb. 715, 256 N.W. 872 (1934).

Statute restricting the right to petition for recall of city officers to voters whose names appear upon the registration list is not violative of this section. State ex rel. Miller v. Berg, 97 Neb. 63, 149 N.W. 61 (1914).

Election commissioner is required to accept statements of voter under oath as true and register him as a voter. State ex rel. Williams v. Moorhead, 96 Neb. 559, 148 N.W. 552 (1914).

Following this section, the law makes county clerk liable to forfeit his office and to be fined and imprisoned if he neglects to furnish correct ballots. Wahlquist v. Adams County, 94 Neb. 682, 144 N.W. 171 (1913).

To preserve right of voter at general election, it is not necessary that name of candidate should appear on ballot more than once, nor that he be described as member of more than one political party, as no party can be compelled to put forth as its candidate one who does not affiliate with it. State ex rel. Curyea v. Wells, 92 Neb. 337, 138 N.W. 165 (1912).

The right of every voter to vote a straight ticket for the candidates of his party is guaranteed and any attempt by deception or otherwise to deprive him of that right is a violation of the Constitution. State ex rel. Nebraska Republican State Central Committee v. Wait, 92 Neb. 313, 138 N.W. 159 (1912).

Legislature may control and regulate official ballot and manner of selection of names to be printed thereon, but cannot abolish nor prevent their formation, nor prevent free and open discussion of qualifications and fitness for office. State ex rel. Ragan v. Junkin, 85 Neb. 1, 122 N.W. 473 (1909).

In creation of drainage districts requirement that officers shall be elected by freeholders only does not violate Constitution. State ex rel. Harris v. Hanson, 80 Neb. 738, 117 N.W. 412 (1908).

Legislature may provide for election of officers not named in Constitution by means other than popular vote. State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N.W. 294 (1908).

Where statutes require that ballot be signed by two judges of election, voter cannot be deprived of vote because some ballots were in good faith signed by clerk. Bingham v. Broadwell, 73 Neb. 605, 103 N.W. 323 (1905).

Electors of city cannot be deprived of right to vote for public officer because of failure of Legislature to make special provision for such election. State ex rel. Gordon v. Moores, 70 Neb. 48, 96 N.W. 1011 (1903), affirmed on rehearing 70 Neb. 56, 99 N.W. 504 (1904).

The requirements of the Australian Ballot Law that the names or signatures of the two judges of an election shall be written on the back of each ballot to be used, and that a ballot not so endorsed shall be void, and not counted, are mandatory, and are not inimical to constitutional provisions. Orr v. Bailey, 59 Neb. 128, 80 N.W. 495 (1899).

Sec. 23. Capital cases; right of direct appeal; effect; other cases; right of appeal.

In all capital cases, appeal directly to the Supreme Court shall be as a matter of right and shall operate as a supersedeas to stay the execution of the sentence of death until further order of the Supreme Court. In all other cases, criminal or civil, an aggrieved party shall be entitled to one appeal to the appellate court

created pursuant to Article V, section 1, of this Constitution or to the Supreme Court as may be provided by law.

Source: Neb. Const. art I, sec. 23 (1875); Amended 1972, Laws 1972, LB 196, sec. 1; Amended 1990, Laws 1990, LR 8, sec. 1.

1. Right of review
2. Regulation of exercise of right
3. Miscellaneous

1. Right of review

Right to be heard on question of changes in boundaries of school district by error proceedings could not be denied. Languis v. De Boer, 181 Neb. 32, 146 N.W.2d 750 (1966).

Legislature cannot deprive courts of jurisdiction conferred on them by Constitution. Writ of prohibition is not abolished by statutory provisions. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Right of review of judgment rendered party at open public hearing is guaranteed by Constitution. State ex rel. Sorensen v. Nemaha County Bank of Auburn, 124 Neb. 883, 248 N.W. 650 (1933).

Right of review is to be held inviolate. State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N.W. 616 (1932).

2. Regulation of exercise of right

This section of the Nebraska Constitution does not bar either the Legislature or the Supreme Court from making reasonable rules and regulations governing review on appeal. Nebraska State Bank v. Dudley, 203 Neb. 226, 278 N.W.2d 334 (1979).

Requirement for furnishing of appeal bond in probate matter did not deprive party of right to be heard in court of last resort. Rundall v. Whiteside, 182 Neb. 176, 153 N.W.2d 236 (1967).

Right to be heard in civil case in Supreme Court is dependent upon its exercise in strict conformity to law. Weiner v. State, 179 Neb. 297, 137 N.W.2d 852 (1965).

This section does not prohibit the Legislature from prescribing reasonable rules for review of cause on appeal. Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N.W.2d 120 (1944).

Constitutional provision does not prohibit Legislature from prescribing reasonable rules and regulations for the review of a cause by appeal. In re Kothe's Estate, 131 Neb. 531, 268 N.W. 464 (1936).

Legislature may prescribe reasonable rules and regulations for review of case on appeal. In re Estate of Mathews, 125 Neb. 737, 252 N.W. 210 (1933).

Section does not prevent Supreme Court from making reasonable rules to facilitate procedure, nor prohibit Legislature from taking away one method of review, provided another adequate one is left. Schmidt v. Boyle, 54 Neb. 387, 74 N.W. 964 (1898).

Legislature is not prohibited from prescribing reasonable regulations, such as requiring appellant to give bond. School Dist. No. 6 of Cass County v. Traver, 43 Neb. 524, 61 N.W. 720 (1895).

3. Miscellaneous

The writ of error is a writ of right in all cases of felony. State v. Longmore, 178 Neb. 509, 134 N.W.2d 66 (1965).

Judicial discretion should be exercised to promote rather than to defeat right of review. Keil v. Farmers' Irr. Dist., 119 Neb. 503, 229 N.W. 898 (1930).

Statute denying right of review in mortgage foreclosure suit, where defendant files request for stay, will be strictly construed. Theisen v. Peterson, 114 Neb. 154, 206 N.W. 768 (1925).

Court of equity will grant new trial where party is deprived of right of review because, without his fault, he was unable to obtain bill of exceptions or transcript. Ferber v. Leise, 97 Neb. 795, 151 N.W. 307 (1915); Zweibel v. Caldwell, 72 Neb. 47, 99 N.W. 843 (1904), motion for rehearing overruled 72 Neb. 53, 102 N.W. 84 (1905).

Section does not give absolute right to oral argument, but was intended in sense of review. Schmidt v. Boyle, 54 Neb. 387, 74 N.W. 964 (1898).

Sec. 24. Repealed 1990. Laws 1990, LR 8, sec. 1.

Sec. 25. Rights of property; no discrimination; aliens.

There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law.

Source: Neb. Const. art. I, sec. 25 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 2.

1. Discrimination
2. Rights of aliens
3. Miscellaneous

1. Discrimination

Statute abrogating a right of action for a future tort does not violate this section. State Securities Co. v. Norfolk Livestock Sales Co., Inc., 187 Neb. 446, 191 N.W.2d 614 (1971).

Prohibiting wholesalers from giving discounts to retailers for quantity purchases of alcoholic liquor does not violate this section. Central Markets West, Inc. v. State, 186 Neb. 79, 180 N.W.2d 880 (1970).

Harm caused by statute permitting independent hospital district to fractionate territory of counties insufficient to constitute violation of this section. Shadbolt v. County of Cherry, 185 Neb. 208, 174 N.W.2d 733 (1970).

Prohibiting retailer from accepting credit for purchase of beer from wholesaler while permitting acceptance of credit on purchase of liquor is constitutional. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N.W.2d 232 (1968).

A citizen may not only acquire property but he may sell it at such price as he can obtain in fair barter. Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967).

Penalty for failure to return personal property for taxation was discriminatory and void under this section. Bachus v. Swanson, 179 Neb. 1, 136 N.W.2d 189 (1965).

Statute requiring fencing of right-of-way by railroads did not discriminate between citizens with respect to ownership and enjoyment of property. Linenbrink v. Chicago & N.W. Ry. Co., 177 Neb. 838, 131 N.W.2d 417 (1964).

Every citizen has the right to acquire property and sell it at such price as he can obtain in fair barter. Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963).

Levy of tax for municipal university did not violate discrimination clause. Ratigan v. Davis, 175 Neb. 416, 122 N.W.2d 12 (1963).

City ordinance prescribing charge for conducting business of commercial aerial spraying did not violate this section. City of Ord v. Biemond, 175 Neb. 333, 122 N.W.2d 6 (1963).

Penalty provisions of tax statute were discriminatory and violated this section. Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

Amendments to Blue-Sky Law did not violate this section. Davis v. Walker, 170 Neb. 891, 104 N.W.2d 479 (1960).

Public Auction Law was discriminatory and not based upon reasonable classification. Blauvelt v. Beck, 162 Neb. 576, 76 N.W.2d 738 (1956).

Curb-cut ordinance admitted by demurrer to be discriminatory and not a reasonable exercise of police power violated this section. Panebianco v. City of Omaha, 151 Neb. 463, 37 N.W.2d 731 (1949).

Imposition of liability for reimbursement on estate of recipient of old age assistance does not violate this section. Boone County Old Age Assistance Board v. Myhre, 149 Neb. 669, 32 N.W.2d 262 (1948).

A private employment agency is not a business in which the public has such an interest that price fixing may properly be included as a method of regulation. Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507 (1943).

Housing Authority Act sustained as constitutional. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Limitation on lawful business creating a monopoly violates this section. Nelsen v. Tilley, 137 Neb. 327, 289 N.W. 388 (1939).

Regulation of size of containers in which alcoholic liquors are sold at retail is not violative of this section. Marsh & Marsh v. Carmichael, 136 Neb. 797, 287 N.W. 616 (1939).

The constitutional right to acquire and possess property includes the right to dispose of it in such innocent manner as the owner pleases. State ex rel. English v. Ruback, 135 Neb. 335, 281 N.W. 607 (1938).

Zoning ordinance was not discriminatory. City of Lincoln v. Foss, 119 Neb. 666, 230 N.W. 592 (1930).

Statute providing for tuberculin test making distinction between breeding cattle and feeding cattle and authorizing summary destruction of diseased animals, is constitutional. State ex rel. Spillman v. Splittgerber, 119 Neb. 436, 229 N.W. 332 (1930).

Former statute prohibiting trial of divorce suit within six months after service of summons is not violative of this section. Garrett v. State, 118 Neb. 373, 224 N.W. 860 (1929).

Occupation tax on ''rolling store'' was not discriminatory. Erwin v. City of Omaha, 118 Neb. 331, 224 N.W. 692 (1929).

''Cedar Rust'' law is constitutional. Upton v. Felton, 4 F.Supp. 585 (D. Neb. 1932).

2. Rights of aliens

Provision precluding distinction between resident aliens and citizens was inapplicable to nonresident wife of resident alien. Engen v. Union State Bank of Harvard, 121 Neb. 257, 236 N.W. 741 (1931).

Legislature did not intend by Alien Act of 1889 to discriminate against the heirs of a resident alien in favor of the heirs of a nonresident. State ex rel. Toop v. Thomas, 103 Neb. 151, 172 N.W. 690 (1919).

Statutes limiting right of dower of nonresident widow to lands of which husband died seized, while extending right of dower to resident widow of other lands, does not violate Constitution. Miner v. Morgan, 83 Neb. 400, 119 N.W. 781 (1909).

The words ''aliens'' and ''citizens'' relate to political status of persons as respecting their relation to United States, while the word ''residents'' relates to status of persons with respect to State of Nebraska. Glynn v. Glynn, 62 Neb. 872, 87 N.W. 1052 (1901).

Statute denying aliens the right to take or hold title to real estate in Nebraska by descent or devise, with certain exceptions and qualifications, does not violate this section. Toop v. Ulysses Land Co., 278 F. 840 (D. Neb. 1913).

3. Miscellaneous

This provision of the Nebraska Constitution is no more demanding than the Equal Protection Clause of the U.S. Constitution. Mach v. County of Douglas, 259 Neb. 787, 612 N.W.2d 237 (2000).

Sec. 26. Powers retained by people.

This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people.

Source: Neb. Const. art. I, sec. 26 (1875).

L.B. 1003, Eighty-second Legislature, First Session, sections 23-2601 to 23-2612 does not contravene this section. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

A state agency may not, by invoking the doctrine of police power, exercise powers not granted it by and inconsistent with provisions of the state Constitution. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938).

This section is characteristic of republican form of government and distinguishes such government from monarchy or oligarchy. State ex rel. Harte v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916).

This section removes all doubt that powers other than those specified in bill of rights were retained by the people, and any act in violation of such rights is as clearly invalid as though same had been expressly prohibited by fundamental law. State ex rel. Smyth, Attorney General v. Moores, 55 Neb. 480, 76 N.W. 175 (1898), overruled in Redell v. Moores, 63 Neb. 219, 88 N.W. 243 (1901).

Police power is one of the powers which has been reserved by the people of the state, and which cannot be surrendered. Chicago, B. & Q. R. R. Co. v. State ex rel. City of Omaha, 47 Neb. 549, 66 N.W. 624 (1896).

Sec. 27. English language to be official.

The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Source: Neb. Const. art. I, sec. 27 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 3.

Sec. 28. Crime victims; rights enumerated; effect; Legislature; duties.

(1) A victim of a crime, as shall be defined by law, or his or her guardian or representative shall have: The right to be informed of all criminal court proceedings; the right to be present at trial unless the trial court finds sequestration necessary for a fair trial for the defendant; and the right to be informed of, be present at, and make an oral or written statement at sentencing, parole, pardon, commutation, and conditional release proceedings. This enumeration of certain rights for crime victims shall not be construed to impair or deny others provided by law or retained by crime victims.

(2) The Legislature shall provide by law for the implementation of the rights granted in this section. There shall be no remedies other than as specifically provided by the Legislature for the enforcement of the rights granted by this section.

(3) Nothing in this section shall constitute a basis for error in favor of a defendant in any criminal proceeding, a basis for providing standing to participate as a party to any criminal proceeding, or a basis to contest the disposition of any charge.

Source: Neb. Const. art. I, sec. 28 (1996); Adopted 1996, Laws 1995, LR 21CA, sec. 1.

This provision is not self-executing. Legislative action is necessary to provide for the implementation of the rights provided herein. State ex rel. Lamm v. Nebraska Bd. of Pardons, 260 Neb. 1000, 620 N.W.2d 763 (2001).

Sec. 29. Marriage; same-sex relationships not valid or recognized.

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Source: Neb. Const. art. I, sec. 29 (2000); Adopted 2000, Initiative Measure No. 416.

ARTICLE II

DISTRIBUTION OF POWERS

Section
1. Legislative, executive, judicial.

Sec. 1. Legislative, executive, judicial.

(1) The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.

(2) Notwithstanding the provisions of subsection (1) of this section, supervision of individuals sentenced to probation, released on parole, or enrolled in programs or services established within a court may be undertaken by either the judicial or executive department, or jointly, as provided by the Legislature.

Source: Neb. Const. art. II, sec. 1 (1875); Amended 2006, Laws 2006, LR 274CA, sec. 1.

1. Legislative power
2. Executive power
3. Judicial power
4. Miscellaneous

1. Legislative power

An executive agency decision which is a legislative act encroaches upon and interferes with legislative powers that cannot be delegated to an executive agency. Such unilateral action by an agency violates the language of this provision. Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185 (1994).

A grant of administrative authority is not an unconstitutional delegation of legislative power. Blackledge v. Richards, 194 Neb. 188, 231 N.W.2d 319 (1975).

Sections 77-202.25 to 77-202.33 do not constitute an appropriation and are not violative hereof. Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974).

Sections 79-486 and 79-4,102 do not unlawfully delegate legislative authority and are not unconstitutional. Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N.W.2d 729 (1971).

Legislature cannot through appropriations exercise or invade constitutional rights or powers of executive. Legislature cannot administer appropriations once made. State ex rel. Meyer v. State Board of Equalization & Assessment, 185 Neb. 490, 176 N.W.2d 920 (1970).

Nebraska Revenue Act of 1967 was not an unlawful delegation of legislative power to the United States. Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967).

Legislature may not delegate or impose legislative functions upon judicial department. McDonald v. Rentfrow, 176 Neb. 796, 127 N.W.2d 480 (1964).

Grant of legislative power to Department of Education was an exception expressly authorized by Constitution. School Dist. No. 8 of Sherman County v. State Board of Education, 176 Neb. 722, 127 N.W.2d 458 (1964).

Legislature, in creating an administrative body, cannot delegate power which is conferred solely upon the Legislature. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission, 175 Neb. 26, 120 N.W.2d 374 (1963).

Legislature has power to confirm appointments to public office. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

Delegation of rule-making power to Superintendent of Public Instruction, without adequate standards, violated this section. School Dist. No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955).

Delegation of legislative powers to a county committee to fix boundaries of school district was constitutional. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

Legislature could delegate to Board of Regents authority to make rules for efficient operation of University Hospital. Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N.W.2d 221 (1951).

Reclamation Act did not violate this section. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Housing authority acts granting administrative functions to city council were not unconstitutional delegation of legislative authority. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Legislature has no power to delegate legislative authority to an administrative board or to outside agency such as United States Congress. Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492 (1935).

Statute regulating size of loaf of bread, authorizing Secretary of Agriculture to fix reasonable excess tolerances, is not invalid as a delegation of legislative power. Petersen Baking Co. v. Bryan, 124 Neb. 464, 247 N.W. 39 (1933), affirmed in 290 U.S. 570 (1934).

Act providing for control and eradication of diseases among domestic animals does not delegate legislative power, and is not invalid. State ex rel. Sorensen v. Knudtsen, 121 Neb. 270, 236 N.W. 696 (1931).

Governor, in submitting budget recommendations and in acting on appropriation bills, is in performance of ''legislative duties'' within meaning hereof. Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).

Proviso of law relating to organization of new school districts was unconstitutional as attempting to delegate legislative functions to private persons. Rowe v. Ray, 120 Neb. 118, 231 N.W. 689 (1930).

Duty placed on administrative board to provide form of insurance contract was not an unconstitutional delegation of legislative power. State ex rel. Martin v. Howard, 96 Neb. 278, 147 N.W. 689 (1914).

Statute providing for direct appeals to Supreme Court from Railway Commission is not invalid as attempting to confer legislative power on court. Hooper Tel. Co. v. Nebraska Tel. Co., 96 Neb. 245, 147 N.W. 674 (1914).

This section prohibits attempting to confer upon district court legislative authority to sever agricultural lands from municipal limits. Winkler v. City of Hastings, 85 Neb. 212, 122 N.W. 858 (1909).

Making it discretionary in district court to determine necessity for calling grand jury does not confer legislative powers upon judiciary. Dinsmore v. State, 61 Neb. 418, 85 N.W. 445 (1901).

2. Executive power

The Board of Nursing has power to deny a license upon proof applicant is guilty of unprofessional conduct, and upon review de novo, district court may not substitute its own judgment on that issue. Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N.W.2d 683 (1976).

The statutes which give the Court of Industrial Relations jurisdiction over public employees are not unconstitutional. American Fed. of S., C. & M. Emp. v. Department of Public Institutions, 195 Neb. 253, 237 N.W.2d 841 (1976).

Adoption of existing law or regulation by reference does not delegate legislative power to administrative officer to create criminal offenses. State v. Workman, 186 Neb. 467, 183 N.W.2d 911 (1971).

Statute authorizing transfer of land from a nonaccredited to an accredited high school district did not violate this section. De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N.W.2d 296 (1966).

Regulation of Nebraska Liquor Control Commission fixing hours for sale of beer outside corporate limits of cities and

villages did not violate this section. Griffin v. Gass, 133 Neb. 56, 274 N.W. 193 (1937).

Powers of State Board of Agriculture are neither legislative nor judicial. Crete Mills v. Nebraska State Board of Agriculture, 132 Neb. 244, 271 N.W. 684 (1937).

Legislature may not impose judicial power upon executive officers or delegate legislative power to them. Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1936).

Act requiring county attorney to perform duties of coroner is not invalid as clothing administrative officer with judicial power. State ex rel. Crosby v. Moorhead, 100 Neb. 298, 159 N.W. 412 (1916).

Act authorizing chief officer of state department or institution to employ attorney, rather than to have Attorney General act, is not invalid. Follmer v. State, 94 Neb. 217, 142 N.W. 908 (1913).

Ministerial officers, such as board of education, while not exactly executive or political, are obviously more nearly related to executive than to legislative or judicial department. State v. Loechner, 65 Neb. 814, 91 N.W. 874 (1902).

Attempt to confer upon courts authority to remove police magistrates for misconduct in office was unlawful delegation of executive power. Gordon v. Moores, 61 Neb. 345, 85 N.W. 298 (1901).

By quo warranto proceeding court does not exercise nor assume to exercise any power belonging to executive department. State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892), reversed in Boyd v. Nebraska ex rel. Thayer 143 U.S. 135 (1892).

3. Judicial power

The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. In re Application of Brown, 270 Neb. 891, 708 N.W.2d 251 (2006).

A trial court that indicates it will concur in an agreement granting sentence concessions is not bound and has not ceded its authority and, thus, has not violated the doctrine of the separation of powers. State v. Lotter, 255 Neb. 456, 586 N.W.2d 591 (1998).

Although courts have no jurisdiction to review wholly legislative acts, some agency determinations possess quasi-judicial characteristics and are reviewable without violating the separations of powers doctrine. Slack Nsg. Home v. Department of Soc. Servs., 247 Neb. 452, 528 N.W.2d 285 (1995).

The Nebraska Supreme Court, and only that court, is invested with the power to admit persons to the practice of law and to fix qualifications for admission to the bar. Thus, it has the responsibility to adopt and implement systems designed to protect the public and safeguard the judicial system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies. In re Application of Majorek, 244 Neb. 595, 508 N.W.2d 275 (1993).

The discretion vested in a prosecuting attorney to determine in which court a minor shall be prosecuted does not violate this section as an unlawful delegation of legislative power. State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974).

Legislative act attempting to confer upon the courts the power of determining what lands should be annexed to a city violated this section. Williams v. County of Buffalo, 181 Neb. 233, 147 N.W.2d 776 (1967).

Legislature may confer upon the courts the power to review action taken by county board of equalization in levying taxes. C. R. T. Corp. v. Board of Equalization, 172 Neb. 540, 110 N.W.2d 194 (1961).

Motor Vehicle Safety Responsibility Act does not confer judicial powers on Department of Roads and Irrigation. Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952).

Under separation of powers of government, judiciary has the inherent right to admit attorneys to practice law and prescribe their qualifications, and while Legislature may impose minimum standards as an exercise of the police power, the judiciary is not required to accept lower standards than it prescribes. State ex rel. Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942).

Power to admit persons to practice of law and fix their qualifications to practice is vested solely in Supreme Court. State ex rel. Wright v. Hinckle 137 Neb. 735, 291 N.W. 68 (1940).

Statute conferring powers over solvent and insolvent banks on Department of Banking is not unconstitutional as attempt to delegate judicial powers to the department. Department of Banking v. Hedges, 136 Neb. 382, 286 N.W. 277 (1939).

The right to define and regulate the practice of law belongs to the judicial department of government. In re Integration of the Nebraska State Bar Association, 133 Neb. 283, 275 N.W. 265 (1937).

The Supreme Court has no power to regulate public utilities. Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N.W. 756 (1937).

Power to admit persons to practice law in this state and to fix their qualifications is vested solely in the Supreme Court. State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936).

Statute providing for assignment of district judges as appraisers in condemnation proceedings is not unconstitutional delegation of power hereunder. City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N.W. 484 (1933).

Judicial department of government must protect its jurisdiction at boundaries of power fixed by the Constitution. State ex rel. Sorensen v. Mitchell State Bank, 123 Neb. 120, 242 N.W. 283 (1932); State ex rel. Sorensen v. State Bank of Minatare, 123 Neb. 109, 242 N.W. 278 (1932).

Statute relating to declaratory judgments is valid since it does not confer nonjudicial powers on courts. Lynn v. Kearney County, 121 Neb. 122, 236 N.W. 192 (1931).

Power conferred on Supreme Court Justice to require filing of nomination acceptance is judicial, not quasi political or administrative. State ex rel. Meissner v. McHugh, 120 Neb. 356, 233 N.W. 1 (1930).

Statute requiring court to determine whether power district should be incorporated, what its boundaries should be, etc., is invalid as imposing nonjudicial duties. Searle v. Yensen, 118 Neb. 835, 226 N.W. 464 (1929).

Statute making federal census reports basis for determining population of subdivisions of state is void as usurping judicial power. Gordon v. Lowry, 116 Neb. 359, 217 N.W. 610 (1928).

Appointment by Supreme Court of district judges to appraise public utility does not violate this section. In re Appraisement of Omaha Gas Plant, 102 Neb. 782, 169 N.W. 725 (1918).

Statute vesting in district court duty of ordering annexation or disconnecting territory from municipal limits upon determination of existence of required facts does not violate Constitution. Bisenius v. City of Randolph, 82 Neb. 520, 118 N.W. 127 (1908).

Statute providing for appointment of municipal park commissioners by judges of district court is void as violating Constitution. State ex rel. Thompson v. Neble and Latenser, 82 Neb. 267, 117 N.W. 723 (1908).

Statute cannot vest judiciary with legislative functions under subterfuge of giving court jurisdiction over such questions on appeal. Tyson v. Washington County, 78 Neb. 211, 110 N.W. 634 (1907).

Creation of State Banking Board with regulatory power over banking corporations does not vest such board with judicial powers in violation of this article. State ex rel. Prout v. N. W. Trust Co., 72 Neb. 497, 101 N.W. 14 (1904).

Issuance of writ of mandamus by judicial branch directing performance of duty by member of executive department does not violate this section. State ex rel. Wright v. Savage, 64 Neb. 684, 90 N.W. 898 (1902), modified on rehearing 64 Neb. 702, 91 N.W. 557 (1902).

Supreme Court, on appeal from State Board of Equalization involving valuation and assessment of railroad property, acts in

judicial and not in administrative capacity. Chicago & N. W. Ry. Co. v. Bauman, 69 F.2d 171 (8th Cir. 1934).

4. Miscellaneous

The distribution of powers clause prohibits one branch of government from exercising the duties of another. State v. Divis, 256 Neb. 328, 589 N.W.2d 537 (1999).

The powers of the state government are separated into three distinct departments, none of which shall exercise the powers belonging to the others. State v. Bainbridge, 249 Neb. 260, 543 N.W.2d 154 (1996).

This provision separates the powers of state government into three distinct departments, none of which shall exercise the powers belonging to the others. State v. Jones, 248 Neb. 117, 532 N.W.2d 293 (1995).

This provision, which distributes state governmental powers to the legislative, judicial, and executive branches, does not apply to the governing bodies of municipalities. Howard v. City of Lincoln, 243 Neb. 5, 497 N.W.2d 53 (1993).

This provision prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives, and prohibits one who exercises the powers of one branch from being a member of one of the other branches. An employee of a state college is a member of the executive branch of government. An individual cannot simultaneously hold a position as an assistant professor at a state college and serve in the Legislature. State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991).

Act establishing Court of Industrial Relations does not violate any constitutional provision and the standards for its guidance are adequate. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

The provision authorizing an Industrial Commission is an independent part of the Constitution and not an amendment to Article II. School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972).

Provision in Nebraska Clean Waters Commission Act regarding appointment of trustees construed so as not to violate this section. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Airport Authority Act did not violate this section. Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 105 (1967).

Statute providing that judicial determination that legislative act is unconstitutional shall have prospective effect only held to be in violation of this section. Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N.W.2d 907 (1964).

Statute authorizing paving in city of the second class did not delegate legislative functions to private individuals. Elliott v. City of Auburn, 172 Neb. 1, 108 N.W.2d 328 (1961).

Grade A Milk Act was unconstitutional as conferring legislative power upon administrative officer. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N.W.2d 227 (1960).

Powers of government are divided into three distinct departments, the legislative, the executive and the judicial. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Appointment of district judges as appraisers in condemnation proceedings does not violate the doctrine of separation of powers. May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945).

Requirement that candidate for office of member of State Railway Commission be not less than thirty years of age does not violate this section. State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N.W.2d 892 (1942).

Purpose of section was to establish and maintain the independence of the three branches of government. State ex rel. Randall v. Hall, 125 Neb. 236, 249 N.W. 756 (1933).

This section concerns only government of state and does not attempt to limit Legislature in prescribing manner in which municipalities may administer local affairs. State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N.W. 224 (1912).

ARTICLE III
LEGISLATIVE POWER

Section

Section
20. Salt springs, coal, oil, minerals; alienation prohibited.
21. Donation of state lands prohibited; when.
22. Appropriations for state; deficiencies; bills for pay of members and officials.
23. Repealed 1972. Laws 1972, LB 302, sec. 1.
24. Games of chance, lotteries, and gift enterprises; restrictions; parimutuel wagering on horseraces; bingo games; use of state lottery proceeds.
25. Incidental expenses of state officers; specific appropriations always necessary; warrants for money.
26. Privilege of members.
27. Acts take effect after three months; emergency bills; session laws.
28. Repealed 1934. Initiative Measure No. 330.
29. Legislative authority in emergencies due to enemy attack upon United States.
30. Legislature to pass necessary laws.

Sec. 1. Legislative authority; how vested; power of initiative; power of referendum.

The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum.

Source: Neb. Const. art. III, sec. 1 (1875); Amended 1912, Laws 1911, c. 223, sec. 2, p. 671; Amended 1934, Initiative Measure No. 330; Amended 2000, Laws 1999, LR 18CA, sec. 3.

1. Grant of power
2. Limitations on exercise of power
3. Delegation of power
4. Miscellaneous

1. Grant of power

The statutes which give the Court of Industrial Relations jurisdiction over public employees are not unconstitutional. American Fed. of S., C. & M. Emp. v. Department of Public Institutions, 195 Neb. 253, 237 N.W.2d 841 (1976).

A grant of administrative authority is not an unconstitutional delegation of legislative power. Blackledge v. Richards, 194 Neb. 188, 231 N.W.2d 319 (1975).

The right of the people to exercise the initiative and referendum is specifically reserved to them. Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966).

The Legislature, subject only to the initiative and referendum, and constitutional inhibitions, and provided that legislation is for a public purpose, has an unlimited field within which to legislate. Power Oil Co. v. Cochran, 138 Neb. 827, 295 N.W. 805 (1941).

Right of local self-government in cities and towns existed prior to present Constitution, is vested in people of respective municipalities, and cannot be taken away by Legislature. State ex rel. Smyth, Attorney General v. Moores, 55 Neb. 480, 76 N.W. 175 (1898), overruled in Redell v. Moores, 63 Neb. 219, 88 N.W. 243 (1901).

2. Limitations on exercise of power

Under this provision, a legislature may not attempt to restrict the constitutional power of a succeeding legislature to legislate. State ex rel. Stenberg v. Moore, 249 Neb. 589, 544 N.W.2d 344 (1996).

In the creation of a new executive department, a two-thirds majority of all members elected to the Legislature is required. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Restrictions and limitations of the Constitution apply with equal force to legislative proceedings under the unicameral system as they did under the bicameral system. Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N.W.2d 633 (1945).

Constitution does not define, but limits, the powers of the Legislature; otherwise as to powers of city council under home rule charter. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922).

The 1934 amendment to this section giving all legislative powers to the Unicameral applied to Article IV, section 15, of the Constitution so as to require all orders, resolutions, and votes of the one house Legislature to be presented to the Governor and this controlled procedure as to the 1969 resolution retroceding jurisdiction over Indian reservations. Omaha Tribe of Nebraska v. Village of Walthill, 334 F.Supp. 823 (D. Neb. 1971).

3. Delegation of power

The power of the Legislature to create a body with power to deal with labor relations of governmental entities and departments does not depend upon Article XV, section 9, of the Nebraska Constitution, but it exists by virtue of Article III, section 1. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

Sections 79-486 and 79-4,102 do not unlawfully delegate legislative authority and are not unconstitutional. Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N.W.2d 729 (1971).

Adoption of existing law or regulation by reference does not delegate legislative power to administrative officer to create criminal offenses. State v. Workman, 186 Neb. 467, 183 N.W.2d 911 (1971).

Nebraska Clean Waters Commission Act did not delegate legislative authority in violation of this section. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Nebraska Revenue Act of 1967 was not an unlawful delegation of legislative power to the United States. Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967).

Statute authorizing transfer of land from a nonaccredited to an accredited high school district did not violate this section. De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N.W.2d 296 (1966).

Legislature cannot delegate to administrative agency powers conferred solely upon Legislature. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission, 175 Neb. 26, 120 N.W.2d 374 (1963).

Legislature cannot delegate its legislative power to define a criminal offense to an administrative or executive authority. Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N.W.2d 227 (1960).

Fair Trade Act was an unconstitutional delegation of legislative authority. McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N.W.2d 608 (1955).

In absence of adequate standards, delegation of rule-making power to Superintendent of Public Instruction was unconstitutional. School Dist. No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955).

Legislature can delegate to administrative agency power to make rules and regulations covering the details of the legislative purpose. Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N.W.2d 221 (1951).

Reclamation Act did not violate this section. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Housing authority acts granting administrative functions to city council are not unconstitutional delegation of authority. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

The extraordinary session of the Legislature of 1935 was properly constituted. Steinacher v. Swanson, 131 Neb. 439, 268 N.W. 317 (1936).

The Legislature may not delegate legislative powers to an administrative board or to any outside agency such as the United States Congress. Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492 (1935).

Proviso of law relating to organization of new school districts is not invalid as attempt to delegate legislative functions. Rowe v. Ray, 120 Neb. 118, 231 N.W. 689 (1930).

4. Miscellaneous

Act establishing Court of Industrial Relations does not violate any constitutional provision and the standards for its guidance are adequate. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

L.B. 1003, Eighty-second Legislature, First Session, sections 23-2601 to 23-2612 does not contravene this section. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

Rural Cemetery District Act violated this provision of the Constitution. Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961).

Conditions and restrictions upon former Bicameral Legislature apply to the Unicameral Legislature. State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N.W.2d 122 (1950).

Constitution relating to referendum contemplates that actions brought under law be speedily disposed of so that elections be had at time specified. Barkley v. Pool, 102 Neb. 799, 169 N.W. 730 (1918).

Office created by Legislature may be abolished by it. State ex rel. Topping v. Houston, 94 Neb. 445, 143 N.W. 796 (1913).

Sec. 2. First power reserved; initiative.

The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the proposed measure shall be set forth at length. If the petition be for the enactment of a law, it shall be signed by seven percent of the registered voters of the state, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by ten percent of such registered voters. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state, and when thus signed, the petition shall be filed with the Secretary of State who shall submit the measure thus proposed to the electors of the state at the first general election held not less than four months after such petition shall have been filed. The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years. If conflicting measures submitted to the people at the same election be approved, the one receiving the highest number of affirmative votes shall thereby become law as to all conflicting provisions. The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative. Initiative measures shall contain only one subject. The Legislature shall not amend, repeal, modify, or impair a law enacted by the people by initiative, contemporaneously with the adoption of this initiative measure or at any time

thereafter, except upon a vote of at least two-thirds of all the members of the Legislature.

Source: Neb. Const. art. III, sec. 1A (1912); Adopted 1912, Laws 1911, c. 223, sec. 2, p. 671; Amended 1920, Constitutional Convention, 1919-1920, No. 4; Amended 1988, Laws 1988, LR 248, sec. 1; Amended 1998, Laws 1997, LR 32CA, sec. 1; Amended 2004, Initiative Measure No. 418, sec. 1.

In order to qualify for the ballot, a petition to amend Nebraska's Constitution must be signed by 10 percent of the registered voters of the state. State ex rel. Bellino v. Moore, 254 Neb. 385, 576 N.W.2d 793 (1998).

In a case involving the people's amendment to this state's Constitution, the Supreme Court makes no attempt to judge the wisdom or the desirability in enacting such amendments. Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Article III, section 2, which refers to registered voters repeals the reference in article III, section 4, which refers to those voting in the preceding gubernatorial election. The number of signatures required for placement of an initiative petition on the ballot by the Nebraska Constitution is equal to 10 percent of the number of registered voters on the date the signatures are to be turned in. Duggan v. Beermann, 245 Neb. 907, 515 N.W.2d 788 (1994).

Provisions in a statute making it a criminal offense for a person to willfully and knowingly circulate a petition outside the county in which the person is registered to vote, and providing that signatures secured in such a manner shall not be counted, unnecessarily obstruct the people's right to participate in the initiative and referendum process and are therefore unconstitutional. A law which unnecessarily obstructs or impedes operation of the initiative and referendum process is unconstitutional. State ex rel. Stenberg v. Beermann, 240 Neb. 754, 485 N.W.2d 151 (1992).

Article III, sections 2 and 4, of the Constitution of the State of Nebraska set out some of the procedural requirements that must be met before an enactment initiated by a petition becomes a part of the statutory law of Nebraska or a part of the Nebraska Constitution. The people of Nebraska have specifically reserved the right to amend their Constitution themselves in sections 2 and 4 of article III and in article XVI, section 1, of the Nebraska Constitution. Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

This section is satisfied by a filing on July 5 for a general election to be held November 5. State ex rel. Morris v. Marsh, 183 Neb. 521, 162 N.W.2d 262 (1968).

Legislature is authorized to enact laws to facilitate operation of the initiative power. State ex rel. Winter v. Swanson, 138 Neb. 597, 294 N.W. 200 (1940).

Provision that election on initiative shall be submitted at next general election is not mandatory. If court proceedings require, election may be at subsequent general election. Barkley v. Pool, 102 Neb. 799, 169 N.W. 730 (1918).

Initiative procedure did not constitute adequate remedy to correct existing inequalities in apportionment of legislative districts. League of Nebraska Municipalities v. Marsh, 209 F.Supp. 189 (D. Neb. 1962).

Sec. 3. Second power reserved; referendum.

The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. Petitions invoking the referendum shall be signed by not less than five percent of the registered voters of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. Each such petition shall set out the title of the act against which the referendum is invoked and, in addition thereto, when only a portion of the act is sought to be referred, the number of the section or sections or portion of sections of the act designating such portion. No more than one act or portion of an act of the Legislature shall be the subject of each referendum petition. When the referendum is thus invoked, the Secretary of State shall refer thesame to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of such petition.

When the referendum is invoked as to any act or part of act, other than emergency acts or those for the immediate preservation of the public peace, health, or safety, by petition signed by not less than ten percent of the registered voters of the state distributed as aforesaid, it shall suspend the taking

effect of such act or part of act until the same has been approved by the electors of the state.

Source: Neb. Const. art. III, sec. 1B (1912); Adopted 1912, Laws 1911, c. 223, sec. 2, p. 671; Amended 1920, Constitutional Convention, 1919-1920, No. 4; Amended 1988, Laws 1988, LR 248, sec. 1; Amended 1998, Laws 1997, LR 32CA, sec. 2.

A funding provision in a bill providing for future contributions to a public school support trust fund is not an appropriation bill and referendum may be invoked. Lawrence v. Beermann, 192 Neb. 507, 222 N.W.2d 809 (1974).

An act of the Legislature means a particular legislative bill which has been passed by the Legislature and approved by the Governor. Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966).

Taking effect of an emergency act is not suspended until the act has been voted upon by the electors. Read v. City of Scottsbluff, 179 Neb. 410, 138 N.W.2d 471 (1965).

Section has reference only to state legislation, and is not applicable to municipal legislation. Carlberg v. Metcalfe, 120 Neb. 481, 234 N.W. 87 (1930).

Provisions of this section, relating to referendum, have reference to acts of the Legislature only, and not to municipal legislation. Schroeder v. Zehrung, 108 Neb. 573, 188 N.W. 237 (1922).

Federal district court would not abstain from deciding whether state banking statute was properly adopted by Nebraska Legislature where analysis of the applicable Nebraska case law left no doubt that such statute was invalid. Nebraskans for Independent Banking, Inc. v. Omaha Nat. Bank, 423 F.Supp. 519 (D. Neb. 1976).

Sec. 4. Initiative or referendum; signatures required; veto; election returns; constitutional amendments; non-partisan ballot.

The whole number of votes cast for Governor at the general election next preceding the filing of an initiative or referendum petition shall be the basis on which the number of signatures to such petition shall be computed. The veto power of the Governor shall not extend to measures initiated by or referred to the people. A measure initiated shall become a law or part of the Constitution, as the case may be, when a majority of the votes cast thereon, and not less than thirty-five per cent of the total vote cast at the election at which the same was submitted, are cast in favor thereof, and shall take effect upon proclamation by the Governor which shall be made within ten days after the official canvass of such votes. The vote upon initiative and referendum measures shall be returned and canvassed in the manner prescribed for the canvass of votes for president. The method of submitting and adopting amendments to the Constitution provided by this section shall be supplementary to the method prescribed in the article of this Constitution, entitled, ''Amendments'' and the latter shall in no case be construed to conflict herewith. The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation. All propositions submitted in pursuance hereof shall be submitted in a non-partisan manner and without any indication or suggestion on the ballot that they have been approved or endorsed by any political party or organization. Only the title or proper descriptive words of measures shall be printed on the ballot and when two or more measures have the same title they shall be numbered consecutively in the order of filing with the Secretary of State and the number shall be followed by the name of the first petitioner on the corresponding petition.

Source: Neb. Const. art. III, sec. 1C & 1D (1912); Adopted 1912, Laws 1911, c. 223, sec. 2, p. 671; Amended 1920, Constitutional Convention, 1919-1920, No. 4.

Article III, section 2, which refers to registered voters repeals the reference in article III, section 4, which refers to those voting in the preceding gubernatorial election. The number of signatures required for placement of an initiative petition on the ballot by the Nebraska Constitution is equal to 10 percent of the number of registered voters on the date the signatures are to be turned in. Duggan v. Beermann, 245 Neb. 907, 515 N.W.2d 788 (1994).

Provisions in a statute making it a criminal offense for a person to willfully and knowingly circulate a petition outside the county in which the person is registered to vote, and providing that signatures secured in such a manner shall not be counted,

unnecessarily obstruct the people's right to participate in the initiative and referendum process and are therefore unconstitutional. A law which unnecessarily obstructs or impedes operation of the initiative and referendum process is unconstitutional. State ex rel. Stenberg v. Beermann, 240 Neb. 754, 485 N.W.2d 151 (1992).

Under the constitutional provision authorizing the Legislature to enact laws which facilitate the initiative and referendum process, the Legislature may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. State ex rel. Stenberg v. Beermann, 240 Neb. 754, 485 N.W.2d 151 (1992).

Article III, sections 2 and 4, of the Constitution of the State of Nebraska set out some of the procedural requirements that must be met before an enactment initiated by a petition becomes a part of the statutory law of Nebraska or a part of the Nebraska Constitution. The people of Nebraska have specifically reserved the right to amend their Constitution themselves in sections 2 and 4 of article III and in article XVI, section 1, of the Nebraska Constitution. Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

Legislation may be enacted to facilitate referendum. Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966).

This section authorizes Legislature to enact laws to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. State ex rel. Winter v. Swanson, 138 Neb. 597, 294 N.W. 200 (1940).

The result of a vote upon a proposed constitutional amendment is determined by State Canvassing Board, and, if carried, becomes operative on the date of the Governor's proclamation to that effect. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937).

An election held without affirmative constitutional or statutory authority is a nullity. Thompson v. James, 125 Neb. 350, 250 N.W. 237 (1933).

Sec. 5. Legislative districts; apportionment; redistricting, when required.

The Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory. One member of the Legislature shall be elected from each such district. The basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census. The Legislature shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature.

Source: Neb. Const. art. III, sec. 2 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 5; Amended 1934, Initiative Measure No. 330; Amended 1962, Laws 1961, c. 246, sec. 1, p. 731; Amended 1966, Laws 1965, c. 304, sec. 1, p. 856; Amended 2000, Laws 1999, LR 18CA, sec. 3.

Where only two counties in the state possessed populations such that they could legally constitute unitary legislative districts and reapportionment plans were offered in the Legislature to that end, it was ''practicable'' to establish districts which followed the boundaries of those counties. When the population of a county is such that it can legally constitute a legislative district and it is practicable to do so, the Legislature must establish a district which follows that county's boundaries. Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992).

The part of the 1962 amendment to this section permitting the crossing of county lines in making reapportionment of legislative districts was constitutional. Carpenter v. State, 179 Neb. 628, 139 N.W.2d 541 (1966).

Changing of boundaries of city did not operate to interfere with power of Legislature to divide state into legislative districts. Buller v. City of Omaha, 164 Neb. 435, 82 N.W.2d 578 (1957).

Where grave, unreasonable and gross inequalities exist between different districts, apportionment will be held void. Rogers v. Morgan, 127 Neb. 456, 256 N.W. 1 (1934).

Legislature may only redistrict itself once every ten years. Exon v. Tiemann, 279 F.Supp. 603 (D. Neb. 1967).

Crossing of county lines in making reapportionment of legislative districts was permissible. League of Nebraska Municipalities v. Marsh, 253 F.Supp. 27 (D. Neb. 1966).

Portion of 1962 amendment to this section providing for not less than twenty and not more than thirty per cent weight to be given to area in making apportionment for legislative districts was unconstitutional. League of Nebraska Municipalities v. Marsh, 232 F.Supp. 411 (D. Neb. 1964).

Federal court would not interfere with submission to electors of 1962 amendment to this section. League of Nebraska Municipalities v. Marsh, 209 F.Supp. 189 (D. Neb. 1962).

Sec. 6. Legislature; number of members; annual sessions.

The Legislature shall consist of not more than fifty members and not less than thirty members. The sessions of the Legislature shall be annual except as otherwise provided by this constitution or as may be otherwise provided by law.

Source: Neb. Const. art. III, sec. 3 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 6; Amended 1934, Initiative Measure No. 330; Amended 1970, Laws 1969, c. 415, sec. 1, p. 1424.

Second 1965 reapportionment act sustained as constitutional. League of Nebraska Municipalities v. Marsh, 253 F.Supp. 27 (D. Neb. 1966).

Legislative act of 1965 on apportionment of Legislature was unconstitutional. League of Nebraska Municipalities v. Marsh, 242 F.Supp. 357 (D. Neb. 1965).

Sec. 7. Legislators; terms; effect of redistricting; election; salary; expenses; mileage.

At the general election to be held in November 1964, one-half the members of the Legislature, or as nearly thereto as may be practicable, shall be elected for a term of four years and the remainder for a term of two years, and thereafter all members shall be elected for a term of four years, with the manner of such election to be determined by the Legislature. When the Legislature is redistricted, the members elected prior to the redistricting shall continue in office, and the law providing for such redistricting shall where necessary specify the newly established district which they shall represent for the balance of their term. Each member shall be nominated and elected in a nonpartisan manner and without any indication on the ballot that he or she is affiliated with or endorsed by any political party or organization. Each member of the Legislature shall receive a salary of not to exceed one thousand dollars per month during the term of his or her office. In addition to his or her salary, each member shall receive an amount equal to his or her actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than his or her salary and expenses, and employees of the Legislature shall receive no compensation other than their salary or per diem.

Source: Neb. Const. art. III, sec. 4 (1875); Amended 1886, Laws 1885, c. 124, p. 435; Amended 1912, Laws 1911, c. 224, sec. 1, p. 675; Amended 1920, Constitutional Convention, 1919-1920, No. 7; Amended 1934, Initiative Measure No. 330; Amended 1960, Laws 1959, c. 235, sec. 1, p. 818; Amended 1962, Laws 1961, c. 247, sec. 1, p. 733; Amended 1966, Laws 1965, c. 304, sec. 1, p. 856; Amended 1968, Laws 1967, c. 323, sec. 1, p. 859; Amended 1988, Laws 1988, LR 7, sec. 1.

LB 1129, adopted by the Nebraska Legislature on April 16, 1986, created a pension program for members of the Legislature that constitutes ''pay or perquisites'' and is in contravention of this portion of the Constitution, and is thus invalid and unenforceable. State ex rel. Spire v. Public Emp. Ret. Bd., 226 Neb. 176, 410 N.W.2d 463 (1987).

This constitutional provision does not prohibit reimbursement to legislators for their actual expenses of holding office. State ex rel. Douglas v. Beermann, 216 Neb. 849, 347 N.W.2d 297 (1984).

It was a practical impossibility to redistrict legislative districts without taking into consideration the staggered terms of members of Legislature required by this section. Carpenter v. State, 179 Neb. 628, 139 N.W.2d 541 (1966).

Legislator can receive for services as member of Legislature, or member of committee, only compensation provided by Constitution. In re Appeal of Wilkins, 116 Neb. 748, 219 N.W. 9 (1928).

Sec. 8. Legislators; qualifications; one-year residence in district; removal from district, effect.

No person shall be eligible to the office of member of the Legislature unless on the date of the general election at which he is elected, or on the date of his appointment he is a registered voter, has attained the age of twenty-one years and has resided within the district from which he is elected for the term of one year next before his election, unless he shall have been absent on the public business of the United States or of this State. And no person elected as aforesaid shall hold his office after he shall have removed from such district.

Source: Neb. Const. art. III, sec. 5 (1875); Amended 1972, Laws 1971, LB 126, sec. 1; Amended 1992, Initiative Measure No. 407; Amended 1994, Initiative Measure No. 408.

Note: The changes made to Article III, section 8, of the Constitution of Nebraska by Initiative 407 in 1992 have been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 245 Neb. 907, 515 N.W.2d 788 (1994).

Note: The changes made to Article III, section 8, of the Constitution of Nebraska by Initiative 408 in 1994 have been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Sec. 9. Legislators; disqualifications; election to other office; resignation required.

No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to or have a seat in the Legislature. No person elected or appointed to the Legislature shall receive any civil appointment to a state office while holding membership in the Legislature or while the Legislature is in session, and all such appointments shall be void. Except as otherwise provided by law, a member of the Legislature who is elected to any other state or local office prior to the end of his or her term in the Legislature shall resign from the Legislature prior to the commencement of the legislative session during which the term of the state or local office will begin.

Source: Neb. Const. art. III, sec. 6 (1875); Amended 1972, Laws 1972, LB 1514, sec. 1; Amended 2000, Laws 2000, LR 6CA, sec. 1.

It was the purpose not to permit any incentive or temptation for emoluments, gains, or position, to influence members of the Legislature. In re Appeal of Wilkins, 116 Neb. 748, 219 N.W. 9 (1928).

Sec. 10. Legislative sessions; time; quorum; rules of procedure; expulsion of members; disrespectful behavior, penalty.

Beginning with the year 1975, regular sessions of the Legislature shall be held annually, commencing at 10 a.m. on the first Wednesday after the first Monday in January of each year. The duration of regular sessions held shall not exceed ninety legislative days in odd-numbered years unless extended by a vote of four-fifths of all members elected to the Legislature, and shall not exceed sixty legislative days in even-numbered years unless extended by a vote of four-fifths of all members elected to the Legislature. Bills and resolutions under consideration by the Legislature upon adjournment of a regular session held in an odd-numbered year may be considered at the next regular session, as if there had been no such adjournment. The Lieutenant Governor shall preside, but shall vote only when the Legislature is equally divided. A majority of the members elected to the Legislature shall constitute a quorum; the Legislature shall determine the rules of its proceedings and be the judge of the election, returns, and qualifications of its members, shall choose its own officers, including a Speaker to preside when the Lieutenant Governor shall be absent, incapacitated, or shall act as Governor. No member shall be expelled except by a vote of two-thirds of all members elected to the Legislature, and no member shall be twice expelled for the same offense. The Legislature may punish by imprisonment any person not a member thereof who shall be guilty of disrespect to the Legislature by disorderly or contemptuous behavior in its presence, but no such imprisonment shall extend beyond twenty-four hours at one time, unless the person shall persist in such disorderly or contemptuous behavior.

Source: Neb. Const. art. III, sec. 7 (1875); Amended 1934, Initiative Measure No. 330; Amended 1970, Laws 1969, c. 415, sec. 1, p. 1424; Amended 1974, Laws 1974, LB 598, sec. 1.

This section applies to all but final passage of a legislative bill. Center Bank v. Dept. of Banking & Finance, 210 Neb. 227, 313 N.W.2d 661 (1981).

Legislature may provide by its rules for reconsideration of confirmation of appointments. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

Canvass of votes for executive state officers occurs when Legislature convenes on first Tuesday in January after election. State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N.W.2d 122 (1950).

Court will, by mandamus, compel proper officers to issue certificate of election to member elected. State ex rel. Norton v. Van Camp, 36 Neb. 91, 54 N.W. 113 (1893).

Sec. 11. Legislative journal; vote viva voce; open doors; committee votes.

The Legislature shall keep a journal of its proceedings and publish them, except such parts as may require secrecy, and the yeas and nays of the members on any question shall at the desire of any one of them be entered on the journal. All votes shall be viva voce. The doors of the Legislature and of the committees of the Legislature shall be open, except when the business shall be such as ought to be kept secret. The yeas and nays of each member of any committee of the Legislature shall be recorded and published on any question in committee to advance or to indefinitely postpone any bill.

Source: Neb. Const. art. III, sec. 8 (1875); Amended 1934, Initiative Measure No. 330; Amended 1998, Laws 1997, LR 10CA, sec. 1.

When journals of both houses of Legislature and signature of Governor each clearly show the passage of an act in a certain definite form, the undisputed mistake of an enrolling clerk will not be allowed to defeat the act. State ex rel. Ball v. Hall, 130 Neb. 18, 263 N.W. 400 (1935).

A bill duly certified as having passed both houses of the Legislature and approved by the Governor imports verity and its passage can only be overthrown by the journals of the Legislature showing affirmatively that it was not passed in manner prescribed by the Constitution. State ex rel. Loseke v. Fricke, 126 Neb. 736, 254 N.W. 409 (1934).

Electric roll call device answers constitutional requirements of ''viva voce'' vote in Legislature. Day v. Walker, 124 Neb. 500, 247 N.W. 350 (1933).

Procedural action by the Legislature in passing on appropriation bill is prescribed, in part, by this section. Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).

Legislative journals are the best evidence of what affirmatively appears regarding enactment of the law. Webster v. City of Hastings, 59 Neb. 563, 81 N.W. 510 (1900).

Certificate of presiding officer of branch of Legislature, that bill was duly passed, is mere prima facie evidence of that fact. Evidence may be received to ascertain whether or not bill actually passed. Webster v. City of Hastings, 56 Neb. 669, 77 N.W. 127 (1898).

It is not competent to impeach proceedings of Legislature by contradicting journals, and facts proper to be inferred from approval of Governor and adoption of bill by officers in House and Senate. In re Granger, 56 Neb. 260, 76 N.W. 588 (1898).

Federal district court would not abstain from deciding whether state banking statute was properly adopted by Nebraska Legislature where analysis of the applicable Nebraska case law left no doubt that such statute was invalid. Nebraskans for Independent Banking, Inc. v. Omaha Nat. Bank, 423 F.Supp. 519 (D. Neb. 1976).

Sec. 12. Legislators; terms; limitation.

(1) No person shall be eligible to serve as a member of the Legislature for four years next after the expiration of two consecutive terms regardless of the district represented.

(2) Service prior to January 1, 2001, as a member of the Legislature shall not be counted for the purpose of calculating consecutive terms in subsection (1) of this section.

(3) For the purpose of this section, service in office for more than one-half of a term shall be deemed service for a term.

Source: Neb. Const. art. III, sec. 12 (2000); Adopted 2000, Initiative Measure No. 415.

Sec. 13. Style of bills; majority necessary to passage; yeas and nays entered on journal.

The style of all bills shall be, Be it enacted by the people of the State of Nebraska, and no law shall be enacted except by bill. No bill shall be passed by the Legislature unless by the assent of a majority of all members elected and the yeas and nays on the question of final passage of any bill shall be entered upon the journal.

Source: Neb. Const. art. III, sec. 10 (1875); Amended 1912, Laws 1911, c. 223, sec. 3, p. 674; Amended 1920, Constitutional Convention, 1919-1920, No. 8; Amended 1972, Laws 1971, LB 132, sec. 1.

Under this provision, a legislature may not attempt to restrict the constitutional power of a succeeding legislature to legislate. State ex rel. Stenberg v. Moore, 249 Neb. 589, 544 N.W.2d 344 (1996).

Language requiring assent of a majority of all members elected to the Legislature before a bill can be passed means that to pass a bill on final reading, bill must have affirmative votes of a majority of all members, and a vote of the Lieutenant Governor is not effective to break a tie and pass a legislative bill on final reading. Center Bank v. Dept. of Banking & Finance, 210 Neb. 227, 313 N.W.2d 661 (1981).

Enrolled bill signed by presiding officers of both houses of Legislature and approved by Governor imports verity as to its passage. State ex rel. Loseke v. Fricke, 126 Neb. 736, 254 N.W. 409 (1934).

Electric roll call device answers constitutional requirement if it provides proper record of vote in journal. Day v. Walker, 124 Neb. 500, 247 N.W. 350 (1933).

Appropriation bill containing items in excess of budget recommendations was legally adopted by three-fifths vote of Legislature, without separate three-fifths vote on each item increased over budget proposal. Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).

This section requires an affirmative vote of a majority of all members elected to the Legislature, and not merely the majority of a quorum, in order to either enact a law or add amendments to a bill or a rescission of an affirmative act already taken. Moore v. Neece, 80 Neb. 600, 114 N.W. 767 (1908).

Sec. 14. Bills and resolutions read by title; printing; vote for final passage; bills to contain one subject; amended section to be set forth; signing of bills.

Every bill and resolution shall be read by title when introduced, and a printed copy thereof provided for the use of each member. The bill and all amendments thereto shall be printed and presented before the vote is taken upon its final passage and shall be read at large unless three-fifths of all the members elected to the Legislature vote not to read the bill and all amendments at large. No vote upon the final passage of any bill shall be taken until five legislative days after its introduction nor until it has been on file for final reading and passage for at least one legislative day. No bill shall contain more than one subject, and the subject shall be clearly expressed in the title. No law shall be amended unless the new act contains the section or sections as amended and the section or sections so amended shall be repealed. The Lieutenant Governor, or the Speaker if acting as presiding officer, shall sign, in the presence of the Legislature while it is in session and capable of transacting business, all bills and resolutions passed by the Legislature.

Source: Neb. Const. art. III, sec. 11 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 8; Amended 1934, Initiative Measure No. 330; Amended 1996, Laws 1995, LR 4CA, sec. 1.

1. Title to act
2. Acts containing more than one subject
3. Independent complete acts
4. Amendatory acts
5. Legislative procedure
6. Miscellaneous

1. Title to act

The Supreme Court will not strike down legislation as violative of this section if the title calls attention to the subject matter of the bill, and the portion of the bill challenged is germane to the purpose announced in the title. One does not have standing to complain that a statute is unconstitutional unless he is injuriously affected thereby. Blackledge v. Richards, 194 Neb. 188, 231 N.W.2d 319 (1975).

Purpose of the title is to describe the subject not to synopsize the contents or every conceivable consequence. Title found sufficient. Hall v. Simpson, 184 Neb. 762, 171 N.W.2d 805 (1969).

Bill providing procedure for withdrawal from area vocational technical schools did not violate this section. Chaloupka v. Area Vocational Technical School No. 2, 184 Neb. 196, 165 N.W.2d 719 (1969).

Title of act need not refer to provisions of the act being amended if the nature of the legislation contained or the nature of the changes or additions made by it are sufficiently indicated. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N.W.2d 232 (1968).

In enacting act increasing penalty for assault upon guard by inmate of penal institution, the title of the act did not violate this section. State v. Lovell, 181 Neb. 401, 149 N.W.2d 46 (1967).

Title to Industrial Development Act of 1961 was sufficient, and act was not broader than title. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962).

Title of amendatory act must give reasonable notice of the general subject upon which it is proposed to legislate. State ex rel. Bottolfson v. School Board of Sch. Dist. No. R1 of Cedar and Dixon Counties, 170 Neb. 417, 103 N.W.2d 146 (1960).

Amendment to Installment Loan Act was broader than title and was violative of this section. Thompson v. Commercial Credit Equipment Corp., 169 Neb. 377, 99 N.W.2d 761 (1959).

Title to amendatory act relating to taxation of motor vehicles was sufficient. Peterson v. Hancock, 166 Neb. 637, 90 N.W.2d 298 (1958).

Defect in title was cured by incorporation of statute in 1943 revision. Peterson v. Vasak, 162 Neb. 498, 76 N.W.2d 420 (1956).

Title to act dealing with depopulated school districts was sufficient. Schutte v. Schmitt, 162 Neb. 162, 75 N.W.2d 656 (1956).

Defect in title to legislative act was cured by adoption by Legislature of general revision act. McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N.W.2d 608 (1955).

Title to Motor Vehicle Safety Responsibility Act was good. Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952).

Where bill contains but one subject and that subject is clearly expressed in the title, constitutional requirements have been met, even though title contains duplicitous or extraneous provisions not necessary to its validity. Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N.W.2d 174 (1950).

Legislative act defining offense of foeticide is constitutional. Hans v. State, 147 Neb. 67, 22 N.W.2d 385 (1946).

Where title to amendatory act indicates the subject of the proposed legislation, and the provisions of the act are germane to the subject matter of the original section proposed to be changed, the act is not violative of this section. County of Dawson v. South Side Irr. Co., 146 Neb. 512, 20 N.W.2d 387 (1945).

It is not required that title be a synopsis of the act. Maher v. State, 144 Neb. 463, 13 N.W.2d 641 (1944).

If act has but one general object, no matter how broad, and contains no matter not germane thereto, and title fairly expresses the subject of the bill, it does not violate constitutional provisions. Beisner v. Cochran, 138 Neb. 445, 293 N.W. 289 (1940).

Statute defining ice cream was not vulnerable to objection act was broader than its title. State v. McCosh, 134 Neb. 780, 279 N.W. 775 (1938).

A title is not necessary to an act providing for submission of a proposed amendment to Constitution, and will be treated as null and void. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937).

Title, ''An act relating to municipal courts,'' is sufficient to include a section providing for eligibility of judges of such courts. Spier v. Thomas, 131 Neb. 579, 269 N.W. 61 (1936).

Act providing for payment of delinquent taxes by annual installments was not broader than title. Steinacher v. Swanson, 131 Neb. 439, 268 N.W. 317 (1936).

Act providing for adoption of managerial form of county government was broader than title. State ex rel. O'Connor v. Tusa, 130 Neb. 528, 265 N.W. 524 (1936).

In determining whether an act amending a previous act is broader than its title, court will consider the titles to both the amending and amended acts. Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N.W. 855 (1935).

A proviso attached to an appropriation, subject of which proviso is not referred to in title of act, is invalid. State ex rel National Surety Corp. v. Price, 129 Neb. 433, 261 N.W. 894 (1935).

Title reading, ''to provide punishment for one who makes statements or representations with intent to defraud,'' is not broad enough to include imposition of penalty on one who does not know that statements are false but had ground to believe they were false. Joseph v. State, 128 Neb. 824, 260 N.W. 803 (1935).

Title of independent act authorizing construction of sewers and providing that owners or occupants of premises be charged for the services, and to raise money, is broad enough to include legislation authorizing issuance of bonds secured by property and revenue of sewerage system. State ex rel. City of Columbus v. Price, 127 Neb. 132, 254 N.W. 889 (1934).

Act relating to irrigation, flood control, storage of waters, and to generation, distribution, transmission, sale and purchase of electrical energy was valid. State ex rel. Loseke v. Fricke, 126 Neb. 736, 254 N.W. 409 (1934).

Act providing for erecting bridges over irrigation ditches on public roads was invalid to extent it was broader than title. State ex rel. County of Dawson v. Dawson County Irr. Co., 125 Neb. 836, 252 N.W. 320 (1934).

Where title to act provided for the regulation and licensing of traffic in tobacco, it was not unconstitutional as a revenue measure, a subject not mentioned in title. Nash-Finch Co. v. Beal, 124 Neb. 835, 248 N.W. 374 (1933).

Nepotism law was void because provisions for penalty were not embraced in title. Wayne County v. Steele, 121 Neb. 438, 237 N.W. 288 (1931).

Act providing for control and eradication of disease among domestic animals was not invalid as containing more than one subject not clearly expressed in title. State ex rel. Sorensen v. Knudtsen, 121 Neb. 270, 236 N.W. 696 (1931).

Title designating act as establishing laws relating to civil government and administration thereof was broad enough to include provisions regulating banking. Westbrook v. State, 120 Neb. 625, 234 N.W. 579 (1931).

Securities law was not invalid because provision for burden of proof as to exemptions was not specifically referred to in title. Pandolfo v. State, 120 Neb. 616, 234 N.W. 483 (1931).

Where title fairly gives expression to general subject matter, act will not be held invalid as broader than title. Mehrens v. Bauman, 120 Neb. 110, 231 N.W. 701 (1930)

Title must be such as to give reasonable notice to members of Legislature and others interested, of the general subject upon which it is proposed to legislate. Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N.W. 1133 (1912).

If general purpose of act is expressed and matter contained in body is germane thereto, title is sufficient. State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N.W. 224 (1912).

Title need not be abstract of bill, but it is sufficient if title indicates subject of proposed legislation. Nebraska Loan & Bldg. Assn. v. Perkins, 61 Neb. 254, 85 N.W. 67 (1901).

Title of act is part thereof and must clearly express subject matter. State v. Burlington & M. R. R. Co., 60 Neb. 741, 84 N.W. 254 (1901).

Purpose is to prevent subjects of different nature from being inserted under color of amendment. State ex rel. Graham v. Tibbets, 52 Neb. 228, 71 N.W. 990 (1897).

Provisions relating to title should be liberally construed to admit insertion in act of all provisions which, though not specifically expressed in title, are comprehended within objects and purposes of act, and all provisions germane and not foreign to expressed provisions in title. Affholder v. State ex rel. McMullen, 51 Neb. 91, 70 N.W. 544 (1897).

Provision as to title applies to amendatory acts as well as complete and independent acts. West Point Water Power & Land Improvement Co. v. State ex rel. Moodie, 49 Neb. 223, 68 N.W. 507 (1896).

2. Acts containing more than one subject

Act of Legislature authorizing city of primary class to annex contiguous or adjacent lands did not violate this section. Campbell v. City of Lincoln, 182 Neb. 459, 155 N.W.2d 444 (1968).

Nebraska Revenue Act of 1967 did not violate provision that no bill shall contain more than one subject. Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967).

Title of Blanket Mill Tax Levy Act was good and act was independent legislation. Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85 (1952).

Statute prohibiting state and federal officers and employees from being delegates to county, district, and state political conventions contained but one subject which was clearly expressed in the title. State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950).

Act relating to county jails and fees of sheriffs with reference to care of prisoners therein contained but one subject and was constitutional. Dorrance v. County of Douglas, 149 Neb. 685, 32 N.W.2d 202 (1948).

Statute relating to condemnation of public utilities is not violative of constitutional requirement of single subject clearly expressed in title. City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N.W. 484 (1933).

Intangible tax statute was not invalid as containing more than one subject. Mehrens v. Greenleaf, 119 Neb. 82, 227 N.W. 325 (1929).

Act relating to recovery on forfeited recognizance was not void as containing more than one subject not clearly expressed in title. State v. Painter, 117 Neb. 42, 219 N.W. 794 (1928).

Statute entitled ''An act to amend'' certain sections ''and to repeal'' the same as then existing, was not broader than title. Conservative Sav. & L. Assn. of Omaha v. Anderson, 116 Neb. 627, 218 N.W. 423 (1928).

Including provision for drainage of subirrigated lands in act relating to organization of irrigation district does not violate requirement that bill shall contain only one subject to be expressed in title. State ex rel. Reed v. Farmers Irr. Dist., 116 Neb. 373, 217 N.W. 607 (1928).

Provisions for raising money by taxation, issuing bonds, and eminent domain, was not beyond scope of act ''defining powers and government of light, heat and power districts.'' Elliott v. Wille, 112 Neb. 78, 200 N.W. 347 (1924).

Provision for housing municipal court in county courthouse was not beyond scope of act ''to create municipal court,'' etc. State ex rel. City of Omaha v. Board of County Comrs. of Douglas County, 109 Neb. 35, 189 N.W. 639 (1922).

Where title of act refers to both relocation of county seats and county division, but body of act relates only to relocation, it is not invalid as containing two subjects. Murray v. Nelson, 107 Neb. 52, 185 N.W. 319 (1921).

Statute ''relating to stealing, buying or concealing automobiles,'' was not invalid as containing more than one subject, although providing for rules of evidence, and for including more than one count in indictment. Birdhead v. State, 105 Neb. 296, 180 N.W. 583 (1920).

Act ''to provide for county farm bureaus,'' was not invalid for containing more than one subject, though it contains provisions for employment and payment of county agent, duties of county board, etc. State ex rel. Hall County Farm Bureau v. Miller, 104 Neb. 838, 178 N.W. 846 (1920).

Including crime of buying or receiving stolen automobiles in act relating to larceny of motor vehicles was not more than one subject. Sandlovich v. State, 104 Neb. 169, 176 N.W. 81 (1920).

Act relating to rural school districts contained only one subject. Gauchat v. School Dist. No. 5 in Nemaha County, 101 Neb. 377, 163 N.W. 334 (1917).

Statute regulating licensing of persons practicing chiropody, chiropractic, and dentistry, was not invalid as containing more than one subject. Peet Stock Remedy Co. v. McMullen, 32 F.2d 669 (8th Cir. 1929).

3. Independent complete acts

If an act is complete and independent in itself it may incidentally amend, modify, or have impact upon provisions of existing statutes without violating this section. Aschenbrenner v. Nebraska P.P. Dist., 206 Neb. 157, 291 N.W.2d 720 (1980).

The independent act considered herein is not unconstitutional for failure to mention in the incidental provision for payment or exemption from payment of costs, nor for failing to refer to and repeal certain other statutes. State ex rel. Douglas v. Gradwohl, 194 Neb. 745, 235 N.W.2d 854 (1975).

L.B. 1357, Laws 1969, providing for natural resources districts was independent legislation and not violative of this section. Neeman v. Nebraska Nat. Resources Commission, 191 Neb. 672, 217 N.W.2d 166 (1974).

Act prohibiting merger of school districts in certain cases was complete and independent. Bodenstedt v. Rickers, 189 Neb. 407, 203 N.W.2d 110 (1972).

Nebraska Trust Deeds Act did not violate this section. Blair Co. v. American Savings Co., 184 Neb. 557, 169 N.W.2d 292 (1969).

Parking Authority Law was original and independent legislation and title to act was sufficient. Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956).

Eminent domain procedure act sustained as constitutional. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N.W.2d 591 (1954).

Reclamation Act did not violate this section. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

General appropriation bill of 1945 sustained as constitutional. Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947).

An independent act may incorporate within itself by reference provisions of another existing act, and the effect is the same as though the statute or part adopted had been written into the adopting statute. Rocky Mountain Lines v. Cochran, 140 Neb. 378, 299 N.W. 596 (1941).

Housing authority acts of 1937 are independent and complete in themselves and hence not violative of constitutional provision. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

If act is complete and independent in itself, it may amend or modify provisions of existing statutes without controverting the provisions of Constitution relating to amendments. Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N.W. 515 (1939); Hinman v. Temple, 133 Neb. 268, 274 N.W. 605 (1937).

Independent act, complete in itself, is not rendered amendatory because it refers to another act for procedure taken. Department of Banking v. Foe, 136 Neb. 422, 286 N.W. 264 (1939).

An independent legislative act covering the entire subject of legislation may change or repeal former enactments in conflict with new provisions. State ex rel. Kaspar v. Lehmkuhl, 127 Neb. 812, 257 N.W. 229 (1934).

Civil Administrative Code law was complete in itself, and not amendatory. Sheridan County v. Hand, 114 Neb. 813, 210 N.W. 273 (1926).

Act, complete in itself, which conflicts with prior statute but does not purport to amend it, is not invalid, but repeals earlier statute by implication. Drew v. Mumford, 114 Neb. 100, 206 N.W. 159 (1925).

Act defining and providing penalties for blackmail was complete act covering distinct crime, and not amendatory of statutes covering related offenses. McKenzie v. State, 113 Neb. 576, 204 N.W. 60 (1925).

Act relating to state mineral land leases was complete and not amendatory. Briggs v. Neville, 103 Neb. 1, 170 N.W. 188 (1918).

Mothers' Pension Law was complete and not amendatory of poor laws. Rumsey v. Saline County, 102 Neb. 302, 167 N.W. 66 (1918).

Act requiring county attorney to perform duties of coroner was complete, and its effect was to incorporate into new law the existing laws relating to duties of coroner. State ex rel. Crosby v. Moorhead, 100 Neb. 298, 159 N.W. 412 (1916).

Later act relating to verification, filing and allowance of claims against counties, being complete in itself, repealed by implication conflicting prior statute. Uttley v. Sievers, 100 Neb. 59, 158 N.W. 373 (1916).

Act providing for teaching foreign languages in schools was complete, and not amendatory of or in conflict with any prior law. State ex rel. Thayer v. School Dist. of Nebraska City, 99 Neb. 338, 156 N.W. 641 (1916).

Act to define ''week'' in legal notices was complete and not amendatory. In re Estate of Johnson, 98 Neb. 799, 154 N.W. 550 (1915).

Act complete in itself repeals by implication existing laws in conflict or repugnant thereto. State ex rel. Farmers State Bank of Pickrell v. Hevelone, 92 Neb. 748, 139 N.W. 636 (1913).

Mere fact that act refers to prior act by implication does not render new act amendatory if otherwise complete. Stewart v. Barton, 91 Neb. 96, 135 N.W. 381 (1912).

Provision is not violated by changes or modifications in existing statutes merely as incidental result of adopting new law covering whole subject to which it relates. De France v. Harmer, 66 Neb. 14, 92 N.W. 159 (1902).

Law relating to irrigation districts containing no reference to previous law must be construed as independent act. Bridgeport Irr. Dist. v. United States, 40 F.2d 827 (8th Cir. 1930).

Statute conferring additional powers on irrigation district was independent act, complete in itself, not governed by this section. New York Trust Co. v. Farmers Irr. Dist., 280 F. 785 (8th Cir. 1922).

4. Amendatory acts

The Depressant and Stimulant Drugs Act of 1967 did not violate this section. State v. Waechter, 189 Neb. 433, 203 N.W.2d 104 (1972).

L.B. 1003, Eighty-second Legislature, First Session, sections 23-2601 to 23-2612 did not violate this section since it was not amendatory. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

An act which does not contain section amended but changes existing statutes in part so that changes and existing provisions result in connected piece of legislation covering same subject matter is void under this section. State v. Greenburg, 187 Neb. 149, 187 N.W.2d 751 (1971).

Cited in construing intent of the Legislature. Schurmann v. Curtiss, 183 Neb. 277, 159 N.W.2d 554 (1968).

Airport Authority Act did not violate this section. Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 105 (1967).

The 1959 amendments to the act prescribing rules for administrative agencies were constitutional. Yellow Cab Co. v. Nebraska State Railway Commission, 175 Neb. 150, 120 N.W.2d 922 (1963).

The fact that legislation is cast in the form of an independent act is not controlling if in substance it is amendatory. Chicago, B. & Q. R. R. Co. v. County of Box Butte, 166 Neb. 603, 90 N.W.2d 72 (1958).

Inference of amendment by implication could not be made. Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N.W.2d 582 (1953).

Legislative act providing for proceedings with reference to children born out of wedlock did not violate this section. In re Application of Rozgall, 147 Neb. 260, 23 N.W.2d 85 (1946).

Reference to sections in compilation by an amendatory act applied to constitutional parts of original act, even though portions thereof had been held unconstitutional. Sullivan v. City of Omaha, 146 Neb. 297, 19 N.W.2d 510 (1945).

Statute may adopt penalty provision of another statute without being amendatory thereof. Adams v. State, 138 Neb. 613, 294 N.W. 396 (1940).

Under prior constitutional provision, if a bill was introduced in Legislature with constitutional time limit, amendments germane to its subject may be made after expiration of such time limit. Pierson v. Faulkner, 134 Neb. 865, 279 N.W. 813 (1938).

Where an act, although purporting to be independent act complete in itself, is in fact purely amendatory of existing legislation, it is void for noncompliance with this section. State ex rel. Day v. Hall, 129 Neb. 699, 262 N.W. 850 (1935); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

Statute providing for payment of delinquent taxes without interest and penalty was amendatory of existing laws and invalid because not repealing original sections. Tukey v. Douglas County, 129 Neb. 353, 261 N.W. 833 (1935).

Where title states that subject of an act is to amend one section of a former statute, the act cannot be extended to amend other sections, and where title is to repeal certain sections the bill cannot re-enact the substance of the statutes repealed in title nor amend sections so repealed. Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934).

Where an act, although professing to be an independent act, makes changes in existing acts by adding new provisions and mingling the new with the old so as to make of the new and the old a connected piece of legislation covering the same subject, it is within the constitutional prohibition. State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N.W. 256 (1934).

Substituting complete new act authorizing counties to foreclose liens for taxes delinquent more than three years, by amendment germane to original act, was not violative of requirement that new act set out amended sections. Douglas County v. Barker Co., 125 Neb. 253, 249 N.W. 607 (1933); Commercial Savings & Loan Assn. v. Pyramid Realty Co., 121 Neb. 493, 237 N.W. 575 (1931).

Common law marriage statute was not violative of constitutional prohibitions herein. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N.W. 766 (1932).

Provision appointing county treasurer agent of department of public works in collection of automobile registration fees, and providing that he should retain 5-cent fee and account therefor was germane to act which it amended. Wayne County v. Steele, 121 Neb. 438, 237 N.W. 288 (1931).

Act to determine heirship did not violate provision respecting amendments. In re Robinson Heirship, 119 Neb. 285, 228 N.W. 852 (1930).

Intangible tax statute was not violative of provision respecting amendments. Mehrens v. Greenleaf, 119 Neb. 82, 227 N.W. 325 (1929).

Where act does not cover the whole subject or general scheme of legislation, and fails to amend existing statutes, it is void. State v. Painter, 117 Neb. 42, 219 N.W. 794 (1928).

Statute purporting to amend a certain section mentioned in title, but which attempts to amend another section without reference thereto, is void. Endres v. McDonald, 115 Neb. 827, 215 N.W. 114 (1927).

Statute requiring claims for damages against utilities district to be filed within 20 days, was void because not germane to original section attempted to be amended. Day v. Metropolitan Utilities Dist., 115 Neb. 711, 214 N.W. 647 (1927).

Section in Bovine Tuberculosis Act was void because not germane to subject expressed in title. State ex rel. Spillman v. Heldt, 115 Neb. 435, 213 N.W. 578 (1927).

Title of amendatory act using the word "bootlegging" was not inconsistent with body of act or subject matter of section to be amended. Knothe v. State, 115 Neb. 119, 211 N.W. 619 (1926).

Act amending section of Workmen's Compensation Law was void because added words were not germane to original section. Allen v. Trester, 112 Neb. 515, 199 N.W. 841 (1924).

Where two statutes are enacted at the same session without reference to one another, but as amendments of identical sections of the statutes, the one which is the later expression of the legislative will prevails, if the two enactments are irreconcilable. State ex rel. City of Omaha v. Board of County Comrs. of Douglas County, 109 Neb. 35, 189 N.W. 639 (1922).

Act amending section of prohibition law was germane to subject of legislation. State v. Badberg, 108 Neb. 816, 189 N.W. 157 (1922).

Amendatory act relating to county high school districts was germane to subject of legislation. State ex rel. Stockwell v. Berryman, 102 Neb. 553, 167 N.W. 790 (1918).

Amendatory act providing for consolidating contiguous school districts was germane to purpose of original section providing for children in one district attending school in another. Johnson v. School Dist. No. 101 of Saunders County, 102 Neb. 347, 167 N.W. 210 (1918).

Amendatory act requiring drainage district directors to submit question of incurring expense to election was germane to original section defining directors' duties. State ex rel. Gantz v.

Drainage Dist. No. 1 of Merrick County, 100 Neb. 625, 160 N.W. 997 (1916).

Act increasing limit of taxation for county building was not complete but amendatory of existing statute fixing limit, and void because it does not contain or repeal amended section. Minier v. Burt County, 95 Neb. 473, 145 N.W. 977 (1914), rehearing denied 95 Neb. 483, 145 N.W. 1104 (1914).

Section as amended should contain all that is substituted for original section and original section should be entirely repealed. State ex rel. Martin v. Farmers & Merchants Bank of Oakland, 93 Neb. 1, 139 N.W. 653 (1913).

Where act amends specified section of statute, it is sufficient if the amendment is germane. State ex rel. Sch. Dist. of City of Lincoln v. Barton, 91 Neb. 357, 136 N.W. 22 (1912).

No amendatory legislation not germane to subject matter of original section can be included in act to amend particular section. Armstrong v. Mayer, 60 Neb. 423, 83 N.W. 401 (1900).

Amendatory legislation foreign to subject of original act, and not embraced in title thereof, cannot be included in amendatory act. State ex rel. Scott v. Bowen, 54 Neb. 211, 74 N.W. 615 (1898).

Act must set out in full new section and also contain repeal of old section amended. Reynolds v. State, 53 Neb. 761, 74 N.W. 330 (1898).

Referring to section of statute is sufficient in an amendatory act, but matters not germane to original section can not be included. Horkey v. Kendall, 53 Neb. 522, 73 N.W. 953 (1898).

Amendatory act is void if there is no mention of, or reference to, amended section or law. Douglas County v. Hayes, 52 Neb. 191, 71 N.W. 1023 (1897).

This section requires all parts of amended law to be included in new act and old law so amended to be repealed. State ex rel. Carey v. Cornell, 50 Neb. 526, 70 N.W. 56 (1897).

Act amending subdivision of section, and which contains subdivision so amended, does not violate Constitution. State ex rel. City Water Co. v. City of Kearney, 49 Neb. 325, 68 N.W. 533 (1896).

Where act may be construed to be either amendatory or an independent act, it will be given that construction which will sustain its constitutionality. Bridgeport Irr. Dist. v. United States, 40 F.2d 827 (8th Cir. 1930).

Statute relating to practice of veterinary medicine and surgery was not violative of this section. Peet Stock Remedy Co. v. McMullen, 32 F.2d 669 (8th Cir. 1929).

5. Legislative procedure

This provision does not demand that a bill remain uninterrupted on final reading for at least 1 legislative day immediately prior to its passage. DeCamp v. State, 256 Neb. 892, 594 N.W.2d 571 (1999).

This section, applying to legislative bills, refers to final passage. Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966).

Substituting an entire new bill by amendment is not unconstitutional where changes are germane; and it is not necessary that bill, if read twice before amendment, should again be placed on first and second reading. State ex rel. Davis v. Cox, 105 Neb. 75, 178 N.W. 913 (1920).

Failure of senate presiding officer to sign bill, afterwards approved by Governor, and shown on senate journal passed by constitutional majority, does not invalidate. State ex rel. Neb. State Railway Commission v. Missouri P. Ry. Co., 100 Neb. 700, 161 N.W. 270 (1916).

Three readings are not required after amendments have been made following the first and second reading. State ex rel. Martin v. Ryan, 92 Neb. 636, 139 N.W. 235 (1912).

Bill not authenticated by signature of presiding officer of either branch of Legislature was void. State ex rel. McClay v. Mickey, 73 Neb. 281, 102 N.W. 679 (1905).

This section does not require three separate readings of bills as finally amended. State ex rel. First Nat. Bank of Atkinson v. Cronin, 72 Neb. 636, 101 N.W. 325 (1904).

This section does not require that amendment or bills as amended, shall be read on three separate days. Cleland v. Anderson, 66 Neb. 252, 92 N.W. 306 (1902), affirmed on rehearing 66 Neb. 273, 96 N.W. 212 (1903), affirmed on rehearing 66 Neb. 276, 98 N.W. 1075 (1904).

Bill must be read on three separate days. State v. Burlington & M. R. R. Co., 60 Neb. 741, 84 N.W. 254 (1900).

6. Miscellaneous

Under this provision, a legislature may not attempt to restrict the constitutional power of a succeeding legislature to legislate. State ex rel. Stenberg v. Moore, 249 Neb. 589, 544 N.W.2d 344 (1996).

Act establishing Court of Industrial Relations does not violate any constitutional provision and the standards for its guidance are adequate. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

Constitutionality of Municipal Ground Water Act raised, but not decided. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966).

Unconstitutionality of tax statute under this section raised but not decided. Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

Provision of former primary election law requiring filing fifty days before primary by incumbent of one office seeking another was unconstitutional. Fitzgerald v. Kuppinger, 163 Neb. 286, 79 N.W.2d 547 (1956).

Installment Loan Act did not violate requirements of this section. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

This section does not apply to passage of city ordinances, and decisions thereunder are only valuable as analogies. Gembler v. City of Seward, 136 Neb. 196, 285 N.W. 542 (1939).

Entire act is void, where part of the act which is held unconstitutional is an inducement to the passage thereof, and is not separable. McShane v. Douglas County, 96 Neb. 664, 148 N.W. 569 (1914).

Federal district court would not abstain from deciding whether state banking statute was properly adopted by Nebraska Legislature where analysis of the applicable Nebraska case law left no doubt that such statute was invalid. Nebraskans for Independent Banking, Inc. v. Omaha Nat. Bank, 423 F.Supp. 519 (D. Neb. 1976).

Sec. 15. Members privileged from arrest.

Members of the Legislature in all cases except treason, felony or breach of the peace, shall be privileged from arrest during the session of the Legislature, and for fifteen days next before the commencement and after the termination thereof.

Source: Neb. Const. art. III, sec. 12 (1875).

Legislature may by law provide that members are exempt from service of civil process during session. Berlet v. Weary, 67 Neb. 75, 93 N.W. 238 (1903).

Privilege of member is not privilege of the Legislature merely but of the people, and is conferred to enable him to discharge trust confided to him by constituents. State v. Elder, 31 Neb. 169, 47 N.W. 710 (1891).

Sec. 16. Members of the Legislature and state officers; conflicts of interest; standards for.

No member of the Legislature or any state officer shall have a conflict of interest, as defined by the Legislature, directly in any contract, with the state or any county or municipality thereof, authorized by any law enacted during the term for which he shall have been elected or appointed, or within one year after the expiration of such term. The Legislature shall prescribe standards and definitions for determining the existence of such conflicts of interest in contracts, and it shall prescribe sanctions for enforcing this section.

Source: Neb. Const. art. III, sec. 13 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 9; Amended 1968, Laws 1967, c. 322, sec. 1, p. 856; Amended 1972, Laws 1972, LB 1514, sec. 1.

Legislator can receive from state only compensation provided by Constitution, for services as member of Legislature or of committee. In re Appeal of Wilkins, 116 Neb. 748, 219 N.W. 9 (1928).

If member is interested in any contract authorized by law passed during his term, this section would prevent his claiming any rights under such contract, but would not invalidate the law. Briggs v. Neville, 103 Neb. 1, 170 N.W. 188 (1918).

Sec. 17. Impeachment; procedure.

The Legislature shall have the sole power of impeachment, but a majority of the members elected must concur therein. Proceedings may be initiated in either a regular session or a special session of the Legislature. Upon the adoption of a resolution of impeachment, which resolution shall give reasonable notice of the acts or omissions alleged to constitute impeachable offenses but need not conform to any particular style, a notice of an impeachment of any officer, other than a Judge of the Supreme Court, shall be forthwith served upon the Chief Justice, by the Clerk of the Legislature, who shall thereupon call a session of the Supreme Court to meet at the Capitol in an expeditious fashion after such notice to try the impeachment. A notice of an impeachment of the Chief Justice or any Judge of the Supreme Court shall be served by the Clerk of the Legislature, upon the clerk of the judicial district within which the Capitol is located, and he or she thereupon shall choose, at random, seven Judges of the District Court in the State to meet within thirty days at the Capitol, to sit as a Court to try such impeachment, which Court shall organize by electing one of its number to preside. The case against the impeached civil officer shall be brought in the name of the Legislature and shall be managed by two senators, appointed by the Legislature, who may make technical or procedural amendments to the articles of impeachment as they deem necessary. The trial shall be conducted in the manner of a civil proceeding and the impeached civil officer shall not be allowed to invoke a privilege against self-incrimination, except as otherwise applicable in a general civil case. No person shall be convicted without the concurrence of two-thirds of the members of the Court of impeachment that clear and convincing evidence exists indicating that such person is guilty of one or more impeachable offenses, but judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust, in this State, but the party impeached, whether convicted or acquitted, shall nevertheless be liable to prosecution and punishment according to law. No officer shall exercise his or

her official duties after he or she shall have been impeached and notified thereof, until he or she shall have been acquitted.

Source: Neb. Const. art. III, sec. 14 (1875); Amended 1972, Laws 1971, LB 126, sec. 1; Amended 1986, Laws 1986, LR 318, sec. 1.

An impeachment must be tried by the Supreme Court. State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

The effect of this provision is to require the concurrence of five or more judges to convict on any count of an impeachable offense. State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

A constitutional officer can only be removed by impeachment. Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1936).

Only method of removing county judge is by impeachment under this section. Conroy v. Hallowell, 94 Neb. 794, 144 N.W. 895 (1913).

Impeachment is essentially criminal prosecution and accused must be proven guilty beyond reasonable doubt. State v. Hastings, 37 Neb. 96, 55 N.W. 774 (1893).

Authority to present other or amended articles of impeachment rests along with Legislature, and power to impeach cannot be delegated. State v. Leese, 37 Neb. 92, 55 N.W. 798 (1893).

Power of impeachment is exclusively conferred upon the Legislature and either one of two judgments can be pronounced, removal from office or removal and disqualification to hold office. Impeachment will not lie after term of office has expired. State v. Hill, 37 Neb. 80, 55 N.W. 794 (1893).

Sec. 18. Local or special laws prohibited.

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

For granting divorces.

Changing the names of persons or places.

Laying out, opening altering and working roads or highways.

Vacating roads, Town plats, streets, alleys, and public grounds.

Locating or changing County seats.

Regulating County and Township offices.

Regulating the practice of Courts of Justice.

Regulating the jurisdiction and duties of Justices of the Peace, Police Magistrates and Constables.

Providing for changes of venue in civil and criminal cases.

Incorporating Cities, Towns and Villages, or changing or amending the charter of any Town, City, or Village.

Providing for the election of Officers in Townships, incorporated Towns or Cities.

Summoning or empaneling Grand or Petit Juries.

Providing for the bonding of cities, towns, precincts, school districts or other municipalities.

Providing for the management of Public Schools.

The opening and conducting of any election, or designating the place of voting.

The sale or mortgage of real estate belonging to minors, or others under disability.

The protection of game or fish.

Chartering or licensing ferries, or toll bridges, remitting fines, penalties or forfeitures, creating, increasing and decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association, or individual, the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; *Provided*, that notwithstanding any other provisions of this Constitution, the Legislature shall have authority to separately define and classify loans and installment sales, to establish maximum rates within classifications of loans or installment sales which it establishes, and to regulate with respect thereto. In all other cases where a general law can be made applicable, no special law shall be enacted.

Source: Neb. Const. art. III, sec. 15 (1875); Amended 1964, Laws 1965, (Appendix), Seventy-fourth Extraordinary Session, 1963, c. 3, sec. 1, p. 1921.

1. Valid legislation

The provisions of section 79-487 authorizing the transportation of nonprofit private school students on public school buses do not violate the provisions of this section in that they extend transportation benefits to nonprofit private school students on exactly the same basis and under the same regulations governing the transportation of public school students. State ex rel. Bouc v. School Dist. of City of Lincoln, 211 Neb. 731, 320 N.W.2d 472 (1982).

Section 25-222 relating to limitation of actions for professional negligence does not violate this section. Taylor v. Karrer, 196 Neb. 581, 244 N.W.2d 201 (1976).

Political Subdivisions Tort Claims Act including one year notice of claim requirements and two year limitation for bringing action held constitutional. Campbell v. City of Lincoln, 195 Neb. 703, 240 N.W.2d 339 (1976).

The affected class defined in L.B. 1003, Eighty-second Legislature, First Session, sections 23-2601 to 23-2612 is valid and the act is not a local or special law. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

Statute authorizing transfer of land for school purposes was not void as special legislation. Kaup v. Sweet, 187 Neb. 226, 188 N.W.2d 891 (1971).

Law prohibiting usury defenses by corporation not violative of this section. Snyder v. Woxo, Inc., 185 Neb. 545, 177 N.W.2d 281 (1970).

Prohibiting retailer from accepting credit for purchase of beer from wholesaler while permitting acceptance of credit on purchase of liquor is constitutional. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N.W.2d 232 (1968).

Act of Legislature authorizing cities of primary class to annex contiguous or adjacent lands was not local or special law. Campbell v. City of Lincoln, 182 Neb. 459, 155 N.W.2d 444 (1968).

The 1964 amendment to this section was designed and intended to authorize legislation regulating installment sales. Engelmeyer v. Murphy, 180 Neb. 295, 142 N.W.2d 342 (1966).

Statute authorizing transfer of land for school purposes was not special legislation in violation of this section. McDonald v. Rentfrow, 176 Neb. 796, 127 N.W.2d 480 (1964).

Statute providing for limited access to interstate highway was not special legislation. Fougeron v. County of Seward, 174 Neb. 753, 119 N.W.2d 298 (1963).

Brand Inspection Act is not special legislation within meaning of this section. Satterfield v. State, 172 Neb. 275, 109 N.W.2d 415 (1961).

Statute providing for sewer use charge in metropolitan cities did not violate this section. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N.W.2d 397 (1961).

Parking Authority Law did not violate constitutional prohibition against special legislation. Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956).

Installment Loan Act was not a local or special law regulating interest on money. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

A statute which becomes operative within thirty days from the date it takes effect as to existing counties in the class, but specifies no machinery by which it shall become immediately operative in counties subsequently entering the class, is not violative of this section. Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N.W.2d 174 (1950).

Statute providing for appointment of district judges as appraisers in condemnation proceeding is reasonable and not inimical to this section. May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945).

Requirement that candidate for office of member of State Railway Commission be not less than thirty years of age does not violate this section. State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N.W.2d 892 (1942).

Act creating Nebraska Advertising Commission did not violate this section. Power Oil Co. v. Cochran, 138 Neb. 827, 295 N.W. 805 (1941).

If a law is general and operates uniformly and equally on all brought within the relation and circumstances for which it provides, it is not a local or special law in the constitutional sense. Bauer v. State Game, Forestation & Parks Commission, 138 Neb. 436, 293 N.W. 282 (1940).

Acts creating housing authorities was not special legislation. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Act exempting irrigation companies from building bridges over ditches crossing public roads was discriminatory and void. State ex rel. County of Dawson v. Dawson County Irr. Co., 125 Neb. 836, 252 N.W. 320 (1934).

Statute providing for condemnation of public utilities is not special act regulating courts prohibited hereunder. City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N.W. 484 (1933).

Statute providing venue of actions was not in violation of this section. Schwarting v. Ogram, 123 Neb. 76, 242 N.W. 273 (1932).

Act according priority to classes of claims in bank receiverships was not violative of prohibition against special and class legislation. State ex rel Sorensen v. First State Bank of Alliance, 122 Neb. 510, 240 N.W. 750 (1932); State ex rel. Sorensen v. First State Bank of Alliance, 122 Neb. 502, 240 N.W. 747 (1932).

Law permitting fencing with gates across highway was not unconstitutional as class, local, or special legislation. McFadden v. Denter, 118 Neb. 38, 223 N.W. 462 (1929).

Law relating to testing cattle for tuberculosis does not violate provision forbidding special law where general law applicable. State ex rel Spillman v. Wallace, 117 Neb. 588, 221 N.W. 712 (1928).

Law adding ministers to classes exempted from Railroad Anti-Pass Law was not special legislation. State ex rel. Sorensen v. Chicago, B. & Q. R. R. Co., 112 Neb. 248, 199 N.W. 534 (1924).

Law requiring Board of Regents to manufacture and sell hog cholera serum, at cost, to farmers and swine growers, was valid. Fisher v. Board of Regents of Univ. of Neb., 108 Neb. 666, 189 N.W. 161 (1922).

Law authorizing counties of 150,000 or more to issue bonds and levy tax to rebuild courthouse destroyed by fire or riot was valid. Cunningham v. Douglas County, 104 Neb. 405, 177 N.W. 742 (1920).

Law restricting number of candidates appearing on ballot at primary election for delegates to constitutional convention was valid. Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430 (1919).

Law relating to state mineral land leases was valid. Briggs v. Neville, 103 Neb. 1, 170 N.W. 188 (1918).

Prohibiting saloons within two and one half miles of military posts is valid. Rushart v. Crippen, 99 Neb. 682, 157 N.W. 611 (1916).

Law fixing maximum rate of interest and brokerage fee for money lenders was valid. Althaus v. State, 99 Neb. 465, 156 N.W. 1038 (1916).

Law permitting teaching of foreign languages in schools was valid. State ex rel. Thayer v. School Dist. of Nebraska City, 99 Neb. 338, 156 N.W. 641 (1916).

Law regulating hours of service for firemen, but excepting chief and assistant chief was valid. State ex rel. Rea v. City Council of Lincoln, 98 Neb. 634, 154 N.W. 217 (1915).

Law authorizing county board to pay for bridge material, though claim had previously been adjudged invalid in court, was valid. Gibson v. Sherman County, 97 Neb. 79, 149 N.W. 107 (1914).

Act regulating practice of medicine was valid. Mathews v. Hedlund, 82 Neb. 825, 119 N.W. 17 (1908).

Act prohibiting common labor on Sunday was valid. In re Caldwell, 82 Neb. 544, 118 N.W. 133 (1908).

Act relating to taxation of building and loan associations as a class was valid. Nebraska Central Bldg. & Loan Assn. v. Board of Equalization of Lancaster County, 78 Neb. 472, 111 N.W. 147 (1907).

Act providing for election of city officers on particular day was valid. State ex rel. Pentzer v. Malone, 74 Neb. 645, 105 N.W. 893 (1905).

Act giving irrigation companies right to prior appropriation in water, does not contravene Constitution prohibiting special privileges. Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).

Act regulating hours of employment of females in manufacturing and mechanical establishments was valid. Wenham v. State, 65 Neb. 394, 91 N.W. 421 (1902).

Act providing for Tax Commissioner in city of specified class was valid. State ex rel. Prout v. Aitken, 62 Neb. 428, 87 N.W. 153 (1901).

General law, though affecting but single county, is not for that reason void as special legislation. State ex rel Douglas County v. Frank, 61 Neb. 679, 85 N.W. 956 (1901).

Permitting prosecution by information in one county and indictment in another is valid. Dinsmore v. State, 61 Neb. 418, 85 N.W. 445 (1901).

Act providing for recovery of attorney's fees to be treated as costs in action against fire insurance company was valid. Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N.W. 911 (1895).

Ordinance granting exclusive contract for removal of garbage was valid. Coombs v. MacDonald, 43 Neb. 632, 62 N.W. 41 (1895).

Statute allowing reasonable attorney's fee to plaintiff, to be taxed as costs, in suit on insurance policy covering real property was valid. Farmers & Merchants Ins. Co. v. Dobney, 189 U.S. 301 (1903).

Statute relative to practice of veterinary medicine and surgery was not discriminatory hereunder. Peet Stock Remedy Co. v. McMullen, 32 F.2d 669 (8th Cir. 1929).

Cedar Rust Law was not special legislation. Upton v. Felton, 4 F.Supp. 585 (D. Neb. 1932).

2. Invalid legislation

Act providing for the reimbursement of funds to depositors of failed industrial loan and investment companies violated this provision. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

An act which permits public grants to students, which must be used in private institutions in this state, is unconstitutional. State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974).

To hold that city of first class without home rule charter may be annexed but one with home rule charter could not be dissolved would violate this section. City of Millard v. City of Omaha, 185 Neb. 617, 177 N.W.2d 576 (1970).

Act which fixed value of agricultural income-producing machinery and equipment as those used by taxpayer in determining federal income tax violated this section. State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N.W.2d 596 (1970).

Cited legislation violated this section by creating permanently closed class and by being totally arbitrary and unreasonable in method of classification. City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N.W.2d 74 (1970).

Amendment extending time for appeal under section 77-510, R.R.S.1943, after appeal time had expired violated this section. In re Valuation and Equalization, 182 Neb. 621, 156 N.W.2d 728 (1968).

Penalty for failure to return property for taxation was special law in violation of this section. Bachus v. Swanson, 179 Neb. 1, 136 N.W.2d 189 (1965).

Legislative Bill 16 of 1963 Special Session violated this section and was unconstitutional in its entirety. Kometscher v. Wade, 177 Neb. 299, 128 N.W.2d 781 (1964).

Statute changing penalty relating to agreements for sale of personal property upon an installment basis held to be special legislation in violation of this section. Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N.W.2d 907 (1964).

Designation of retail installment sales contracts as a class, in fixing maximum interest permitted to be charged, was special legislation inhibited by this section. Stanton v. Mattson, 175 Neb. 767, 123 N.W.2d 844 (1963).

Installment Sales Act of 1959 was unconstitutional because it fixed different interest rates on automobiles according to age. Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963).

Statute requiring reporting of property in warehouse for taxation and excepting household goods was violative of this section. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N.W.2d 408 (1959).

Legislature cannot create liability on part of state for fraud of its officers, and waive statute of limitations for benefit of few within a class. Bordy v. State, 142 Neb. 714, 7 N.W.2d 632 (1943).

Where legislation is of state wide concern, a legislative act applying to part of cities within designated class and not applying to other cities within the same class having a home rule charter violates this section. Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).

An act of Legislature attempting to waive sovereignty of the state and create liability on state's part in favor of an individual

for negligence of state's servants and agents is a special law in contravention of this section. Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938).

Law authorizing counties of more than 150,000 to use portion of gas tax to retire highway construction bonds was invalid, as special legislation. State ex rel. Cone v. Bauman, 120 Neb. 77, 231 N.W. 693 (1930).

Statute purporting to validate proceedings to form light and power districts was invalid as special legislation. Anderson v. Lehmkuhl, 119 Neb. 451, 229 N.W. 773 (1930).

Law regulating public dances on Sunday, but excepting metropolitan cities from its operation, was invalid special legislation. Galloway v. Wolfe, 117 Neb. 824, 223 N.W. 1 (1929).

Proviso authorizing irrigation districts under certain circumstances, to require landowners to construct and maintain laterals and supervise water distribution, was prohibited special legislation. State ex rel. Campbell v. Gering Irr. Dist., 114 Neb. 329, 207 N.W. 525 (1926).

Law imposing liability on counties for destruction of personal property of officers in public buildings by riotous mobs, was void. Court intimates that it would also be void as special legislation. Wakeley v. Douglas County, 109 Neb. 396, 191 N.W. 337 (1922).

Classification of counties for purpose of relocating county seats, if not general and cannot be applied to all counties, is void as special legislation. State ex rel. Conkling v. Kelso, 92 Neb. 628, 139 N.W. 226 (1912).

Statute operating upon county of specified population for particular year was void as special legislation. State v. Scott, 70 Neb. 685, 100 N.W. 812 (1904).

Act fixing day's work at eight hours for labor but exempting farmers or domestic labor, was void as special legislation. Low v. Rees Printing Co., 41 Neb. 127, 59 N.W. 362 (1894).

3. Classification

A legislative act constitutes special legislation, violative of this provision, if it (1) creates an arbitrary and unreasonable method of classification or (2) creates a permanently closed class. City of Ralston v. Balka, 247 Neb. 773, 530 N.W.2d 594 (1995).

A legislative act can violate this provision as special legislation (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. MAPCO Ammonia Pipeline v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991).

A classification which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

A legislative act can violate this provision as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

The term ''class legislation'' is a characterization of legislation in contravention of this provision. It is that which makes improper discrimination by conferring privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

A legislative classification must operate uniformly on all within a class which is reasonable. Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991).

The Legislature may, for the purpose of legislating, classify persons, places, objects, or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991).

The Legislature may classify persons under this section as long as, absent implication of a fundamental right or suspect classification, the categorization has a rational basis. Distinctive Printing & Packaging Co. v. Cox, 232 Neb. 846, 443 N.W.2d 566 (1989).

Section 60-1701 contains classifications and exceptions which are unreasonable, arbitrary, and unrelated to the public interest, and is therefore unconstitutional and void in violation of this section. State v. Edmunds, 211 Neb. 380, 318 N.W.2d 859 (1982).

Provisions of legislation creating the Local Government Revenue Fund were unconstitutional because classifications created by the act were arbitrary and unreasonable closed classifications in that they prevented a county from moving from one classification to another and the legislation was, therefore, a special law as to each of the state's counties. State ex rel. Douglas v. Marsh, 207 Neb. 598, 300 N.W.2d 181 (1980).

A bill which treats all those who exceed the fifty-five miles per hour interstate highway limit by no more than ten miles per hour, in different manner, as to fines and costs, than those in other categories is not special legislation. State ex rel. Douglas v. Gradwohl, 194 Neb. 745, 235 N.W.2d 854 (1975).

The partial exemption from taxation of classes of property specified in section 77-202.25, is not unreasonable, objectionable as discriminatory, or violative hereof. Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974).

Free port law does not violate constitutional provisions for uniformity and against special privileges. Norden Laboratories, Inc. v. County Board of Equalization, 189 Neb. 437, 203 N.W.2d 152 (1973).

Cigarette Tax Act, sections 77-2602 et seq., 1971 Supp., is not void for unreasonable classification, nor is it a special law. Sandberg v. State, 188 Neb. 335, 196 N.W.2d 501 (1972).

Cited legislation violated this section by creating permanently closed class and by being totally arbitrary and unreasonable in method of classification. City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N.W.2d 74 (1970).

Prohibiting retailer from accepting credit for purchase of beer from wholesaler while permitting acceptance of credit on purchase of liquor is constitutional. Tom & Jerry, Inc. v. Nebraska Liquor Control Commission, 183 Neb. 410, 160 N.W.2d 232 (1968).

Act of Legislature authorizing cities of primary class to annex contiguous or adjacent lands was not local or special law. Campbell v. City of Lincoln, 182 Neb. 459, 155 N.W.2d 444 (1968).

Provisions of Grid System Act constituted a grant of special privileges and an unlawful splitting of a class, and was unconstitutional. Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966).

Act regulating the profession of engineers and architects sustained as constitutional against claim of discrimination in classification. State ex rel. Meyer v. Knutson, 178 Neb. 375, 133 N.W.2d 577 (1965).

State Employees Retirement Act did not constitute an unreasonable classification and was not unconstitutional as special legislation. Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964).

Waiver or remission of penalties by a local or special law is prohibited. Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

Constitution recognizes that villages and cities are separate and distinct. Hueftle v. Eustis Cemetery Assn., 171 Neb. 293, 106 N.W.2d 400 (1960).

Amendment to Installment Loan Act creating four classes as to which different penalties were applicable was violative of this section. Thompson v. Commercial Credit Equipment Corp., 169 Neb. 377, 99 N.W.2d 761 (1959).

Arbitrary classification may result in special legislation. United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).

Classification according to population is permitted where real and substantial differences exist. Dorrance v. County of Douglas, 149 Neb. 685, 32 N.W.2d 202 (1948).

Classification of business or property for taxation can be permitted only if classification is reasonable and the tax operates uniformly upon all members of the class. Thorin v. Burke, 146 Neb. 94, 18 N.W.2d 664 (1945).

Penalties for nonpayment of taxes are punitive in their nature and their remission by Legislature is not forbidden as arbitrary class legislation. Tukey v. Douglas County, 133 Neb. 732, 277 N.W. 57 (1938).

Act providing for annual tax on fire insurance companies based on gross premiums received by each for insurance written within state was invalid because it did not operate equally and uniformly upon all members of class. Continental Ins. Co. v. Smrha, 131 Neb. 791, 270 N.W. 122 (1936).

Act extending time in which to pay taxes was invalid as based on arbitrary classification. Steinacher v. Swanson, 131 Neb. 439, 268 N.W. 317 (1936).

Legislature may classify persons, corporations and property for purposes of legislation, but classification must rest upon real differences in situation and circumstances of members of the class relative to subject of legislation, and the law must operate uniformly on every member of class so designated. State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

Classification must be reasonable. Althaus v. State, 94 Neb. 780, 144 N.W. 799 (1913); Livingston Loan & Building Assn. v. Drummond, 49 Neb. 200, 68 N.W. 375 (1896).

If statute operates equally upon all persons or objects of a class so constituted, it is enough. Dougherty v. Kubat, 67 Neb. 269, 93 N.W. 317 (1903).

Statute must be general and uniform throughout the state, and operate alike on all persons and localities of a class reasonably constituted with reference to relations and circumstances provided for. Cleland v. Anderson, 66 Neb. 252, 92 N.W. 306 (1902), affirmed on rehearing 66 Neb. 273, 96 N.W. 212 (1903), affirmed on rehearing 66 Neb. 276, 98 N.W. 1075 (1904).

If law is general and uniform throughout the state, operating alike on all persons and localities of a class, it is not objectionable. Livingston Loan & Bldg. Assn. v. Drummond, 49 Neb. 200, 68 N.W. 375 (1896).

Classification of cities into classes and subclasses for purposes of legislation does not violate Constitution. State ex rel. Jones v. Graham, 16 Neb. 74, 19 N.W. 470 (1884).

4. Miscellaneous

In Nebraska, both equal protection and the prohibition against special legislation emanate from this provision, however the test of validity under each is different. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

This provision concerns itself with disparate treatment in much the same manner as does the language of U.S. Const. amend. XIV, which prohibits a state from making or enforcing any law which denies any person within its jurisdiction ''the equal protection of the laws.'' Distinctive Printing & Packaging Co. v. Cox, 232 Neb. 846, 443 N.W.2d 566 (1989).

Requiring registration of mobile homes and assessing a reasonable fee to defray cost of registration and inspection, if any, does not violate constitutional provision requiring uniform and proportionate taxation of personal property. Gates v. Howell, 204 Neb. 256, 282 N.W.2d 22 (1979).

Statute abrogating right of action against auctioneers under conditions stated does not violate this section. State Securities Co. v. Norfolk Livestock Sales Co., Inc., 187 Neb. 446, 191 N.W.2d 614 (1971).

Claim of unconstitutionality of city ordinance regulating labor relations as special law raised but not decided. Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 131 N.W.2d 609 (1964)

Power to regulate interest on money may not be done by local or special law. State Securities Co. v. Ley, 177 Neb. 251, 128 N.W.2d 766 (1964).

State may enjoin threatened diversion of realty from its original use where it was granted by state to a church for religious purposes. State ex rel. Hunter v. Home Savings & Loan Assn., 137 Neb. 231, 288 N.W. 691 (1939).

Regulation of Nebraska Liquor Control Commission providing that opening and closing hours for sale of beer in rural districts shall be same as those fixed by ordinance in nearest incorporated city or village was valid. Griffin v. Gass, 133 Neb. 56, 274 N.W. 193 (1937).

Refusal of State Railway Commission to grant authority to operate motor buses to a second common carrier in Omaha was not inhibited by this section. Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N.W. 756 (1937).

Prohibitions in this section are confined to specific cases mentioned, and Legislature may legislate upon any subject not therein prohibited. Stewart v. Barton, 91 Neb. 96, 135 N.W. 381 (1912).

Special privilege is right, power, franchise, immunity, or privilege granted to, or vested in, a person or class of persons to exclusion of others and in derogation of common rights. City of Plattsmouth v. Nebraska Tel. Co., 80 Neb. 460, 114 N.W. 588 (1908).

It is for Legislature to determine as to applicability of general law and propriety of special law. Weston v. Ryan, 70 Neb. 211, 97 N.W. 347 (1903).

Determination of whether act is general or special depends upon substance of act, not its form. State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N.W. 941 (1897).

This section is not restriction upon powers of Legislature over subject involved, but rather limitation in respect to manner of exercise of power. Smiley v. MacDonald, 42 Neb. 5, 60 N.W. 355 (1894).

If law is general in terms and restricted to no particular locality, and operates equally upon all of a group of objects, it is not special law. Hunzinger v. State, 39 Neb. 653, 58 N.W. 194 (1894).

No special law can be enacted where general law can be made applicable. In re House Roll 284, 31 Neb. 505, 48 N.W. 275 (1891).

Federal district court would not abstain from deciding whether state banking statute was properly adopted by Nebraska Legislature where analysis of the applicable Nebraska case law left no doubt that such statute was invalid. Nebraskans for Independent Banking, Inc. v. Omaha Nat. Bank, 423 F.Supp. 519 (D. Neb. 1976).

Sec. 19. Compensation; increase when; extra compensation to public officers and contractors prohibited; retirement benefits; adjustment.

The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into, except that retirement benefits of retired public officers and employees may be adjusted to reflect changes in the cost of living and wage levels that have occurred subsequent to the date of retirement.

The compensation of any public officer, including any officer whose compensation is fixed by the Legislature, shall not be increased or diminished during his or her term of office, except that when there are members elected or appointed to the Legislature or the judiciary, or officers elected or appointed to a board or commission having more than one member, and the terms of such members commence and end at different times, the compensation of all members of the Legislature, of the judiciary, or of such board or commission may be increased or diminished at the beginning of the full term of any member thereof.

Nothing in this section shall prevent local governing bodies from reviewing and adjusting vested pension benefits periodically as prescribed by ordinance.

The surviving spouse of any retired public officer, agent, or servant, who has retired under a pension plan or system, shall be considered as having pensionable status and shall be entitled to the same benefits which may, at any time, be provided for or available to spouses of other public officers, agents, or servants who have retired under such pension plan or system at a later date, and such benefits shall not be prohibited by the restrictions of this section or of Article XIII, section 3 of the Constitution of Nebraska.

Source: Neb. Const. art. III, sec. 16 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 10; Amended 1952, Laws 1951, c. 159, sec. 1, p. 634; Amended 1968, Laws 1967, c. 322, sec. 1, p. 856; Amended 1972, Laws 1972, LB 1414, sec. 1; Amended 1978, Laws 1978, LB 739, sec. 1; Amended 2000, Laws 2000, LR 291CA, sec. 1.

1. Salary increase
2. Extra compensation
3. Miscellaneous

1. Salary increase

A resolution of a county board fixing the salaries of elected county officers at an amount plus an annual adjustment for changes in the cost of living as determined by an independent federal agency, does not violate this Article and section of the Nebraska Constitution. Shepoka v. Knopik, 201 Neb. 780, 272 N.W.2d 364 (1978).

Laws 1971, L.B. 743, was not effective as to compensation for county attorney whose term had started before it was adopted. State ex rel. Nebraska State Bar Assn. v. Holscher, 193 Neb. 729, 230 N.W.2d 75 (1975).

Act creating State Employees Retirement System did not violate this section. Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964).

Salary of executive officer could not be increased during term. State ex rel. Laughlin v. Johnson, 156 Neb. 671, 57 N.W.2d 531 (1953).

Increase or decrease in compensation resulting from a change in population is not prohibited by this section. Hamilton v. Foster, 155 Neb. 89, 50 N.W.2d 542 (1951).

Increase in salaries of county commissioners during their term of office was prohibited by this section. Ramsey v. County of Gage, 153 Neb. 24, 43 N.W.2d 593 (1950).

Legislature has authority to increase salary of officer during term whose compensation has not previously been fixed by legislative enactment. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N.W.2d 799 (1947).

Statute providing for garnishment of officers and employees of state and its subdivisions does not violate provision prohibiting increase or diminution of compensation of public officers during term of office. Department of Banking v. Foe, 136 Neb. 422, 286 N.W. 264 (1939).

Action of a county board in determining population of a county as a basis for determining salaries of county officers, without notice and opportunity to such officers to be heard was void. Shambaugh v. Buffalo County, 133 Neb. 46, 274 N.W. 207 (1937).

Salary of any public officer, whether fixed by Constitution or statute, cannot be diminished during term. State ex rel. Day v. Hall, 129 Neb. 699, 262 N.W. 850 (1935); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

Salary of officer created by Constitution could not be diminished during his term. State ex rel. Randall v. Hall, 125 Neb. 236, 249 N.W. 756 (1933).

2. Extra compensation

The prohibition contained in this section of the Nebraska Constitution is not applicable to the compensation paid to a jailer, even if the duties of jailer are performed by the sheriff. State ex rel. Landanger v. Madison County, 213 Neb. 33, 327 N.W.2d 93 (1982).

Law authorizing payment to county treasurer of 25 cent fee for each applicant for motor vehicle operator's license was not void as increasing salary. Mehrens v. Bauman, 120 Neb. 110, 231 N.W. 701 (1930).

Legislator can receive from state for services as member, or member of committee, only compensation provided by Constitution. In re Appeal of Wilkins, 116 Neb. 748, 219 N.W. 9 (1928).

Pension granted to firemen in municipality is not gratuity nor extra compensation within Constitution. State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N.W. 196 (1911).

3. Miscellaneous

Prohibition against a gratuity of compensation after services rendered applies both to the state and all political subdivisions thereof. Retired City Gov. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys., 199 Neb. 507, 260 N.W.2d 472 (1977).

Judges of the district court of this state are members of a court within meaning of this section. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

Deduction from salary for retirement pay during existing term of judge was violation of this section. Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956).

Office of police judge is constitutional office within this section, and period of an officer holding over, together with regular term, constitutes one term. State ex rel. Gordon v. Moores, 61 Neb. 9, 84 N.W. 399 (1900).

Before 1920 amendment this section applied alone to those officers whose offices were created by the Constitution and did not apply to office of county commissioner. Douglas County v. Timme, 32 Neb. 272, 49 N.W. 266 (1891).

Sec. 20. Salt springs, coal, oil, minerals; alienation prohibited.

The salt springs, coal, oil, minerals, or other natural resources on or contained in the land belonging to the state shall never be alienated; but provision may be made by law for the leasing or development of the same.

Source: Neb. Const. art. III, sec. 17 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 11.

Phrase all mineral rights in challenged statute held declaratory of this section. State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N.W.2d 156 (1969).

Prohibition against alienation of mineral rights in state educational lands did not apply to sale made prior to 1920. Stoller v. State, 171 Neb. 93, 105 N.W.2d 852 (1960).

Object of this section was not to prevent alienation of salt springs where brine yield is of no commercial value and state may convey with reservation that springs shall belong to state if they become commercially valuable. State ex rel. Central Realty & Investment Co. v. McMullen, 119 Neb. 739, 230 N.W. 677 (1930).

Board of Educational Lands and Funds has no jurisdiction over disposal of saline lands. Chicago, B. & Q. R. R. Co. v. Neville, 102 Neb. 817, 170 N.W. 176 (1918); McMurtry v. Engelhardt, 5 Neb. Unof. 271, 98 N.W. 40 (1904).

Sec. 21. Donation of state lands prohibited; when.

Lands under control of the State shall never be donated to railroad companies, private corporations or individuals.

Source: Neb. Const. art. III, sec. 18 (1875).

Industrial Development Act of 1961 was sustained as constitutional under constitutional amendment notwithstanding this section. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962).

Sec. 22. Appropriations for state; deficiencies; bills for pay of members and officials.

Each Legislature shall make appropriations for the expenses of the Government. And whenever it is deemed necessary to make further appropriations for deficiencies, the same shall require a two-thirds vote of all the members elected to the Legislature. Bills making appropriations for the pay of members and officers of the Legislature, and for the salaries of the officers of the Government, shall contain no provision on any other subject.

Source: Neb. Const. art. III, sec. 19 (1875); Amended 1972, Laws 1971, LB 139, sec. 1.

1. Necessity of appropriation
2. Subject of appropriation
3. Continuing appropriation
4. Miscellaneous

1. Necessity of appropriation

Before a state warrant may issue, there must have been an appropriation made by the Legislature for its payment. Fischer v. Marsh, 113 Neb. 153, 202 N.W. 422 (1925).

Appropriation for one biennium cannot be used to supply deficiency of preceding biennium. State ex rel. Western Bridge & Construction Co. v. Marsh, 111 Neb. 185, 196 N.W. 130 (1923).

It is not essential that money be actually drawn during fiscal year, but expenses must have been actually incurred during the period for which appropriation was made. State ex rel. Ledwith v. Brian, 84 Neb. 30, 120 N.W. 916 (1909).

No appropriation will lapse before the end of the first fiscal quarter after adjournment of Legislature unless specifically otherwise directed by act making appropriation. State ex rel. Dales v. Moore, 36 Neb. 579, 54 N.W. 866 (1893).

Unless otherwise limited, the appropriation extends to the end of the first fiscal quarter after the adjournment of the next session of the Legislature. State ex rel. Bullock Mfg. Co. v. Babcock, 22 Neb. 33, 33 N.W. 709 (1887).

2. Subject of appropriation

Sections 77-202.25 to 77-202.33 do not constitute an appropriation and are not violative hereof. Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974).

Imposition of maximum expenditures for personal services on annual basis constitutional. State ex rel. Meyer v. State Board of Equalization & Assessment, 185 Neb. 490, 176 N.W.2d 920 (1970).

Act which allowed pledging of fees and charges received by the commission beyond the biennium violated this section. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Act which pledged future receipts of fees for permits and licenses to hunt, trap, and fish for payment of bonds violated this section. State ex rel. Meyer v. Steen, 183 Neb. 297, 160 N.W.2d 164 (1968).

Bills appropriating salaries for state officers cannot contain provisions on any other subject. This limitation applies to all officers of the state government. State ex rel. Hibbard v. Cornell, 60 Neb. 276, 83 N.W. 72 (1900).

3. Continuing appropriation

Continuing legislative appropriations are prohibited. Rein v. Johnson 149 Neb. 67, 30 N.W.2d 548 (1947).

Warrants may be drawn on special fund originally established as a continuing appropriation without subsequent biennial appropriation. State ex rel. Ridgell v. Hall, 99 Neb. 89, 155 N.W. 228 (1915), affirmed on rehearing 99 Neb. 95, 156 N.W. 16 (1916), overruled in Rein v. Johnsen, 149 Neb. 67, 30 N.W.2d 548 (1947).

An appropriation under this section cannot be made to continue for a longer period than the biennium. State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N.W. 373 (1896).

4. Miscellaneous

Attempt to appropriate funds was not an inducing element to passage of remainder of Tax Appraisal Board Act. Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N.W.2d 174 (1950).

Legislature has authority to increase salary of officer during term whose compensation has not previously been fixed by legislative enactment. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N.W.2d 799 (1947).

Excess of gasoline inspection fees paid without protest or demand for refund, lapsed after each biennium, and after having lapsed, court is without power to determine directly the question of their excessiveness. Power Oil Co. v. Cochran, 138 Neb. 827, 295 N.W. 805 (1941).

Sec. 23. Repealed 1972. Laws 1972, LB 302, sec. 1.

Sec. 24. Games of chance, lotteries, and gift enterprises; restrictions; parimutuel wagering on horseraces; bingo games; use of state lottery proceeds.

(1) Except as provided in this section, the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money for the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time.

(2) The Legislature may authorize and regulate a state lottery pursuant to subsection (3) of this section and other lotteries, raffles, and gift enterprises which are intended solely as business promotions or the proceeds of which are to be used solely for charitable or community betterment purposes without profit to the promoter of such lotteries, raffles, or gift enterprises.

(3)(a) The Legislature may establish a lottery to be operated and regulated by the State of Nebraska. The proceeds of the lottery shall be appropriated by the Legislature for the costs of establishing and maintaining the lottery and for the following purposes, as directed by the Legislature:

(i) The first five hundred thousand dollars after the payment of prizes and operating expenses shall be transferred to the Compulsive Gamblers Assistance Fund;

(ii) Forty-four and one-half percent of the money remaining after the payment of prizes and operating expenses and the initial transfer to the Compulsive Gamblers Assistance Fund shall be transferred to the Nebraska Environmental Trust Fund to be used as provided in the Nebraska Environmental Trust Act;

(iii) Forty-four and one-half percent of the money remaining after the payment of prizes and operating expenses and the initial transfer to the Compulsive Gamblers Assistance Fund shall be used for education as the Legislature may direct;

(iv) Ten percent of the money remaining after the payment of prizes and operating expenses and the initial transfer to the Compulsive Gamblers Assistance Fund shall be transferred to the Nebraska State Fair Board if the most

populous city within the county in which the fair is located provides matching funds equivalent to ten percent of the funds available for transfer. Such matching funds may be obtained from the city and any other private or public entity, except that no portion of such matching funds shall be provided by the state. If the Nebraska State Fair ceases operations, ten percent of the money remaining after the payment of prizes and operating expenses and the initial transfer to the Compulsive Gamblers Assistance Fund shall be transferred to the General Fund; and

(v) One percent of the money remaining after the payment of prizes and operating expenses and the initial transfer to the Compulsive Gamblers Assistance Fund shall be transferred to the Compulsive Gamblers Assistance Fund.

(b) No lottery game shall be conducted as part of the lottery unless the type of game has been approved by a majority of the members of the Legislature.

(4) Nothing in this section shall be construed to prohibit (a) the enactment of laws providing for the licensing and regulation of wagering on the results of horseraces, wherever run, either within or outside of the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure or (b) the enactment of laws providing for the licensing and regulation of bingo games conducted by nonprofit associations which have been in existence for a period of five years immediately preceding the application for license, except that bingo games cannot be conducted by agents or lessees of such associations on a percentage basis.

Source: Neb. Const. art. III, sec. 21 (1875); Amended 1934, Initiative Measure No. 332; Amended 1958, Initiative Measure No. 302; Amended 1962, Laws 1961, c. 248, sec. 1, p. 735; Amended 1968, Laws 1967, c. 307, sec. 1, p. 832; Amended 1988, Laws 1988, LR 15, sec. 1; Amended 1992, Laws 1991, LR 24CA, sec. 1; Amended 2004, Laws 2004, LR 209CA, sec. 1.

Cross References

Nebraska Environmental Trust Act, see section 81-15,167.

This provision plainly requires that parimutuel wagering on horses must be conducted by an entity licensed to do so and must be conducted by licensees at a racetrack enclosure which is licensed to operate horse races. Wagering that occurs in a detached facility, one that is by definition outside a licensed racetrack enclosure, cannot logically occur within a licensed racetrack enclosure as required by this provision. State ex rel. Stenberg v. Douglas Racing Corp., 246 Neb. 901, 524 N.W.2d 61 (1994).

Free replays are things of value and when obtained on a gambling device constitute property. State ex rel. Spire v. Strawberries, Inc., 239 Neb. 1, 473 N.W.2d 428 (1991).

''Proceeds'' means net proceeds and ''promoter'' means only the person or organization legally responsible for operating a lottery, not each employee thereof. State v. City Betterment Corp., 197 Neb. 575, 250 N.W.2d 601 (1977).

Where registration was required to participate in drawing for prize, the element of consideration was present to constitute a lottery. State ex rel. Line v. Grant, 162 Neb. 210, 75 N.W.2d 611 (1956).

Pinball machine was prohibited as game of chance. Baedaro v. Caldwell, 156 Neb. 489, 56 N.W.2d 706 (1953).

Sec. 25. Incidental expenses of state officers; specific appropriations always necessary; warrants for money.

No allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation and upon an account specifying each item. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued as the Legislature may direct, and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever by resolution.

Source: Neb. Const. art. III, sec. 22 (1875); Amended 1964, Laws 1963, c. 302, sec. 2(1), p. 894.

1. General appropriation for incidental expenses
2. Specific appropriation
3. Miscellaneous

1. General appropriation for incidental expenses

Funds in state treasury which may be used in payment of claims against state may be withdrawn only pursuant to appropriation by Legislature. Fischer v. Marsh, 113 Neb. 153, 202 N.W. 422 (1925); State ex rel. Pearson v. Cornell, 54 Neb. 647, 75 N.W. 25 (1898); State ex rel. Graham v. Babcock, 18 Neb. 221, 24 N.W. 683 (1885).

State cannot use appropriation for one biennium to meet deficiency for preceding biennium. State ex rel. Western Bridge & Construction Co. v. Marsh, 111 Neb. 185, 196 N.W. 130 (1923).

Appropriation to pay expenses of State Board of Education was sufficient to include appropriation for salary of secretary. State ex rel. Ludden v. Barton, 88 Neb. 576, 130 N.W. 260 (1911).

Appropriations for incidental expenses of state officer in general appropriation must specify each item for which appropriation is made. State ex rel. James v. Babcock, 22 Neb. 38, 33 N.W. 711 (1887).

A specific appropriation is one expressly providing funds for particular purpose. There can be no implied appropriation under the Constitution. State ex rel. Cline v. Wallichs, 15 Neb. 609, 20 N.W. 110 (1884).

Under an appropriation for current expenses of state government, no money may be drawn for expenses of returning prisoners to penitentiary. State ex rel. Nobes v. Wallichs, 15 Neb. 457, 19 N.W. 641 (1884).

2. Specific appropriation

Act itself is sufficient appropriation, at least for current biennium, for expenditure of fees and charges to carry on work of commission. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Act providing for refunding of excess grain inspection fees was not in conflict herewith. Bollen v. Price, 129 Neb. 342, 261 N.W. 689 (1935).

Subsequent appropriation of money raised by previous special tax levy amounts to specific appropriation of entire fund. State ex rel. Ledwith v. Searle, 79 Neb. 111, 112 N.W. 380 (1907).

Specific appropriations for salaries of officers fixed by Constitution are not necessary. Weston v. Herdman, 64 Neb. 24, 89 N.W. 384 (1902).

Money paid into the treasury by the state cannot be credited by bookkeeping and thus deducted from the proper charge. It requires specific appropriation to transfer the fund. Providence Washington Ins. Co. v. Weston, 63 Neb. 764, 89 N.W. 253 (1902).

Under general act providing bounty for sugar manufacturers, but carrying no specific appropriation, no such bounty payment can be made. State ex rel. Norfolk Beet-Sugar Co. v. Moore, 50 Neb. 88, 69 N.W. 373 (1896).

Where the Legislature has made a specific appropriation for a special purpose, it is no part of the auditor's duty to inquire as to the justice of such appropriation. State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N.W. 755 (1894).

3. Miscellaneous

Sections 77-202.25 to 77-202.33 do not constitute an appropriation and are not violative hereof. Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974).

This section prevents the diversion of money from any appropriation or the taking thereof from any fund by legislative resolution as distinguished from legislative act. Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947).

Noncompliance with this section by Nebraska State Board of Agriculture disclosed that it was not public governmental agency. Crete Mills v. Nebraska State Board of Agriculture, 132 Neb. 244, 271 N.W. 684 (1937).

This section has no reference to any provision which the Legislature might see fit to make regarding custody or investment of money in treasury while waiting disbursement. State v. Hill, 47 Neb. 456, 66 N.W. 541 (1896).

Money may be drawn from the treasury only on vouchers which shall be presented to auditor that he may see that claim is one for which appropriation has been made. State ex rel. Garneau v. Moore, 37 Neb. 507, 55 N.W. 1078 (1893), 56 N.W. 154 (1893).

When appropriation provides for rewards and fees for capture of escaped convicts, etc., no warrant can be drawn to pay sheriff for conveying offenders to reform schools. State ex rel. Ensign v. Wallichs, 12 Neb. 407, 11 N.W. 860 (1882).

Sec. 26. Privilege of members.

No member of the Legislature shall be liable in any civil or criminal action whatever for words spoken in debate.

Source: Neb. Const. art. III, sec. 23 (1875).

Sec. 27. Acts take effect after three months; emergency bills; session laws.

No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, which is expressed in the preamble or body of the act, the Legislature shall by a vote of two-thirds of all the members elected otherwise direct. All laws shall be published within sixty days after the adjournment of each session and distributed among the several counties in such manner as the Legislature may provide.

Source: Neb. Const. art. III, sec. 24 (1875); Amended 1972, Laws 1971, LB 126, sec. 1; Amended 1998, Laws 1997, LR 17CA, sec. 1.

1. Without emergency clause
2. With emergency clause
3. Miscellaneous

1. Without emergency clause

Without an emergency clause, a legislative act takes effect three calendar months after adjournment of Legislature. Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N.W.2d 748 (1960).

While act passed without emergency clause takes effect three calendar months after adjournment of session, operation of act can be postponed to a later date. Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956).

Statute without emergency clause does not become operative until three calendar months after adjournment of the Legislature which enacted it. Bainter v. Appel, 124 Neb. 40, 245 N.W. 16 (1932).

Following clause of act ''this act shall take effect on and after its passage and approval'' does not express an emergency. State v. Pacific Express Co., 80 Neb. 823, 115 N.W. 619 (1908).

Act containing no emergency clause does not become operative until after three calendar months from adjournment of Legislature. State ex rel. City Water Co. v. City of Kearney, 49 Neb. 325, 68 N.W. 533 (1896).

2. With emergency clause

An act adopted with an emergency clause by vote of two-thirds of all members elected to the Legislature and vetoed by the Governor becomes effective when passed over the veto by vote of three-fifths of the members elected. Sandberg v. State, 188 Neb. 335, 196 N.W.2d 501 (1972).

An act of the Legislature stating an emergency, without stating the nature thereof, is sufficient. Read v. City of Scottsbluff, 179 Neb. 410, 138 N.W.2d 471 (1965).

When a statute passes with an emergency clause in computing the time it takes effect, the day of its passage is excluded, and it goes into effect the next day. Wilson & Company, Inc. v. Otoe County et al., 140 Neb. 518, 300 N.W. 415 (1941).

Where two acts are companion laws and must be construed together, the fact that one has an emergency clause does not operate to put companion law into effect prior to date set by Constitution. Lincoln Tel. & Tel. Co. v. Albers, 126 Neb. 329, 253 N.W. 429 (1934).

3. Miscellaneous

Right of referendum extends to emergency acts of Legislature. Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966).

Interest on forbearance of money computed at the legal rate on date claim arose. Wheaton v. Aetna Life Ins. Co., 128 Neb. 583, 259 N.W. 753 (1935).

Automobile guest law does not affect a cause of action arising after Legislature adjourned but before law took effect. Roh v. Opocensky, 125 Neb. 551, 251 N.W. 102 (1933).

Act may specifically provide for separate provisions taking effect at different dates. State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N.W. 941 (1897).

Term ''calendar month'' denotes period terminating with day of succeeding month, numerically corresponding to day of its beginning, less one. McGinn v. State, 46 Neb. 427, 65 N.W. 46 (1895).

Legislative act may provide that it shall not apply until expiration of terms of incumbent officers. Hopkins v. Scott, 38 Neb. 661, 57 N.W. 391 (1894).

Sec. 28. Repealed 1934. Initiative Measure No. 330.

Sec. 29. Legislative authority in emergencies due to enemy attack upon United States.

(1). In order to insure continuity of state and local governmental operations in periods of emergency resulting from enemy attack upon the United States, or the imminent threat thereof, the Legislature shall have the power and the immediate duty, notwithstanding any other provision to the contrary in this Constitution, to provide by law for:

(a) The prompt and temporary succession to the powers and duties of all public offices, of whatever nature and whether filled by election or appointment, the incumbents of which, after an attack, may be or become unavailable or unable to carry on the powers and duties of such offices;

(b) The convening of the Legislature into general or extraordinary session, upon or without call by the Governor, during or after a war or enemy caused disaster occurring in the United States; and, with respect to any such emergency session, the suspension or temporary change of the provisions of this Constitution or of general law relating to the length and purposes of any legislative session or prescribing the specific proportion or number of legislators whose presence or vote is necessary to constitute a quorum or to accomplish any legislative act or function;

(c) The selection and changing from time to time of a temporary state seat of government, of temporary county seats, and of temporary seats of government for other political subdivisions; to be used if made necessary by enemy attack or imminent threat thereof;

(d) The determination, selection, reproduction, preservation, and dispersal of public records necessary to the continuity of governmental operations in the event of enemy attack or imminent threat thereof; and

(e) Such other measures and procedures as may be necessary and proper for insuring the continuity of governmental operations in the event of enemy attack or imminent threat thereof.

(2). In the exercise of the powers hereinbefore conferred, the Legislature shall in all respects conform to the requirements of this Constitution except to the extent that, in the judgment of the Legislature, so to do would be impracticable or would admit of undue delay.

Source: Neb. Const. art. III, sec. 29 (1960); Adopted 1960, Laws 1959, c. 234, sec. 1, p. 815.

Sec. 30. Legislature to pass necessary laws.

The Legislature shall pass all laws necessary to carry into effect the provisions of this constitution.

Source: Neb. Const. art. XVI, sec. 20 (1875); Transferred by Constitutional Convention, 1919-1920, art. XVII, sec. 6; Neb. Const. art. XVII, sec. 6 (1997); Amended 1998, Laws 1997, LR 17CA, sec. 2.

Legislative power governing the rights and duties of persons is conferred entirely on the elected legislative body. Terry Carpenter, Inc. v. Nebraska Liquor Control Commission, 175 Neb. 26, 120 N.W.2d 374 (1963).

Legislature must provide standards for distribution of school funds. School Dist. No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955).

ARTICLE IV
EXECUTIVE

Section
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Section

Sec. 1. Executive departments; officers; when elected; terms; eligibility; books to be kept at seat of government; residence of officers; heads of departments; appointments.

The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law establish.

The Governor, Lieutenant Governor, Attorney General, Secretary of State, Auditor of Public Accounts, and State Treasurer shall be chosen at the general election held in November 1974, and in each alternate even-numbered year thereafter, for a term of four years and until their successors shall be elected and qualified.

Each candidate for Governor shall select a person to be the candidate for Lieutenant Governor on the general election ballot. In the general election one vote shall be cast jointly for the candidates for Governor and Lieutenant Governor. The Governor shall be ineligible to the office of Governor for four years next after the expiration of two consecutive terms for which he or she was elected.

The records, books, and papers of all executive officers shall be kept at the seat of government. Executive officers shall reside within the State of Nebraska during their respective terms of office. Officers in the executive department of the state shall perform such duties as may be provided by law.

The heads of all executive departments established by law, other than those to be elected as provided herein, shall be appointed by the Governor, with the consent of a majority of all members elected to the Legislature, but officers so appointed may be removed by the Governor. Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments.

Source: Neb. Const. art. V, sec. 1 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 1; Amended 1936, Laws 1935, c. 188, sec. 1, p. 694; Amended 1952, Laws 1951, c. 164, sec. 2(2), p. 645; Amended 1958, Laws 1957, c. 213, sec. 1, p. 748; Amended 1962, Laws 1961, c. 249, sec. 1, p. 736; Amended 1964, Laws 1963, c. 296, sec. 1, p. 883; Amended 1966, Laws 1965, c. 300, sec. 1, p. 846; Amended 1970, Laws 1969, c. 417, sec. 1, p. 1428; Amended 1998, Laws 1997, LR 8CA, sec. 1; Amended 2000, Laws 1999, LR 14CA, sec. 1.

1. Term of office
2. Nature of office or department

3. Miscellaneous

1. Term of office

Period for which an executive officer holds over is part of the term for which he was elected. State ex rel. Gordon v. Moores, 61 Neb. 9, 84 N.W. 399 (1900).

''Until his successor is elected and qualified'' imposes the duty upon incumbent Governor to hold over until his successor is elected and qualified. State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892).

2. Nature of office or department

The officers referred to in this section are the executive officers of the state. Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967).

Heads of all executive departments are required to be appointed by the Governor. State ex rel. Beck v. Obbink, 172 Neb. 242, 109 N.W.2d 288 (1961).

Attorney General is an executive officer. State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N.W.2d 122 (1950).

Merit System Act did not create an executive department. Sommerville v. Johnson, 149 Neb. 167, 30 N.W.2d 577 (1948).

Member of Nebraska Liquor Control Commission is not the head of an executive department. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N.W.2d 1 (1946).

Department of Agriculture and Inspection is an executive department established by law. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Secretary of State is a constitutional officer. State ex rel. Brazda v. Marsh, 141 Neb. 817, 5 N.W.2d 206 (1942).

The Insurance Department is not an agency created by the Constitution but is an executive department of government created by the Legislature under constitutional authority. Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N.W. 449 (1941).

The constitutional provision creating the State Railway Commission is an independent part of the Constitution and not an amendment to the executive, legislative, or judicial articles thereof. Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N.W. 756 (1937).

Nebraska State Board of Agriculture is not a part of executive branch of government, but is a private corporation. Crete Mills v. Nebraska State Board of Agriculture, 132 Neb. 244, 271 N.W. 684 (1937).

3. Miscellaneous

The statutes which give the Court of Industrial Relations jurisdiction over public employees are not unconstitutional. American Fed. of S., C. & M. Emp. v. Department of Public Institutions, 195 Neb. 253, 237 N.W.2d 841 (1976).

The 1920 amendment to this section was deemed essential to include heads of other executive departments. Swanson v. Sorensen, 181 Neb. 312, 148 N.W.2d 197 (1967).

Legislature has no power to provide for suspension or removal of a constitutional officer where the Constitution creates the office, fixes its terms, and the grounds and manner of removal. Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1937).

Amendment abolishing office of Commissioner of Public Lands and Buildings was properly submitted and adopted. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937).

Where Department of Insurance is appointed receiver of insurance company for purpose of liquidation, it becomes, for that purpose, subject to orders of the court rather than of the Governor. State ex rel. Good v. National Old Line Life Ins. Co., 129 Neb. 473, 261 N.W. 902 (1935).

This section secures to electors the right to vote at all elections for state officers. State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N.W. 174 (1905).

State Treasurer must reside at seat of government, which is state capital. State v. Hill, 38 Neb. 698, 57 N.W. 548 (1894).

If constitutional provision, either directly or by implication, imposes duty upon officer or officers, no legislation is necessary to require the performance of such duty. State ex rel. City of Lincoln v. Babcock, 19 Neb. 230, 27 N.W. 98 (1886).

Sec. 2. Governor; Lieutenant Governor; eligibility; qualifications; appointive officers, ineligible for other office.

No person shall be eligible to the office of Governor, or Lieutenant Governor, who shall not have attained the age of thirty years, and who shall not have been for five years next preceding his election a resident and citizen of this state and a citizen of the United States. None of the appointive officers mentioned in this article shall be eligible to any other state office during the period for which they have been appointed.

Source: Neb. Const. art. V, sec. 2 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 2; Amended 1962, Laws 1961, c. 250, sec. 1, p. 738; Amended 1966, Laws 1965, c. 291, sec. 1, p. 832.

Railway commissioner did not fall within the prohibition of this section. Swanson v. Sorensen, 181 Neb. 312, 148 N.W.2d 197 (1967).

Member of Nebraska Liquor Control Commission is not precluded by this section from being appointed to the office of district judge. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N.W.2d 1 (1946).

Head of an executive department is ineligible to be a candidate for the office of Governor during term for which he was appointed. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Unlike officers designated in this section, there is no requirement that candidate for office of Secretary of State be a resident of the state, or possess the qualifications of an elector prior to elections. State ex rel. Brazda v. Marsh, 141 Neb. 817, 5 N.W.2d 206 (1942).

No presumption arises from this section that the Legislature should be without power to require that members of the State Railway Commission should possess reasonable qualifications as a condition of eligibility to office. State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N.W.2d 892 (1942).

Under former law, Lieutenant Governor, during term for which he was elected, was ineligible to office of Governor for

succeeding term. State ex rel. McKelvie v. Wait, 95 Neb. 806, 146 N.W. 1048 (1914).

Candidate for Governor was citizen of United States, although of foreign birth. Boyd v. State ex rel Thayer, 143 U.S. 135 (1892), reversing State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892).

Sec. 3. Treasurer; ineligibility.

The treasurer shall be ineligible to the office of treasurer, for two years next after the expiration of two consecutive terms for which he was elected.

Source: Neb. Const. art. V, sec. 3 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 3; Amended 1992, Initiative Measure No. 407; Amended 1994, Initiative Measure No. 408.

Note: The changes made to Article IV, section 3, of the Constitution of Nebraska by Initiative 407 in 1992 have been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 245 Neb. 907, 515 N.W.2d 788 (1994).

Note: The changes made to Article IV, section 3, of the Constitution of Nebraska by Initiative 408 in 1992 have been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Sec. 4. Election returns; canvass by Legislature; conduct of election contests.

The returns of every election for the officers of the executive department shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the Legislature, who shall immediately after the organization of the Legislature, and before proceeding to other business, open and publish the same in the presence of a majority of the members of the Legislature. The person having the highest number of votes for each of said offices shall be declared duly elected; but if two or more have an equal and the highest number of votes, the Legislature shall choose one of such persons for said office. The conduct of election contests for any of said offices shall be in such manner as may be prescribed by law.

Source: Neb. Const. art. V, sec. 4 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 4; Amended 1960, Laws 1959, c. 236, sec. 1, p. 820; Amended 1972, Laws 1971, LB 340, sec. 1.

The 1960 amendment of this section did not purport to be and is not amendatory of the limited original jurisdiction of the Supreme Court. Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967).

Canvass of returns of election for officers of executive department must be made by the Legislature. State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N.W.2d 122 (1950).

Returns of election upon constitutional amendment must be directed to Speaker and votes canvassed by Legislature. State ex rel. Oldham v. Dean, 84 Neb. 344, 121 N.W. 719 (1909).

Joint resolution in contest proceedings requires signature of presiding officer of House and Senate, also the Governor's. In re Contest Proceeding, 31 Neb. 262, 47 N.W. 923 (1891).

Speaker must open and publish returns of general election even though directed by Legislature not to do so. State ex rel. Benton v. Elder, 31 Neb. 169, 47 N.W. 710 (1891).

Sec. 5. Impeachment.

All civil officers of this state shall be liable to impeachment for any misdemeanor in office.

Source: Neb. Const. art. V, sec. 5 (1875); Transfered by Constitutional Convention, 1919-1920, art. IV, sec. 5.

An act or omission for which an officer may be impeached and removed from office must relate to the duties of the office. A misdemeanor in office may consist of a violation of some provision in the Constitution or a statute, willful neglect of duty done with a corrupt intention, or negligence so gross and disregard of duty so flagrant as to warrant an inference that it was willful and corrupt. A violation of the Code of Professional Responsibility is not, as such, an impeachable offense. State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

Holder of constitutional office may be removed only by impeachment. Fitzgerald v. Kuppinger, 163 Neb. 286, 79 N.W.2d 547 (1956).

County judge can be removed only by impeachment. Conroy v. Hallowell, 94 Neb. 794, 144 N.W. 895 (1913).

The word ''term'' does not include time for which office is held under appointment. Dodson v. Bowlby, 78 Neb. 190, 110 N.W. 698 (1907).

Misdemeanor under this section is violation of positive statute or Constitution amounting to crime, or willful neglect of duty with corrupt intent or gross negligence inferring willful or corrupt intent. State v. Hastings, 37 Neb. 96, 55 N.W. 774 (1893).

Impeachment power cannot be delegated by Legislature. State v. Leese, 37 Neb. 92, 55 N.W. 798 (1893).

Officer cannot be impeached after his term has expired. State v. Hill, 37 Neb. 80, 55 N.W. 794 (1893).

Sec. 6. Supreme executive power.

The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered.

Source: Neb. Const. art. V, sec. 6 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 6.

Legislature cannot through appropriations exercise or invade constitutional rights or powers of executive; Legislature cannot administer appropriations once made. State ex rel. Meyer v. State Board of Equalization & Assessment, 185 Neb. 490, 176 N.W.2d 920 (1970).

The supreme executive power is vested in the Governor. Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966); State ex rel. Beck v. Obbink, 172 Neb. 242, 109 N.W.2d 288 (1961).

All officers and employees of executive department who are not appointed for a definite term are removable at will of Governor. State ex rel. Beck v. Young, 154 Neb. 588, 48 N.W.2d 677 (1951).

As to the executive department, the supreme power is vested in the Governor. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Sec. 7. Message by Governor; budget; contents; budget bill; preparation; appropriations not to be in excess of budget; exception; excess subject to veto.

The Governor may, at the commencement of each session, and at the close of his term of office and whenever the Legislature may require, give by message to the Legislature information of the condition of the state, and shall recommend such measures as he shall deem expedient. At a time fixed by law, he shall present, by message, a complete itemized budget of the financial requirements of all departments, institutions and agencies of the state and a budget bill to be introduced by the Speaker of the Legislature at the request of the Governor. Said budget bill shall be prepared with such expert assistance and under such regulations as may be required by the Governor. No appropriations shall be made in excess of the recommendation contained in such budget including any amendment the Governor may make thereto unless by three-fifths vote of the Legislature, and such excess so approved shall be subject to veto by the Governor.

Source: Neb. Const. art. V, sec. 7 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 7; Amended 1964, Laws 1963, c. 302, sec. 2(2), p. 895; Amended 1972, Laws 1971, LB 301, sec. 1.

Appropriations in excess of recommendation which did not receive two-thirds vote on final passage invalid; section applies to all departments, institutions, and agencies of state in being at commencement of legislative session. State ex rel. Meyer v. State Board of Equalization & Assessment, 185 Neb. 490, 176 N.W.2d 920 (1970).

Requirement of three-fifths vote applies only to increases in amount for departments, institutions and agencies in existence at the time that Governor is required to make budget recommendations. Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N.W.2d 633 (1945).

Appropriation bill containing items in excess of budget recommendation, adopted by three-fifths vote of both houses, but without separate three-fifths vote on each such increased item was legally enacted and not subject to Governor's veto. Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).

Sec. 8. Special sessions.

The Governor may, on extraordinary occasions, convene the Legislature by proclamation, stating therein the purpose for which they are convened, and the

Legislature shall enter upon no business except that for which they were called together.

Source: Neb. Const. art. V, sec. 8 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 8.

Under this section the Governor may, during the Legislature's special session convened pursuant to a gubernatorial proclamation, submit by an appropriate amended proclamation any additional subjects for valid legislation to be enacted at such special session of the Legislature. Jaksha v. State, 222 Neb. 690, 385 N.W.2d 922 (1986).

Amendments to Liquor Control Act, made by chapter 5, Seventy-fourth Extraordinary Session of the Legislature, were unconstitutional because not within Governor's call. Arrow Club, Inc. v. Nebraska Liquor Control Commission, 177 Neb. 686, 131 N.W.2d 134 (1964).

Governor's call of special session of the Legislature was sufficient. State Securities Co. v. Ley, 177 Neb. 251, 128 N.W.2d 766 (1964).

Amendments made to election laws at the 1944 extraordinary session of the Legislature were within the scope of the proclamation of the Governor calling the session. State ex rel. Baldwin v. Strain, 152 Neb. 763, 42 N.W.2d 796 (1950).

Special session can transact no business except that included in objects of proclamation, calling the session. Statement in proclamation asking for revision or amendment of general incorporation law will include in its scope the regulation, control and government of railroad companies. Chicago, B. & Q. R. R. Co. v. Wolfe, 61 Neb. 502, 86 N.W. 441 (1901).

Proclamation calling special session may be revoked by Governor. People ex rel. Tennant v. Parker, 3 Neb. 409 (1873).

Sec. 9. Repealed 1934. Initiative Measure No. 330.

Sec. 10. Governor to appoint officers; removal.

The Governor shall appoint with the approval of a majority of the Legislature, all persons whose offices are established by the Constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such person shall be appointed or elected by the Legislature. The Governor shall have power to remove, for cause and after a public hearing, any person whom he may appoint for a term except officers provided for in Article V of the Constitution, and he may declare his office vacant, and fill the same as herein provided as in other cases of vacancy. The Governor shall have power to remove any other person whom he appoints at any time and for any reason.

Source: Neb. Const. art. V, sec. 10 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 10; Amended 1972, Laws 1972, LB 302, sec. 1.

1. Power of appointment
2. Power of removal
3. Procedure
4. Miscellaneous

1. Power of appointment

Designation by Legislature of University of Nebraska officers as members of Natural Resources Commission was a legislative appointment in violation of Constitution; but designation of Director of Water Resources was valid as simply adding to the duties of a state officer. Neeman v. Nebraska Nat. Resources Commission, 191 Neb. 672, 217 N.W.2d 166 (1974).

Power of appointment and removal of officers is in the Governor except as limited by this section. Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966)

Governor has power to appoint heads of executive departments. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Legislature after it has created an office cannot itself fill it. State ex rel. Hensley v. Plasters, 74 Neb. 652, 105 N.W. 1092 (1905).

Constitution prohibits appointment or election of officers by Legislature. State ex rel. Horne v. Holcomb, 46 Neb. 88, 64 N.W. 437 (1895).

2. Power of removal

The Governor is empowered to remove any officer appointed by him for incompetency, neglect of duty, or malfeasance in office. State ex rel. Beck v. Obbink, 172 Neb. 242, 109 N.W.2d 288 (1961).

Power to remove member of Liquor Control Commission is derived from this section. State ex rel. Beck v. Young, 154 Neb. 588, 48 N.W.2d 677 (1951).

In addition to the power of appointment, the Governor has the power of removal in case of incompetency, neglect of duty, or malfeasance in office. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Lieutenant Governor cannot, during mere temporary absence of Governor from the state, remove from office appointees of the Governor. Johnson v. Johnson, 141 Neb. 239, 3 N.W.2d 414 (1942).

3. Procedure

In a hearing for removal of an officer, the charge must be reasonably definite, notice of hearing must be given, and an opportunity to defend afforded. State ex rel. Meyer v. Sorrell, 174 Neb. 340, 117 N.W.2d 872 (1962).

Three steps are contemplated, namely: Nomination, confirmation, and appointment. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

4. Miscellaneous

This section does not apply to county treasurer whom the Legislature designates as ex officio city treasurer. Cathers v. Hennings, 76 Neb. 295, 107 N.W. 586 (1906).

This section applies only to officers mentioned in Constitution. It has no application to municipal officers. State ex rel. Hastings v. Smith, 35 Neb. 13, 52 N.W. 700 (1892).

This section does not apply to police commissioner of municipality as created by Legislature. State ex rel. Hastings v. Smith, 35 Neb. 13, 52 N.W. 700 (1892).

Sec. 11. Elected state officer; vacation of office; Governor fill by appointment; term.

If any elected state office created by this Constitution, except offices provided for in Article V of this Constitution, shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment, and the appointee shall hold the office until his successor shall be elected and qualified in such manner as may be provided by law.

Source: Neb. Const. art. V, sec. 11 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 11; Amended 1962, Laws 1961, c. 252, sec. 2(1), p. 741; Amended 1972, Laws 1972, LB 302, sec. 1; Amended 1980, Laws 1979, LR 5, sec. 1.

Sec. 12. Nonelective state officers; vacation; Governor; fill the office by appointment; approval by Legislature.

If any nonelective state office, except offices provided for in Article V of this Constitution, shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill that office by appointment. If the Legislature is in session, such appointment shall be subject to the approval of a majority of the members of the Legislature. If the Legislature is not in session, the Governor shall make a temporary appointment until the next session of the Legislature, at which time a majority of the members of the Legislature shall have the right to approve or disapprove the appointment. All appointees shall hold their office until their successors shall be appointed and qualified. No person after being rejected by the Legislature shall be again nominated for the same office at the same session, unless at request of the Legislature, or be appointed to the same office during the recess or adjournment of the Legislature.

Source: Neb. Const. art. V, sec. 12 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 12; Amended 1972, Laws 1972, LB 302, sec. 1.

Judges appointed under the merit plan do not hold temporary appointments. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

During recess of Legislature, appointment to fill vacancy in nonelective office is temporary. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

Sec. 13. Board of parole; members; powers; reprieves; proceedings; power to pardon; limitations.

The Legislature shall provide by law for the establishment of a Board of Parole and the qualifications of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment. The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment. The Board of

Parole may advise the Governor, Attorney General and Secretary of State on the merits of any application for remission, respite, reprieve, pardon or commutation but such advice shall not be binding on them. The Governor shall have power to suspend the execution of the sentence imposed for treason until the case can be reported to the Legislature at its next session, when the Legislature shall either grant a pardon, or commute the sentence or direct the execution, or grant a further reprieve.

Source: Neb. Const. art. V, sec. 13 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 13; Amended 1968, Laws 1967, c. 319, sec. 1, p. 852.

This provision clearly entrusts the power of commutation to the Board of Pardons. State v. Bainbridge, 249 Neb. 260, 543 N.W.2d 154 (1996).

Sentencing judge's announcement he considered possible effect of statutes permitting prison authorities to ameliorate sentences did not violate constitutional due process, and sentences were not excessive. State v. Houston, 196 Neb. 724, 246 N.W.2d 63 (1976).

This section governs paroles after conviction and sentence and Post Conviction Act not available for that purpose. State v. Carpenter, 186 Neb. 605, 185 N.W.2d 663 (1971).

Limitation on power of Governor to reprieve did not prevent granting of successive reprieves which in aggregate might exceed thirty days. Simmons v. Fenton, 113 Neb. 768, 205 N.W. 296 (1925).

The word ''offenses'' is equivalent to ''crimes.'' Governor cannot pardon until after conviction by a court. Champion v. Gillan, 79 Neb. 364, 112 N.W. 585 (1907).

Pardon is free gift from supreme authority confided to chief magistrate. Act authorizing justice of the peace to remit penalty for misdemeanor is not granting pardoning power. Pleuler v. State, 11 Neb. 547, 10 N.W. 481 (1881).

Sec. 14. Governor to be commander-in-chief of militia.

The Governor shall be commander-in-chief of the military and naval forces of the state (except when they shall be called into the service of the United States) and may call out the same to execute the laws, suppress insurrection, and repel invasion.

Source: Neb. Const. art. V, sec. 14 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 14.

Member of national guard upon enlistment became subject to the provisions of this section. Lind v. Nebraska National Guard, 144 Neb. 122, 12 N.W.2d 652 (1944).

Sec. 15. Bills to be presented to Governor; approval; procedure; disapproval or reduction of items of appropriation; passage despite disapproval or reduction.

Every bill passed by the Legislature, before it becomes a law, shall be presented to the Governor. If he approves he shall sign it, and thereupon it shall become a law, but if he does not approve or reduces any item or items of appropriations, he shall return it with his objections to the Legislature, which shall enter the objections at large upon its journal, and proceed to reconsider the bill with the objections as a whole, or proceed to reconsider individually the item or items disapproved or reduced. If then three-fifths of the members elected agree to pass the bill with objections it shall become a law, or if three-fifths of the members elected agree to repass any item or items disapproved or reduced, the bill with such repassage shall become a law. In all cases the vote shall be determined by yeas and nays, to be entered upon the journal. Any bill which shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it; unless the Legislature by their adjournment prevent its return; in which case it shall be filed, with his objections, in the office of the Secretary of State within five days after such adjournment, or

become a law. The Governor may disapprove or reduce any item or items of appropriation contained in bills passed by the Legislature, and the item or items so disapproved shall be stricken therefrom, and the items reduced shall remain as reduced unless the Legislature has reconsidered the item or items disapproved or reduced and has repassed any such item or items over the objection of the Governor by a three-fifths approval of the members elected.

Source: Neb. Const. art. V, sec. 15 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 15; Amended 1972, Laws 1971, LB 301, sec. 1; Amended 1974, Laws 1974, LB 1034, sec. 1; Amended 1976, Laws 1975, LB 17, sec. 1.

It is not the publication by the Revisor of Statutes which creates a law. It is adoption by the Legislature and the Governor's signature which cause a law to be enacted. State ex rel. Wright v. Pepperl, 221 Neb. 664, 380 N.W.2d 259 (1986).

This section does not give the Governor power to return a bill to the Legislature as a ''clerical function''. Where Governor returns a legislative bill to the Legislature with his objections, action constitutes a veto, regardless of reasons stated in the accompanying message. Center Bank v. Dept. of Banking & Finance, 210 Neb. 227, 313 N.W.2d 661 (1981).

A legislative bill, passed with an emergency clause, vetoed by the Governor, is within the ambit of this section and requires only a three-fifths vote to override the veto. Sandberg v. State, 188 Neb. 335, 196 N.W.2d 501 (1972).

Governor's veto of items of appropriation bill in excess of budget recommendation was invalid, where bill, as a whole, was adopted by three-fifths vote of both houses. Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).

Governor, as respects approval or veto of bills, acts as part of lawmaking power. State ex rel. Crocker v. Junkin, 79 Neb. 532, 113 N.W. 256 (1907).

Governor is part of lawmaking power and his duty with relation to bills is a legislative duty enjoined upon him by Constitution. Weis v. Ashley, 59 Neb. 494, 81 N.W. 318 (1899).

This section requires Governor to either approve or veto, and if held by Governor for more than five days, act becomes effective. State v. Abbott, 59 Neb. 106, 80 N.W. 499 (1899); State ex rel. Main v. Crounse, 36 Neb. 835, 55 N.W. 246 (1893); Miller v. Hurford, 11 Neb. 377, 9 N.W. 477 (1881).

Joint resolution providing for contest in an election proceeding must be approved by Governor. In re Contest Proceeding, 31 Neb. 262, 47 N.W. 923 (1891).

Upon receiving resolution, valid on its face, ceding jurisdiction over Indian reservations, Secretary of Interior could rely on it without having determined under state law whether Governor's signature was necessary. United States v. Brown, 334 F.Supp. 536 (D. Neb. 1971).

Sec. 16. Order of succession to become Governor; Lieutenant Governor; duties.

In case of the conviction of the Governor on impeachment, his removal from office, his resignation or his death, the Lieutenant Governor, the Speaker of the Legislature and such other persons designated by law shall in that order be Governor for the remainder of the Governor's term.

In case of the death of the Governor-elect, the Lieutenant Governor-elect, the Speaker of the Legislature and such other persons designated by law shall become Governor in that order at the commencement of the Governor-elect's term.

If the Governor or the person in line of succession to serve as Governor is absent from the state, or suffering under an inability, the powers and duties of the office of Governor shall devolve in order of precedence until the absence or inability giving rise to the devolution of powers ceases as provided by law. After January 1, 1975, the Lieutenant Governor shall serve on all boards and commissions in lieu of the Governor whenever so designated by the Governor, shall perform such duties as may be delegated him by the Governor, and shall devote his full time to the duties of his office.

Source: Neb. Const. art. V, sec. 16 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 16; Amended 1970, Laws 1969, c. 417, sec. 1, p. 1428; Amended 1972, Laws 1972, LB 302, sec. 1.

Lieutenant Governor is not entitled to the emoluments of the Governor's office on account of mere temporary absence of the Governor from the state. Johnson v. Johnson, 141 Neb. 239, 3 N.W.2d 414 (1942).

This section does not apply to incumbent holding over on account of failure to elect successor, but refers only to persons elected and failing to qualify. State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892).

Sec. 17. Repealed 1934. Initiative Measure No. 330.

Sec. 18. Repealed 1972. Laws 1972, LB 302, sec. 1.

Sec. 19. State institutions; management, control, and government; determination by Legislature.

The general management, control and government of all state charitable, mental, reformatory, and penal institutions shall be vested as determined by the Legislature.

Source: Neb. Const. art. V, sec. 19 (1875); Amended 1912, Laws 1911, c. 225, sec. 1, p. 677; Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 19; Amended 1958, Laws 1957, c. 216, sec. 1, p. 753.

The statutes which give the Court of Industrial Relations jurisdiction over public employees are not unconstitutional. American Fed. of S., C. & M. Emp. v. Department of Public Institutions, 195 Neb. 253, 237 N.W.2d 841 (1976).

Under former law, members of the Board of Control were constituted a separate class as to salaries. State ex rel. Day v. Hall, 129 Neb. 699, 262 N.W. 850 (1935); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

Constitutional amendment purporting to exclude schools of deaf and blind from jurisdiction of Board of Control was ineffective for failure to comply with constitutional requirements. State ex rel. Hall v. Cline, 118 Neb. 150, 224 N.W. 6 (1929).

Sec. 20. Public Service Commission; membership; terms; powers.

There shall be a Public Service Commission, consisting of not less than three nor more than seven members, as the Legislature shall prescribe, whose term of office shall be six years, and whose compensation shall be fixed by the Legislature. Commissioners shall be elected by districts of substantially equal population as the Legislature shall provide. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

Source: Neb. Const. (1906); Adopted 1906, Laws 1905, c. 233, sec. 2, p. 791; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 20; Amended 1962, Laws 1961, c. 251, sec. 1, p. 740; Amended 1972, Laws 1972, LB 347, sec. 1.

1. Jurisdiction and powers
2. Regulation of rates and service
3. Miscellaneous

1. Jurisdiction and powers

The powers enumerated in this provision apply only to common carriers. Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist., 256 Neb. 479, 590 N.W.2d 840 (1999).

A legislative act or statute may constitutionally divest the Public Service Commission of jurisdiction over common carriers to the extent that the Legislature, through specific legislation, has preempted the Public Service Commission in control of common carriers. State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 445 N.W.2d 284 (1989).

Although the Public Service Commission is an independent regulatory body under the Nebraska Constitution, Public Service Commission jurisdiction to regulate common carriers may be restricted by the Legislature through ''specific legislation.'' State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 445 N.W.2d 284 (1989).

The Legislature cannot constitutionally divest the Public Service Commission of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers. State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 445 N.W.2d 284 (1989).

While the Legislature may constitutionally occupy a regulatory field, thereby specifically and preemptively excluding the Public Service Commission from some control over a class of common carriers, the Legislature cannot absolutely and totally abandon or abolish constitutionally conferred regulatory control over common carriers. State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 445 N.W.2d 284 (1989).

The powers of the Public Service Commission are plenary and self-executing and past unauthorized services may be considered

by the commission if not prohibited by statute. Groenewold v. Building Movers, Inc., 197 Neb. 187, 247 N.W.2d 629 (1976).

The Public Service Commission has exclusive power and jurisdiction to inquire into complaints concerning telephone rates and where service is woefully inadequate, may require rebates. Myers v. Blair Tel. Co., 194 Neb. 55, 230 N.W.2d 190 (1975).

The powers of the Nebraska Public Service Commission to regulate common carriers hereunder are plenary and self-executing, but where the Legislature enacts specific legislation implementing this section, it is controlling. Dahlsten v. Harris, 191 Neb. 714, 217 N.W.2d 813 (1974).

The Nebraska Public Service Commission is without jurisdiction or authority to fix rates and charges for motor vehicle carriers transporting livestock in intrastate commerce. Livestock Carriers Div. of M.C. Assn. v. Midwest Packers Traf. Assn., 191 Neb. 1, 213 N.W.2d 443 (1973).

Because of plaintiffs' lack of standing, issue of constitutionality is not reached but, in any event, the Metropolitan Transit Authority Act does not prohibit regulation and control by Public Service Commission. Ritums v. Howell, 190 Neb. 503, 209 N.W.2d 160 (1973).

Railway Commission's plenary power to regulate common carriers hereunder extends to new and improved devices, equipment, and methods in telephone service. Radio-Fone, Inc. v. A.T.S. Mobile Telephone, Inc., 187 Neb. 637, 193 N.W.2d 442 (1972).

Railway Commission's powers of enforcement are not limited to injunction authorized by statute in absence of specific legislation to that effect. Nebraska State Railway Commission v. Chicago & N.W. Ry. Co., 187 Neb. 369, 191 N.W.2d 438 (1971).

The fact that the State Railway Commission has certain legislative and judicial powers does not prevent it from being in a broad sense an administrative agency. Yellow Cab Co. v. Nebraska State Railway Commission, 175 Neb. 150, 120 N.W.2d 922 (1963).

Telephone companies are subject to regulation by the State Railway Commission. Block v. Lincoln Tel. & Tel. Co., 170 Neb. 531, 103 N.W.2d 312 (1960).

State Railway Commission has authority to reconsider an order denying a certificate of public convenience and necessity. Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N.W.2d 265 (1959).

Pipe line carriers are subject to regulation by State Railway Commission but are not required to obtain certificate of public convenience and necessity under Motor Carrier Act. Toronto Pipe Line Co. v. Camerland Pipelines Co., Inc., 167 Neb. 201, 92 N.W.2d 554 (1958).

Specific legislation controls over general powers of commission. Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N.W.2d 496 (1953).

Motor Carrier Act was specific legislation limiting plenary power of commission. In re Application of Richling, 154 Neb. 108, 47 N.W.2d 413 (1951).

Transfer of jurisdiction over common carriers by air from State Railway Commission to Department of Aeronautics was unconstitutional. State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N.W.2d 502 (1949).

Legislature may properly enact specific legislation limiting the scope of the commission's powers. Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N.W.2d 363 (1948).

State Railway Commission has original jurisdiction to grant or deny certificate of convenience and necessity to common carrier. In re Application of Effenberger, 150 Neb. 13, 33 N.W.2d 296 (1948).

Legislative act may deprive the Nebraska State Railway Commission of any power to act to extent that it occupies the field. State v. Chicago & N.W. Ry. Co., 147 Neb. 970, 25 N.W.2d 824 (1947).

The State Railway Commission is a constitutionally created body, as distinguished from an executive department or commission created by the Legislature. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N.W.2d 1 (1946).

Nebraska State Railway Commission is a constitutionally created body endowed with powers and duties. In re Application of Hergott, 145 Neb. 100, 15 N.W.2d 418 (1944).

State Railway Commission has power to determine properly presented issues on application of railroad company to discontinue passenger trains on branch line, and, on appeal to Supreme Court, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. In re Application of Chicago, B. & Q. R. R. Co., 138 Neb. 767, 295 N.W. 389 (1940).

Railway Commission has sole power to grant, deny, amend, transfer or revoke certificate of convenience and necessity for the operation of a bus line. Marconnit v. Effenberger, 135 Neb. 564, 283 N.W. 226 (1939); Effenberger v. Marconnit, 135 Neb. 558, 283 N.W. 223 (1939).

Legislature may delegate power to Railway Commission to regulate contract carriers where public may not continue to have safe and dependable transportation system unless contract carriers are brought under just and reasonable regulations bringing their service into relation with common carriers. Rodgers v. Nebraska State Railway Commission, 134 Neb. 832, 279 N.W. 800 (1938).

State Railway Commission is without power to prevent railroad company from leasing portions of its private right-of-way to certain persons for private lumber yards and deny same privilege to others where demised premises are not railroad transportation facilities devoted or necessary to public use. Johnson v. Union Pac. R. R. Co., 133 Neb. 243, 274 N.W. 581 (1937).

State Railway Commission has power to make award of damages against railroad company for exacting over charge from shipper. Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 129 Neb. 726, 262 N.W. 852 (1935).

In reviewing orders of Railway Commission which require exercise of legislative authority, the courts can only determine the limitation of power and reasonableness of the regulation. Central Bridge & Construction Co. v. Chicago & N. W. Ry. Co., 128 Neb. 779, 260 N.W. 172 (1935).

Taxicab companies are common carriers and under jurisdiction of Railway Commission in absence of specific legislation. In re Yellow Cab & Baggage Co., 126 Neb. 138, 253 N.W. 80 (1934).

Railway Commission has jurisdiction over street railways in cities. Omaha & C. B. St. Ry. Co. v. City of Omaha, 125 Neb. 825, 252 N.W. 407 (1934).

Resolution of commission requiring motor carrier to deposit liability insurance or other security is not in excess of powers. Petersen v. Beal, 121 Neb. 348, 237 N.W. 146 (1931).

Power to regulate and control telephone companies is subject to general constitutional limitations, but includes power to order connection of systems. Blackledge v. Farmers' Ind. Tel. Co. of Red Cloud, 105 Neb. 713, 181 N.W. 709 (1921).

Railway Commission has jurisdiction over irrigation companies and may inquire into, regulate and fix water rates. McCook Irrigation & Water Power Co. v. Burtless, 98 Neb. 141, 152 N.W. 334 (1915).

When parties fail to agree, Railway Commission may prescribe terms and conditions of connection, use of lines, and apportionment of expense. Hooper Tel. Co. v. Nebraska Tel. Co., 96 Neb. 245, 147 N.W. 674 (1914).

Power to regulate includes street railway companies. Herpolsheimer Co. v. Lincoln Traction Co., 96 Neb. 154, 147 N.W. 206 (1914), 147 N.W. 1114 (1914), rehearing denied, 97 Neb. 113, 149 N.W. 326 (1914).

Power extends over all railroads and within municipalities. Chicago, R. I. & P. Ry. Co. v. Nebraska State Railway Commission, 89 Neb. 853, 132 N.W. 409 (1911).

2. Regulation of rates and service

The Nebraska Public Service Commission is without jurisdiction or authority to fix rates and charges for motor vehicle carriers transporting livestock in intrastate commerce. Livestock Carriers Div. of M.C. Assn. v. Midwest Packers Traf. Assn., 191 Neb. 1, 213 N.W.2d 443 (1973).

There being no specific legislation to the contrary, this provision is sufficiently broad to authorize the State Railway Commission to fix joint line rates. Howard McLean Co. v. Chicago, B. & Q. R.R. Co., 187 Neb. 30, 187 N.W.2d 300 (1971).

State Railway Commission is clothed with power to hold hearings and establish rates for common carriers in intrastate commerce. Erickson v. Metropolitan Utilities Dist., 171 Neb. 654, 107 N.W.2d 324 (1961).

State Railway Commission has power to regulate rates of telephone companies. City of Scottsbluff v. United Telephone Co. of the West, 171 Neb. 229, 106 N.W.2d 12 (1960).

State Railway Commission has jurisdiction over regulation of rates and service of motor carriers. Strasheim v. Martin, 169 Neb. 787, 101 N.W.2d 161 (1960).

Powers of State Railway Commission do not include regulation of rates of private carriers. City of Bayard v. North Central Gas Co., 164 Neb. 819, 83 N.W.2d 861 (1957).

State Railway Commission had power to consider and determine the issues with respect to discontinuance of motor passenger train service on branch line of railroad. In re Application of Chicago, Burlington & Quincy R. R. Co., 152 Neb. 367, 41 N.W.2d 165 (1950); In re Application of Chicago, Burlington & Quincy R. R. Co., 152 Neb. 352, 41 N.W.2d 157 (1950).

State Railway Commission has power to make rules and regulations for administration of Motor Carrier Act. In re Application of Neylon, 151 Neb. 587, 38 N.W.2d 552 (1949).

Legislature has right to prescribe how commission shall proceed and what authority it may exercise in regulating common carriers. Chicago & N. W. Ry. Co. v. County Board of Dodge County, 148 Neb. 648, 28 N.W.2d 396 (1947).

The grant or refusal of a certificate of convenience and necessity to a motor carrier is within the constitutional authority of the State Railway Commission. Moritz v. State Railway Commission, 147 Neb. 400, 23 N.W.2d 545 (1946).

State Railway Commission may make different intrastate freight rates from the initial shipping point to different places in the same switching district at the station to which shipments are consigned, where difference in conditions so warrants. Shields Co. v. Chicago, B. & Q. R. R. Co., 133 Neb. 722, 276 N.W. 925 (1938).

State Railway Commission has plenary jurisdiction over the rates, service and regulation of common carriers. Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N.W. 756 (1937).

Telephone companies are subject to Railway Commission's reasonable orders on due hearings as to rates and time and manner of service. Farmers & Merchants Tel. Co. of Alma v. Orleans Community Club, 116 Neb. 633, 218 N.W. 583 (1928).

Railway Commission, in absence of specific legislation limiting power, has under this section all power in regulation of rates and service, and general control, that the people themselves could exercise. Omaha & C. B. St. Ry. Co. v. Nebraska State Ry. Com., 103 Neb. 695, 173 N.W. 690 (1919); In re Lincoln Traction Co., 103 Neb. 229, 171 N.W. 192 (1919)

When question is whether community or locality is properly served, not only question of rates are involved, but other questions and conditions peculiarly within province of Railway Commission. Rivett Lumber & Coal Co. of Benson v. Chicago & N. W. Ry. Co., 102 Neb. 492, 167 N.W. 570 (1918).

Railway Commission has power to regulate rates and service within municipalities, and municipality is not empowered to contract with telephone company so as to deprive commission of right to regulate. Marquis v. Polk County Tel. Co., 100 Neb. 140, 158 N.W. 927 (1916).

Railway Commission can fix rates only in absence of specific legislation. State ex rel. Missouri P. R. Co. v. Clarke, 98 Neb. 566, 153 N.W. 623 (1915).

State Railway Commission had jurisdiction to regulate intrastate business use and charges therefor of team tracks on railroad's belt line in city of Omaha. Missouri Pac. R. R. Corp. v. Nebraska State Ry. Commission, 65 F.2d 557 (8th Cir. 1933).

Rates are within rule-making power of State Railway Commission. Mogis v. Lyman-Richey Sand & Gravel Corp., 90 F.Supp. 251 (D. Neb. 1950).

3. Miscellaneous

Railway commissioner was eligible for office of State Treasurer. Swanson v. Sorensen, 181 Neb. 312, 148 N.W.2d 197 (1967).

Where the Legislature enacts specific legislation implementing this section, such legislation is controlling. Sherdon v. American Communication Co., 178 Neb. 454, 134 N.W.2d 42 (1965).

Public power districts are not common carriers. Consumers P. P. Dist. v. Twin Valleys P. P. Dist., 172 Neb. 315, 109 N.W.2d 372 (1961).

State Railway Commission is subject to and governed by specific legislation. Neuswanger v. Houk, 170 Neb. 670, 104 N.W.2d 235 (1960).

Legislature has, by specific legislation, regulated common carriers by motor vehicle. R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N.W.2d 177 (1957).

While this section does not contain provisions pertaining to eligibility, the Legislature may make reasonable restrictions upon eligibility to hold office of member of State Railway Commission. State ex rel. Quinn v. Marsh, 141 Neb. 436, 3 N.W.2d 892 (1942).

One not admitted to the bar is not authorized to engage in the practice of the law before the Nebraska State Railway Commission. State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941).

Members of Railway Commission are constituted a separate class in fixing salary. State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

A State Railway Commissioner is not required to give an official bond. State ex rel. Shields v. Hall, 103 Neb. 17, 170 N.W. 173 (1918).

Sec. 21. Repealed 1972. Laws 1972, LB 302, sec. 1.

Sec. 22. Executive officials to keep accounts; reports; false reports, penalty.

The Legislature shall provide by statute for the keeping of accounts and the reporting by those agencies of the state which are required to administer cash funds not subject to appropriation by the Legislature, and an annual report thereof shall be made to the Governor under oath; and any officer who makes a false report shall be guilty of perjury and punished accordingly.

Source: Neb. Const. art. V, sec. 21 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 22; Amended 1964, Laws 1963, c. 302, sec. 2(2), p. 895.

This section applies to all officers of public institutions. Moore v. State, 53 Neb. 831, 74 N.W. 319 (1898).

Sec. 23. Executive officials and heads of institutions; reports to Legislature; information from expending agencies.

All expending agencies of the state as the Legislature may provide shall at least ten days preceding each regular session of the Legislature severally report to the Governor, who shall transmit such reports to the Legislature, together with the reports of the Judges of the Supreme Court of defects in the constitution and laws, and the Governor or the Legislature may at any time require information, in writing, under oath, from the officers of all expending agencies, upon any subject relating to the condition, management and expenses of their respective offices.

Source: Neb. Const. art. V, sec. 22 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 23; Amended 1964, Laws 1963, c. 302, sec. 2(2), p. 895.

Amendment to Habitual Criminal Act was enacted as result of report of Judges to Legislature of defects in the Constitution and laws. Haffke v. State, 149 Neb. 83, 30 N.W.2d 462 (1948).

Sec. 24. Great seal.

There shall be a seal of the state, which shall be called the ''Great Seal of the State of Nebraska,'' which shall be kept by the Secretary of State and used by him officially as directed by law.

Source: Neb. Const. art. V, sec. 23 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 24.

Sec. 25. Salaries of officials; fees.

The officers provided for in this article shall receive such salaries as may be provided by law. Such officers, or such other officers as may be provided for by law, shall not receive for their own use any fees, costs, or interest upon public money in their hands. All fees that may hereafter be payable by law for services performed, or received by an officer provided for in this article, by virtue of his office shall be paid forthwith into the state treasury.

Source: Neb. Const. art. V, sec. 24 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 25; Amended 1956, Laws 1955, c. 193, sec. 1, p. 555.

Under former law, salary of executive officer could not be changed more than once in eight years. State ex rel. Laughlin v. Johnson, 156 Neb. 671, 57 N.W.2d 531 (1953).

County officer is required to perform the duties of his office for the compensation allowed him by statute. Hoctor v. State, 141 Neb. 329, 3 N.W.2d 558 (1942).

During temporary absence of Governor from state, Lieutenant Governor is entitled only to salary fixed by law for the office of Lieutenant Governor and not for office of Governor. Johnson v. Johnson, 141 Neb. 239, 3 N.W.2d 414 (1942).

Salary of State Railway Commissioner is subject to garnishment under statute in force at time he was candidate and elected to office. Department of Banking v. Foe, 136 Neb. 422, 286 N.W. 264 (1939).

Nebraska State Board of Agriculture was not a public agency so as to require funds to be paid into state treasury. Crete Mills v. Nebraska State Board of Agriculture, 132 Neb. 244, 271 N.W. 684 (1937).

Act providing for refunding of excess grain inspection fees is not in conflict herewith. Bollen v. Price, 129 Neb. 342, 261 N.W. 689 (1935).

Occupancy by Governor of mansion provided by state is not a perquisite of office or other compensation. State v. Sheldon, 78 Neb. 552, 111 N.W. 372 (1907).

Constitution modified all previous statutes so as to require all fees to be paid in advance into the treasury. State v. Home Insurance Co., 59 Neb. 524, 81 N.W. 443 (1900); State v. Moore, 56 Neb. 82, 76 N.W. 474 (1898); Moore v. State, 53 Neb. 831, 74 N.W. 319 (1898).

Sec. 26. Officials to give bonds.

All officers of government shall give bond as may be prescribed by law.

Source: Neb. Const. art. V, sec. 25 (1875); Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 26; Amended 1964, Laws 1963, c. 302, sec. 2(2), p. 895.

Bond required of public officers by Constitution may be defined as a contractual obligation that such officer will faithfully discharge the duties of his office. Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1936).

Sec. 27. Executive offices; creation of.

No executive state office other than herein provided shall be created except by a two-thirds majority of all members elected to the Legislature.

Source: Neb. Const. art. V, sec. 26 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 13; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 27; Amended 1972, Laws 1971, LB 341, sec. 1.

Merit System Act did not create an executive state office. Sommerville v. Johnson, 149 Neb. 167, 30 N.W.2d 577 (1948).

Member of Nebraska Liquor Control Commission is not the head of an executive department. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N.W.2d 1 (1946).

Subject to the limitations of this section, the Legislature has power to create new executive state departments and executive state officers as heads thereof. State ex rel. Howard v. Marsh, 146 Neb. 750, 21 N.W.2d 503 (1946).

Department of Industrial Development was an executive office which required two-thirds vote to create. Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N.W.2d 633 (1945).

Power to create or continue an office is vested in the legislative department of government, subject to constitutional restrictions. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937).

Sec. 28. Tax Equalization and Review Commission; members; powers; Tax Commissioner; powers.

By January 1, 1997, there shall be a Tax Equalization and Review Commission. The members of the commission shall be appointed by the Governor as provided by law. The commission shall have power to review and equalize assessments of property for taxation within the state and shall have such other powers and perform such other duties as the Legislature may provide. The terms of office and compensation of members of the commission shall be as provided by law.

A Tax Commissioner shall be appointed by the Governor with the approval of the Legislature. The Tax Commissioner may have jurisdiction over the administration of the revenue laws of the state and such other duties and powers as provided by law. The Tax Commissioner shall serve at the pleasure of the Governor.

Source: Neb. Const. art. V, sec. 27 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 14; Transferred by Constitutional Convention, 1919-1920, art. IV, sec. 28; Amended 1996, Laws 1995, LR 3CA, sec. 1.

Power to hold examinations of applicants for certification as county assessors and determine qualifications is granted by this section, dependent only on implementing legislative action. Shear v. County Board of Commissioners, 187 Neb. 849, 195 N.W.2d 151 (1972).

Authority and power of State Board of Equalization and Assessment noted. In re Valuation and Equalization, 182 Neb. 621, 156 N.W.2d 728 (1968).

Section is self-executing, and together with statute, constitutes Tax Commissioner an administrative agency to enforce revenue laws. State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N.W. 616 (1932).

Where Auditor of Public Accounts certified appropriation as reduced by unauthorized veto, review of action of State Board of Equalization and Assessment was not confined to writ of error. Elmen v. State Board of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).

State Supreme Court on appeal from decision of State Board of Equalization in proceedings involving valuation and assessment of railroad property for taxation acts in judicial, and not in administrative capacity. Chicago & N. W. Ry. Co. v. Bauman, 69 F.2d 171 (8th Cir. 1934).

ARTICLE V
JUDICIAL

Section

Sec. 1. Power vested in courts; Chief Justice; powers.

The judicial power of the state shall be vested in a Supreme Court, an appellate court, district courts, county courts, in and for each county, with one or more judges for each county or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law. In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice. The Chief Justice shall be the executive head of the courts and may appoint an administrative director thereof.

Source: Neb. Const. art. VI, sec. 1 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional

Convention, 1919-1920, art. V, sec. 1; Amended 1970, Laws 1969, c. 419, sec. 1, p. 1432; Amended 1990, Laws 1990, LR 8, sec. 1.

1. Establishment of courts

Act establishing Court of Industrial Relations does not violate any constitutional provision and the standards for its guidance are adequate. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

The Legislature has power to create courts inferior to the Supreme Court. Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967).

Legislature has power to abolish justice of the peace courts only as an incident to the exercise of the power to substitute other courts for the justice of the peace courts. State ex rel Woolsey v. Morgan, 138 Neb. 635, 294 N.W. 436 (1940).

Justice courts are courts created by the Constitution, and only persons licensed to practice law are entitled to practice in such courts. State ex rel. Hunter v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937).

Workmen's Compensation Court was created pursuant to this section. City of Lincoln v. Nebraska Workmen's Compensation Court, 133 Neb. 225, 274 N.W. 576 (1937).

Legislature may substitute municipal court for justice of peace court within such districts. State ex rel. Wright v. Brown, 131 Neb. 239, 267 N.W. 466 (1936).

Legislature may provide for justice of the peace districts, etc., and may substitute other courts for justice courts within such districts. State ex rel. Bunce v. Kubat, 110 Neb. 362, 193 N.W. 754 (1923).

County judge is constitutional officer, and can be removed only by impeachment. Conroy v. Hallowell, 94 Neb. 794, 144 N.W. 895 (1913).

Police magistrate is a constitutional office, and the term thereof is fixed by Constitution. State ex rel. McDermott v. Reilly, 94 Neb. 232, 142 N.W. 923 (1913), rehearing denied 94 Neb. 238, 143 N.W. 200 (1913).

Police judge is judicial constitutional officer and must be elected as such. State ex rel. Benson v. Mayor & Council of City of Hastings, 91 Neb. 304, 135 N.W. 1028 (1912); State ex rel. Gordon v. Moores, 61 Neb. 9, 84 N.W. 399 (1900); State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N.W. 941 (1897).

County courts are by this section made courts of record. Noakes v. Switzer, 12 Neb. 156, 10 N.W. 536 (1881).

Justice of the peace is a state office and the person filling that office is an officer of the state included in the term public officers under agreement with the Federal Security Administrator requiring social security contributions from state based on compensation paid to officers of the state. State v. Finch, 339 F.Supp. 528 (D. Neb. 1972).

County courts are by this section made a part of the judicial power of the state, being courts of record, with certain constitutional original jurisdiction as well as that given them by statute. City of Hattiesburg v. First National Bank of Hattiesburg, 8 F.Supp. 157 (S. D. Miss. 1934).

2. Functions of judicial department

The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. In re Application of Brown, 270 Neb. 891, 708 N.W.2d 251 (2006).

A court cannot, in enforcing directives of a superior court, deprive a party of legal or substantive rights by acting in an arbitrary or unreasonable manner which is inconsistent with or contravenes principles of general law or constitutional or statutory provisions. In re Estate of Reed, 267 Neb. 121, 672 N.W.2d 416 (2003).

The Supreme Court has administrative authority over all inferior courts. It is essential for the Supreme Court, as a part of its inherent authority, to provide inferior courts with case progression standards in order to ensure that cases are properly disposed of in a timely and efficient manner. In re Estate of Reed, 267 Neb. 121, 672 N.W.2d 416 (2003).

The Nebraska Supreme Court, and only that court, is invested with the power to admit persons to the practice of law and to fix qualifications for admission to the bar. Thus, it has the responsibility to adopt and implement systems designed to protect the public and safeguard the judicial system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies. In re Application of Majorek, 244 Neb. 595, 508 N.W.2d 275 (1993).

County courts can only acquire jurisdiction through legislative enactment. Miller v. Janecek, 210 Neb. 316, 314 N.W.2d 250 (1982).

This provision clearly grants county courts jurisdiction over actions involving speeding violations. State v. Jones, 209 Neb. 296, 307 N.W.2d 126 (1981).

Establishment of judicial department conferred authority necessary to exercise its powers as coordinate department of government. State ex rel. Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942).

Supreme Court is vested with sole power to admit persons to practice of law and fix their qualifications. State ex rel. Wright v. Hinckle, 137 Neb. 735, 291 N.W. 68 (1940).

It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Right to define and regulate the practice of law belongs to the Judicial Department of State Government. In re Integration of the Nebraska State Bar Association, 133 Neb. 283, 275 N.W. 265 (1937).

This section places judicial power in the courts. Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1936).

Supreme Court is vested with sole power to admit persons to practice of law in this state and to fix qualifications for admission to the bar. State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936).

Power conferred by special statute on Supreme Court Justice to require election commissioner to file nomination acceptance and place name on ballot is judicial, not quasi-political or administrative. State ex rel. Meissner v. McHugh, 120 Neb. 356, 233 N.W. 1 (1930).

Unless Constitution provides otherwise, Legislature may classify and regulate judicial powers and functions. State ex rel. Smyth v. Magney, 52 Neb. 508, 72 N.W. 1006 (1897).

Judicial power is the authority of some persons or tribunals to hear and determine a controversy and render judgment or decree binding parties thereto. Acknowledgment of deed is not judicial function. Horbach v. Tyrrell, 48 Neb. 514, 67 N.W. 485 (1896).

3. Judicial powers of administrative boards

Provision in Nebraska Clean Waters Commission Act regarding appointment of trustees construed so as not to violate this

section. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Party who invoked special proceeding could not question constitutionality thereof under this section. Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950).

Reclamation Act did not violate this section. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Statute providing for board of appraisers designated as ''court of condemnation,'' does not create ''court'' in contravention of Constitution although board's functions are judicial in nature. City of Mitchell v. Western Public Service Co., 124 Neb. 248, 246 N.W. 484 (1933).

Statute empowering administrative department to cancel water appropriation after hearing, where water was not put to beneficial use, was not void as giving department judicial powers. Dawson County Irr. Co. v. McMullen, 120 Neb. 245, 231 N.W. 840 (1930).

Law authorizing appointment of three district judges to act as appraisers in condemnation of gas plant by municipality does not create new court. In re Appraisement of Omaha Gas Plant, 102 Neb. 782, 169 N.W. 725 (1918).

Conferring upon boards or individuals of executive or administrative functions requiring exercise of judicial powers does not thereby confer judicial functions. Enterprise Irrigation Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171 (1912).

Giving discretionary and regulatory powers to administrative board does not make it a judicial body. State ex rel. Prout v. Northwestern Trust Co., 72 Neb. 497, 101 N.W. 14 (1904).

Administrative board was not clothed with judicial functions because it incidentally determines water rights of riparian owners. Crawford Co. v. Hathaway, 60 Neb. 754, 84 N.W. 271 (1900).

Granting to county board of duty of passing on claims against county, with right of appeal to district court, does not confer judicial power. Stenberg v. State ex rel. Keller, 48 Neb. 299, 67 N.W. 190 (1896).

Conferring power on county board to oust county officer for corruption does not of itself confer judicial powers on such board. State ex rel. Walters v. Oleson, 15 Neb. 247, 18 N.W. 45 (1893).

4. Miscellaneous

Article V, section 30(3), of the Nebraska Constitution does not limit suspension with pay to the two instances listed; suspension may be imposed in other instances pursuant to this provision. In re Complaint Against Jones, 255 Neb. 1, 581 N.W.2d 876 (1998).

Where district judges are appointed to appraise property in condemnation proceedings, the body thus created is not a court but a special tribunal. May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945).

Creation of municipal courts is provided for in Constitution, and vacancies in office of judge of municipal court must be filled in accordance with constitutional provisions. State ex rel. Hunter v. Maguire, 136 Neb. 365, 285 N.W. 921 (1939).

An affirmative statute giving a remedy not known to the common law does not take away the common law remedy. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Freedom of press does not extend to contemptuous interferences with pending litigation. State v. Lovell, 117 Neb. 710, 222 N.W. 625 (1929).

Notary public cannot impose fine or imprisonment in punishment for contempt in taking of depositions. Courtnay v. Knox, 31 Neb. 652, 48 N.W. 763 (1891).

District judge is not officer of county, but of state. Jones v. York County, 26 F.2d 623 (8th Cir. 1928).

Sec. 2. Supreme Court; number of judges; quorum; jurisdiction; retired judges, temporary duty; court divisions; assignments by Chief Justice.

The Supreme Court shall consist of seven judges, one of whom shall be the Chief Justice. A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges. The Supreme Court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, election contests involving state officers other than members of the Legislature, and such appellate jurisdiction as may be provided by law. The Legislature may provide that any judge of the Supreme Court or judge of the appellate court created pursuant to Article V, section 1, of this Constitution who has retired may be called upon for temporary duty by the Supreme Court. Whenever necessary for the prompt submission and determination of causes, the Supreme Court may appoint judges of the district court or the appellate court to act as associate judges of the Supreme Court, sufficient in number, with the judges of the Supreme Court, to constitute two divisions of the court of five judges in each division. Whenever judges of the district court or the appellate court are so acting, the court shall sit in two divisions, and four of the judges thereof shall be necessary to constitute a quorum. Judges of the district court or the appellate court so appointed shall serve during the pleasure of the court and shall have all the powers of judges of the Supreme Court. The Chief Justice shall make assignments of judges to the divisions of the court, preside over the division of which he or she is a member, and designate the presiding

judge of the other division. The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute and all appeals involving capital cases and may review any decision rendered by a division of the court. In such cases, in the event of the disability or disqualification by interest or otherwise of any of the judges of the Supreme Court, the court may appoint judges of the district court or the appellate court to sit temporarily as judges of the Supreme Court, sufficient to constitute a full court of seven judges. Judges of the district court or the appellate court shall receive no additional salary by virtue of their appointment and service as herein provided, but they shall be reimbursed their necessary traveling and hotel expenses.

Source: Neb. Const. art. VI, sec. 2 (1875); Amended 1908, Laws 1907, c. 202, sec. 1, p. 581; Amended 1920, Constitutional Convention, 1919-1920, Nos. 15 and 16; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 2; Amended 1968, Laws 1967, c. 316, sec. 1, p. 846; Amended 1970, Laws 1969, c. 420, sec. 1, p. 1434; Amended 1990, Laws 1990, LR 8, sec. 1.

1. Original jurisdiction
2. Appellate jurisdiction
3. Miscellaneous

1. Original jurisdiction

The Nebraska Constitution places original sentencing authority in the district courts and does not provide sentencing as one of the Supreme Court's powers. State v. Reeves, 258 Neb. 511, 604 N.W.2d 151 (2000).

Jurisdiction in this case accepted by the Supreme Court because the state is a party and has an interest relating to the revenue. State ex rel. Douglas v. Gradwohl, 194 Neb. 745, 235 N.W.2d 854 (1975).

Declaratory judgment action to determine question of constitutionality of state statute was properly brought in Supreme Court. State Securities Co. v. Ley, 177 Neb. 251, 128 N.W.2d 766 (1964).

Supreme Court has original jurisdiction of declaratory judgment action relating to the revenue of the state. Anderson v. Herrington, 169 Neb. 391, 99 N.W.2d 621 (1959).

Original jurisdiction existed over action relating to validity of Judges Retirement Act. Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956).

Supreme Court has original jurisdiction in quo warranto to try title to office of member of Board of Control. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

Unless unusual circumstances are present or the matter is of statewide importance, Supreme Court will not issue writ of habeas corpus in the exercise of its original jurisdiction. Williams v. Olson, 143 Neb. 115, 8 N.W.2d 830 (1943).

Original jurisdiction in quo warranto is vested in Supreme Court. State ex rel. Johnson v. Consumers Public Power Dist., 142 Neb. 114, 5 N.W.2d 202 (1942).

Original jurisdiction of Supreme Court is limited to cases specified in this section. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

State of Nebraska and executive departments thereof may seek relief in original action under Uniform Declaratory Judgments Act. State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N.W. 555 (1937).

Supreme Court may decline to take original jurisdiction to oust executive state officer where information fails to state cause of action in quo warranto. State ex rel. Good v. Conklin, 127 Neb. 417, 255 N.W. 925 (1934).

On appeal from confirmation of judicial sale to foreclose mortgage on real estate, an application for moratorium is not within original jurisdiction of Supreme Court. Wallace v. Clements, 125 Neb. 358, 250 N.W. 235 (1933).

Repeated violations of criminal statute, harmfully affecting rights of people generally, is ''public wrong'' enjoinable by Supreme Court in original suit by state as plaintiff. State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co., 118 Neb. 851, 226 N.W. 705 (1929).

Original jurisdiction includes injunction to enforce intoxicating liquor law. State v. Chicago, B. & Q. R. R. Co., 88 Neb. 669, 130 N.W. 295 (1911).

Original jurisdiction in cases in which the state is a party is not confined to those of mere pecuniary interest, but includes cases in which the state seeks to enforce public rights or restrain a public wrong. State v. Pacific Express Co., 80 Neb. 823, 115 N.W. 619 (1908).

Designation of original jurisdiction in Supreme Court is prohibition in all other cases. Parties cannot by consent confer jurisdiction on Supreme Court. Edney v. Baum, 70 Neb. 159, 97 N.W. 252 (1903).

Supreme Court has no original jurisdiction in cases criminal in nature. Applied to action for collection of penalty. State v. Missouri Pac. Ry. Co., 64 Neb. 679, 90 N.W. 877 (1902).

Where method of procedure in original jurisdiction of Supreme Court is not pointed out either by Constitution or statutes, court will adopt its own rules of procedure. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

Mandamus cannot be invoked to take place of injunction as preventive remedy only. State ex rel. Dahlman v. Piper, 50 Neb. 25, 69 N.W. 378 (1896).

Legislature cannot confer original jurisdiction of subjects not enumerated in Constitution. Applied to writ of prohibition. State ex rel. King v. Hall, 47 Neb. 579, 66 N.W. 642 (1896).

Original jurisdiction does not include actions for relief for fraud unless state is party. Coombs v. MacDonald, 43 Neb. 632, 62 N.W. 41 (1895).

Unless expressly restricted, original jurisdiction of Supreme Court is concurrent with district courts. In re Petition of Attorney General, 40 Neb. 402, 58 N.W. 945 (1894).

Supreme Court has original jurisdiction to appoint receiver of defunct bank under banking law. State v. Exchange Bank of Milligan, 34 Neb. 198, 51 N.W. 765 (1892); State v. Commercial State Bank, 28 Neb. 677, 44 N.W. 998 (1890).

Supreme Court has original jurisdiction of quo warranto to determine rights to public office. State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892).

Supreme Court has original jurisdiction in quo warranto for determining conflicting claims to public office, but cannot act in contested election claims. State ex rel. Fair v. Frazier, 28 Neb. 438, 44 N.W. 471 (1890).

Original jurisdiction of Supreme Court is limited to those cases designated by this section. Bell v. Templin, 26 Neb. 249, 41 N.W. 1093 (1889).

2. Appellate jurisdiction

The Nebraska Supreme Court, except in those cases wherein original jurisdiction is specially conferred, exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute. State v. Reeves, 258 Neb. 511, 604 N.W.2d 151 (2000).

Unless the context is shown to intend otherwise, action includes any proceeding in a court and only final orders therein are bases for appeals. Grantham v. General Telephone Co., 187 Neb. 647, 193 N.W.2d 449 (1972).

Appellate jurisdiction of the Supreme Court is limited to review of judgments and final orders. Rhodes v. Houston, 172 Neb. 177, 108 N.W.2d 807 (1961).

Supreme Court has jurisdiction on appeal to grant temporary injunction and appoint receiver. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

Except in those cases in which original jurisdiction is conferred hereby, Supreme Court exercises appellate jurisdiction only, which can be conferred only in the manner provided by statute. Larson v. Wegner, 120 Neb. 449, 233 N.W. 253 (1930).

Where cause is determined on appeal by concurrence of five judges as provided by this section, motion for rehearing will be denied, where appellant failed to file written request for hearing to full bench. Day v. Metropolitan Utilities Dist., 115 Neb. 711, 216 N.W. 556 (1927).

Act conferring jurisdiction upon Supreme Court to review decisions of the State Railway Commission confers appellate jurisdiction. Hooper Telephone Co. v. Nebraska Telephone Co., 96 Neb. 245, 147 N.W. 674 (1914).

Supreme Court has no original jurisdiction to compel accounting by corporation manager. State v. Tabitha Home, 78 Neb. 651, 111 N.W. 586 (1907).

Jurisdiction of Supreme Court limited in both original and appellate, former by Constitution, latter by statutes. Johnson v. Parrotte, 46 Neb. 51, 64 N.W. 363 (1895).

Supreme Court has no original jurisdiction to try contested elections. Miller v. Wheeler, 33 Neb. 765, 51 N.W. 137 (1892).

Supreme Court is intended as court of review of judgments of district court. Bell v. Templin, 26 Neb. 249, 41 N.W. 1093 (1889).

State Supreme Court on appeal from decision of State Board of Equalization in proceedings involving valuation and assessment of railroad property for taxation acts in judicial, and not in administrative capacity. Chicago & N. W. Ry. Co. v. Bauman, 69 F.2d 171 (8th Cir. 1934).

3. Miscellaneous

Absent a concurrent basis for jurisdiction over the subject matter of a declaratory judgment action, the Supreme Court of Nebraska does not have original jurisdiction to address declaratory judgment actions. State ex rel. Wieland v. Moore, 252 Neb. 253, 561 N.W.2d 230 (1997).

Since five judges of the court do not hold that sections 85-1,118 to 85-1,123 are unconstitutional, the sections are constitutional. State ex rel. Spire v. Beermann, 235 Neb. 384, 455 N.W.2d 749 (1990).

District judge was empowered to sit with all the powers of the Supreme Court under this provision. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

Purpose of this provision was to create an elastic system which would enable the court to clear its docket, keep it so, and ultimately allow matters to be determined by a full court of seven judges. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

The Nebraska Constitution clearly permits district court judges, retired or not, to act as associate Supreme Court judges when necessary for prompt submission and determination of causes. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

Case on appeal first heard by a division of the Supreme Court and opinion adopted was set for reargument before the full court, and by it affirmed. State v. Schrader, 196 Neb. 632, 244 N.W.2d 498 (1976).

Cited in determining constitutionality of law relating to sale of school lands. State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N.W.2d 156 (1969).

Cited in determining constitutionality of section of Juvenile Court Act. DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968).

Except in the exercise of its appellate jurisdiction, the Supreme Court is a court of limited and enumerated powers. Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967).

District judge may be designated to act as Judge of Supreme Court whenever necessary for prompt submission and determination of causes. Ruehle v. Ruehle, 161 Neb. 691, 74 N.W.2d 689 (1956).

Legislative act cannot be held unconstitutional except by concurrence of five Judges of Supreme Court. Sommerville v. Johnson, 149 Neb. 167, 30 N.W.2d 577 (1948); Mehrens v. Greenleaf, 119 Neb. 82, 227 N.W. 325 (1929).

Constitutional questions will not be decided unless necessary to a determination of the case and the protection of some substantial right. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N.W.2d 683 (1945).

Suit involving constitutional question may be decided on stipulation that absent Justice should participate on briefs. Bauer v. State Game, Forestation & Parks Commission, 138 Neb. 436, 293 N.W. 282 (1940).

Power to correct errors in their own proceedings is inherent in all courts of general jurisdiction. Gate City Co. v. Douglas County, 135 Neb. 531, 282 N.W. 532 (1938).

Private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation. Mooney v. Drainage Dist. No. 1 of Richardson County, 134 Neb. 192, 278 N.W. 368 (1938).

It is the duty of the Supreme Court not to legislate but to expound the law as written. Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N.W. 139 (1938).

The Supreme Court has inherent constitutional powers to determine whether facts on which emergency legislation is based have ceased to exist or ever did, in fact, exist. First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938).

Supreme Court is constituted a separate class with respect to payment of salary. State ex rel. Day v. Hall, 129 Neb. 699, 262 N.W. 850 (1935); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

The word ''revenue'' refers only to those revenues for general state administration and not to those of municipal corporation. Aachen & Munich Fire Insurance Co. v. City of Omaha, 72 Neb. 112, 100 N.W. 137 (1904).

Proceeding by quo warranto is as civil remedy, and is the means employed by state to cancel and recall privilege which corporation has abused. State v. Standard Oil Co., 61 Neb. 28, 84 N.W. 413 (1900); State v. Nebraska Distilling Co., 29 Neb. 700, 46 N.W. 155 (1890).

Jury trial in original quo warranto action in Supreme Court is not demandable as of right. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

Sec. 3. Terms of Supreme Court.

At least two terms of the supreme court shall be held each year, at the seat of government.

Source: Neb. Const. art. VI, sec. 3 (1875); Transferred by Constitutional Convention, 1919-1920, art. V, sec. 3.

Sec. 4. Chief Justice and Judges of the Supreme Court; selection; residence; location of offices.

The Chief Justice and the Judges of the Supreme Court shall be selected as provided in this Article V. They may reside at the place where the court is located but shall reside within the state, and no Chief Justice or Judge of the Supreme Court shall be deemed thereby to have lost his or her residence at the place from which he or she was selected. The offices of the Chief Justice and Judges of the Supreme Court shall be at the place where the court is located.

Source: Neb. Const. art. VI, sec. 4 (1875); Amended 1908, Laws 1907, c. 202, sec. 2, p. 581; Amended 1920, Constitutional Convention, 1919-1920, No. 17; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 4; Amended 1962, Laws 1961, c. 252, sec. 2(2), p. 742; Amended 1998, Laws 1998, LR 303CA, sec. 1.

Judges of the Supreme Court are created as a distinct class for all purposes of legislation affecting them. State ex rel. Day v. Hall, 129 Neb. 699, 262 N.W. 850 (1935); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

Sec. 5. Supreme Court judicial districts; redistricting; when.

The Legislature shall divide the state into six contiguous and compact districts of approximately equal population, which shall be numbered from one to six, which shall be known as the Supreme Court judicial districts. The Legislature shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature. Such districts shall not be changed except upon the concurrence of a majority of the members of the Legislature. Whenever the Supreme Court is redistricted, the judges serving prior to the redistricting shall continue in office, and the law providing for such redistricting shall where necessary specify the newly established districts which they shall represent for the balance of their terms.

Source: Neb. Const. art. VI, sec. 5 (1875); Amended 1908, Laws 1907, c. 202, sec. 3, p. 581; Amended 1912, Laws 1911, c. 226, sec. 1, p. 679; Amended 1920, Constitutional Convention, 1919-1920, No. 17; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 5; Amended 1962, Laws 1961, c. 252, sec. 2(2), p. 742; Amended 1970, Laws 1969, c. 421, sec. 1, p. 1437.

Neither this section nor section 7 makes any mention of application to substitute judges. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

Sec. 6. Chief Justice to preside.

The Chief Justice shall preside at all terms and sittings of the supreme court, and in his absence or disability the judges present shall select one of their number chief justice pro tempore.

Source: Neb. Const. art. VI, sec. 6 (1875); Amended 1908, Laws 1907, c. 202, sec. 4, p. 582; Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 6.

Sec. 7. Chief Justice; Associate Justices; qualifications.

No person shall be eligible to the office of Chief Justice or Judge of the Supreme Court unless he shall be at least thirty years of age, and a citizen of the United States, and shall have resided in this state at least three years next preceding his selection; nor, in the case of a Judge of the Supreme Court selected from a Supreme Court judicial district, unless he shall be a resident and elector of the district from which selected.

Source: Neb. Const. art. VI, sec. 7 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 7; Amended 1962, Laws 1961, c. 252, sec. 2(2), p. 742.

Neither this section nor section 5 makes any mention of application to substitute judges. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

Unlike officer designated in this section, there is no requirement that candidate for office of Secretary of State be a resident of the state. State ex rel. Brazda v. Marsh, 141 Neb. 817, 5 N.W.2d 206 (1942).

Sec. 8. Supreme Court appoint staff; budget; copyright of state reports.

The Supreme Court shall appoint such staff as may be needed for the proper dispatch of the business of the court. The court shall prepare and recommend to each session of the Legislature a budget of the estimated expenses of the court. The copyright of the state reports shall forever remain the property of the state.

Source: Neb. Const. art. VI, sec. 8 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 8; Amended 1972, Laws 1971, LB 333, sec. 1; Amended 1990, Laws 1990, LR 8, sec. 1.

Sec. 9. District courts; jurisdiction; felons may plead guilty; sentence.

The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law.

Source: Neb. Const. art. VI, sec. 9 (1875); Transferred by Constitutional Convention, 1919-1920, art. V, sec. 9.

1. Jurisdiction in general
2. Equity jurisdiction
3. Criminal jurisdiction
4. Miscellaneous

1. Jurisdiction in general

The Nebraska Constitution places original sentencing authority in the district courts and does not provide sentencing as one of the Supreme Court's powers. State v. Reeves, 258 Neb. 511, 604 N.W.2d 151 (2000).

Jurisdiction in suits for an injunction are in the district courts which cannot be legislatively limited or controlled. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc., 208 Neb. 110, 302 N.W.2d 379 (1981).

District court had inherent power to punish for contempt of court which Legislature could not limit. State ex rel. Beck v. Frontier Airlines, Inc., 174 Neb. 172, 116 N.W.2d 281 (1962).

District court alone has jurisdiction over controversy between adverse claimants with respect to interpretation of testamentary trust. In re Trust Estate of Myers, 151 Neb. 255, 37 N.W.2d 228 (1949).

While Legislature may grant to district court such other jurisdiction as it may deem proper, it can not limit or take from such courts the general jurisdiction conferred by the Constitution. State ex rel Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Judicial department of government must protect its jurisdiction at boundaries of power fixed by the Constitution. State ex rel. Sorensen v. Mitchell State Bank, 123 Neb. 120, 242 N.W. 283 (1932); State ex rel. Sorensen v. State Bank of Minatare, 123 Neb. 109, 242 N.W. 278 (1932).

Where cause is properly before equity court, the appointment of receiver for failed or insolvent bank is judicial function hereunder, not subject to executive or legislative control. State ex rel. Sorenesen v. State Bank of Minatare, 123 Neb. 109, 242 N.W. 278 (1932).

This section refers to jurisdiction of court as such, rather than to duties of judge when acting as court. State ex rel. Thompson v. Neble and Latenser, 82 Neb. 267, 117 N.W. 723 (1908).

Jurisdiction over the subject matter cannot be conferred by consent of parties. Crawford Co. v. Hathaway, 61 Neb. 317, 85 N.W. 303 (1901).

Where Legislature confers right without special tribunal for its enforcement, district court has jurisdiction. Armstrong v. Mayer, 60 Neb. 423, 83 N.W. 401 (1900); Foxworthy v. Lincoln & F. R. R. Co., 13 Neb. 398, 14 N.W. 394 (1882).

Legislature may provide original jurisdiction for district court other than that enumerated in Constitution. Arnold v. Weimer, 40 Neb. 216, 58 N.W. 709 (1894).

2. Equity jurisdiction

The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled. K N Energy, Inc. v. City of Scottsbluff, 233 Neb. 644, 447 N.W.2d 227 (1989).

The equity jurisdiction granted the district court hereby cannot be legislatively limited or controlled. Village of Springfield v. Hevelone, 195 Neb. 37, 236 N.W.2d 811 (1975).

An action in equity to partition personal property may be brought in the district court by one owning an undivided interest therein against the administrator of the estate of a deceased person. Hoover v. Haller, 146 Neb. 697, 21 N.W.2d 450 (1946).

An equity court has inherent jurisdiction over the administration of charitable trusts. John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N.W. 261 (1941).

The district court has jurisdiction to compel specific performance of contract to leave property to another by bequest, even though the property is personalty. Cox v. Johnston, 139 Neb. 223, 296 N.W. 883 (1941).

The insurance code in no way curbs or abridges the constitutional, common law or equity powers of the district court. Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N.W. 449 (1941).

The equity power conferred by the Constitution on district courts is ample to grant relief in case where default judgment was obtained through negligence and fraud of attorney and term had expired. Seward v. Churn Ranch Co., 136 Neb. 804, 287 N.W. 610 (1939).

District courts have jurisdiction to hear and determine whether owner of agricultural lands included in corporate limits of city is entitled to have same disconnected therefrom. Witham v. City of Lincoln, 125 Neb. 366, 250 N.W. 247 (1933).

District courts have constitutional equity jurisdiction exercisable without legislative enactment. State ex rel. Sorensen v. Nebraska State Bank of Bloomfield, 124 Neb. 449, 247 N.W. 31 (1933); State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N.W. 616 (1932).

Equity jurisdiction exists independently of statute and comes from the Constitution. Hall v. Hall, 123 Neb. 280, 242 N.W. 607 (1932).

Equity jurisdiction vested in district courts hereby is beyond Legislature's power to limit or control, and extends to administration of trusts. State ex rel. Sorensen v. Farmers State Bank of Polk, 121 Neb. 532, 237 N.W. 857 (1931); Burnham v. Bennison, 121 Neb. 291, 236 N.W. 745 (1931).

Court has chancery power hereunder to enforce rule of laches barring suit to cancel special assessments brought after four years by parties who petitioned for improvements. Tombrink v. Sarpy County, 120 Neb. 160, 231 N.W. 783 (1930).

District courts have constitutional equity jurisdiction which may be exercised without legislative enactment. Matteson v. Creighton University, 105 Neb. 219, 179 N.W. 1009 (1920).

Equity jurisdiction is beyond power of Legislature to limit or control. Lacey v. Zeigler, 98 Neb. 380, 152 N.W. 792 (1915).

3. Criminal jurisdiction

Under this provision, jail time is to be imposed by judges. The trial court may not delegate the authority to impose a jail sentence, or to eliminate a jail sentence, to a nonjudge. State v. Lee, 237 Neb. 724, 467 N.W.2d 661 (1991).

District courts have such jurisdiction in criminal cases as may be provided by law. State v. Furstenau, 167 Neb. 439, 93 N.W.2d 384 (1958).

Judges of district court may admit persons charged with a felony to plead guilty. Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955).

Court, after sentence for less than minimum term prescribed by statute has been served, is without power to vacate it and impose greater penalty. Hickman v. Fenton, 120 Neb. 66, 231 N.W. 510 (1930).

Entire criminal code of Nebraska proceeds upon the principle that a plea of guilty, where it may be received unreservedly, is a waiver of the right to a trial by jury. Smith v. Olson, 44 F.Supp. 456 (D. Neb. 1942).

4. Miscellaneous

Purpose of the medical review panel under the Nebraska Hospital-Medical Liability Act is to provide expert opinion only, not arbitrate the dispute or dispose of the claim. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

Divorce decree providing for child support is subject to power of district court over its processes and decrees in furtherance of justice. Wassung v. Wassung, 136 Neb. 440, 286 N.W. 340 (1939).

Combining legal and equitable causes of action does not conflict with Constitution. Turner v. Althaus, 6 Neb. 54 (1877).

Sec. 10. District court judicial districts.

The state shall be divided into district court judicial districts. Until otherwise provided by law, the boundaries of the judicial districts and the number of judges of the district courts shall remain as now fixed. The judges of the district courts shall be selected from the respective districts as provided in this Article V.

Source: Neb. Const. art. VI, sec. 10 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 10; Amended 1962, Laws 1961, c. 252, sec. 2(2), p. 742.

Under former law, district judge must have been elected for each judicial district. State ex rel. Polk v. Galusha, 74 Neb. 188, 104 N.W. 197 (1905).

Under former law, judges of district court were elected for a term of four years. State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N.W. 941 (1897).

Unorganized territory is part of the judicial district of county to which it is attached. State v. Page, 12 Neb. 386, 11 N.W. 495 (1882); Ex parte Crawford, 12 Neb. 379, 11 N.W. 494 (1882).

County cannot be part of two judicial districts. Olive v. State, 11 Neb. 1, 7 N.W. 444 (1881).

District judge is state, not county, officer. Jones v. York County, 26 F.2d 623 (8th Cir. 1928).

Sec. 11. District court judges; change of number; boundaries.

The Legislature may change the number of judges of the district courts and alter the boundaries of judicial districts. Such change in number or alterations in boundaries shall not vacate the office of any judge. Such districts shall be formed of compact territory bounded by county lines.

Source: Neb. Const. art. VI, sec. 11 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 11; Amended 1972, Laws 1971, LB 303, sec. 1.

The Governor must approve bills increasing number of districts. State ex rel. Main v. Crounse, 36 Neb. 835, 55 N.W. 246 (1893).

Legislature may provide additional judges of district court. State ex rel. Morton v. Stevenson, 18 Neb. 416, 25 N.W. 585 (1885).

Sec. 12. District court judges may hold court for each other; retired judges, temporary duty.

The judges of the district court may hold court for each other and shall do so when required by law or when ordered by the Supreme Court. The Legislature may provide that any judge of the district court who has retired may be called upon for temporary duty by the Supreme Court.

Source: Neb. Const. art. VI, sec. 12 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 12; Amended 1970, Laws 1969, c. 420, sec. 1, p. 1434.

Section 24-729 was enacted in response to this provision. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

District court is court of general jurisdiction of this state divided into judicial districts for the transaction of business; district court is one court of general jurisdiction with interchangeable judges, all exercising the same jurisdiction. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

Supreme Court is given power to order a district judge to serve in a district other than his own. Ruehle v. Ruehle, 161 Neb. 691, 74 N.W.2d 689 (1956).

District judge had jurisdiction to preside over murder trial in another district during absence of regular judge. Iron Bear v. Jones, 149 Neb. 651, 32 N.W.2d 125 (1948).

A district judge is not disqualified to serve in the district court of another district in the state. Rhodes v. Van Steenberg, 225 F.Supp. 113 (D. Neb. 1963).

Sec. 13. Supreme and district judges; salaries.

The chief justice, the judges of the supreme court and the judges of the district court shall receive such salaries as may be provided by law.

Source: Neb. Const. art. VI, sec. 13 (1875); Amended 1908, Laws 1907, c. 202, sec. 5, p. 582; Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 13.

Legislature had authority to increase during term salaries of Judges of Supreme Court provided to be paid by temporary salary schedule of Constitution. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N.W.2d 799 (1947).

Act of 1933, purporting to reduce salaries of judges and other state officers, was unconstitutional. State ex rel. Day v. Hall, 129 Neb. 699, 262 N.W. 850 (1935); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935).

Sec. 14. Supreme and district judges not to act as attorneys; judge not to practice law, when.

No judge of the Supreme or district courts shall act as attorney or counsellor at law in any manner whatsoever. No judge shall practice law in any court in any matter arising in or growing out of any proceedings in his own court.

Source: Neb. Const. art. VI, sec. 14 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 14; Amended 1970, Laws 1969, c. 419, sec. 1(1), p. 1432.

Participation of county judge as counsel for interested parties was in violation of this section. State ex rel. Nebraska State Bar Assn. v. Conover, 166 Neb. 132, 88 N.W.2d 135 (1958).

Participation in litigation by county judge was improper and subject to censure. State ex rel. Nebraska State Bar Assn. v. Bates, 162 Neb. 652, 77 N.W.2d 302 (1956).

County judge cannot practice in any proceeding brought in his own court. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N.W.2d 583 (1951).

County judge may not appear as counsel in any matter in his own court. Tucker v. Heirs of Myers, 151 Neb. 359, 37 N.W.2d 585 (1949).

Sec. 15. Repealed 1970. Laws 1969, c. 419, sec. 1(2), p. 1432.

Sec. 16. Repealed 1970. Laws 1969, c. 419, sec. 1(2), p. 1432.

Sec. 17. Repealed 1970. Laws 1969, c. 419, sec. 1(2), p. 1432.

Sec. 18. Repealed 1970. Laws 1969, c. 419, sec. 1(2), p. 1432.

Sec. 19. Practice of all courts to be uniform.

The organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law and the force and effect of the proceedings, judgments and decrees of such courts, severally, shall be uniform.

Source: Neb. Const. art. VI, sec. 19 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 19.

Legislature may provide for election, term, and districts for justices, and also may substitute other court for justice in metropolitan city. State ex rel. Bunce v. Kubat, 110 Neb. 362, 193 N.W. 754 (1923).

This section does not prohibit establishing of local courts inferior to district court in municipal corporations. State ex rel. Magney v. Hunter, 99 Neb. 520, 156 N.W. 975 (1916).

Uniformity is not violated if all courts of same grade have jurisdiction over same matters and of equal authority. Moores v. State ex rel. Gordon, 63 Neb. 345, 88 N.W. 514 (1901); State ex rel. Smyth v. Magney, 52 Neb. 508, 72 N.W. 1006 (1897).

Law giving authority to prosecute by information does not violate requirement of uniformity. Dinsmore v. State, 61 Neb. 418, 85 N.W. 445 (1901).

Legislature cannot give to district court power or authority to remove from office police judge of one class of cities. Gordon v. Moores, 61 Neb. 345, 85 N.W. 298 (1901).

Law applying to all counties adopting township organization is uniform. Van Horn v. State ex rel. Abbott, 46 Neb. 62, 64 N.W. 365 (1895).

Law which is general and uniform throughout state, operating alike upon all persons and localities of a class who are brought within relations and circumstances provided for, is not wanting in uniformity. State ex rel. Crawford v. Norris, 37 Neb. 299, 55 N.W. 1086 (1893); State ex rel. Selden v. Berka, 20 Neb. 375, 30 N.W. 267 (1886).

Sec. 20. Officers in this Article; tenure; residence; duties; compensation.

All officers provided for in this Article shall hold their offices until their successors shall be qualified and they shall respectively reside in the district or county from which they shall be selected. All officers, when not otherwise provided for in this Article, shall perform such duties and receive such compensation as may be prescribed by law.

Source: Neb. Const. art. VI, sec. 20 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 20; Amended 1962, Laws 1961, c. 252, sec. 2(2), p. 742; Amended 1970, Laws 1969, c. 419, sec. 1, p. 1432.

Elections for police judge must be held along with general election of other constitutional officers. State ex rel. McDermott v. Reilly, 94 Neb. 232, 142 N.W. 923 (1913), rehearing denied 94 Neb. 238, 143 N.W. 200 (1913); State ex rel. Benson v. Mayor and Council of the City of Hastings, 91 Neb. 304, 135 N.W. 1028 (1912).

Term includes period for which incumbent may hold over until his successor has qualified. State ex rel. Polk v. Galusha, 74 Neb. 188, 104 N.W. 197 (1905).

The term of a constitutional officer can neither be extended nor shortened by legislative act. State ex rel. Gordon v. Moores, 70 Neb. 48, 96 N.W. 1011 (1903); State ex rel. Wheeler v. Stuht, 52 Neb. 209, 71 N.W. 941 (1897).

Office of police judge falls within provisions of this section. State ex rel. Gordon v. Moores, 61 Neb. 9, 84 N.W. 399 (1900).

Territorial jurisdiction of justice of the peace is precinct for which he was elected or appointed, but judgment rendered in any other precinct is not void for that reason alone. Jones v. Church of the Holy Trinity, 15 Neb. 81, 17 N.W. 362 (1883).

District judge is state, not county, officer. Jones v. York County, 26 F.2d 623 (8th Cir. 1928).

Sec. 21. Merit plan for selection of judges; terms of office; filling of vacancies; procedure; voting for nominee.

(1) In the case of any vacancy in the Supreme Court or in any district court or in such other court or courts made subject to this provision by law, such vacancy shall be filled by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission. If the Governor shall fail to make an appointment from the list within sixty days from the date it is presented to him, the appointment shall be made by the Chief Justice or the acting Chief Justice of the Supreme Court from the same list.

(2) In all other cases, any vacancy shall be filled as provided by law.

(3) At the next general election following the expiration of three years from the date of appointment of any judge under the provisions of subsection (1) of this section and every six years thereafter as long as such judge retains office, each Justice or Judge of the Supreme Court or district court or such other court or courts as the Legislature shall provide shall have his right to remain in office subject to approval or rejection by the electorate in such manner as the Legislature shall provide; *Provided*, that every judge holding or elected to an office described in subsection (1) of this section on the effective date of this amendment whether by election or appointment, upon qualification shall be deemed to have been selected and to have once received the approval of the electorate as herein provided, and shall be required to submit his right to continue in office to the approval or rejection of the electorate at the general election next preceding the expiration of the term of office for which such judge was elected or appointed, and every six years thereafter. In the case of the Chief Justice of the Supreme Court, the electorate of the entire state shall vote on the question of approval or rejection. In the case of any Judge of the Supreme Court, other than the Chief Justice, and any judge of the district court or any other court made subject to subsection (1) of this section, the electorate of the district from which such judge was selected shall vote on the question of such approval or rejection.

(4) There shall be a judicial nominating commission for the Chief Justice of the Supreme Court and one for each judicial district of the Supreme Court and of the district court and one for each area or district served by any other court made subject to subsection (1) of this section by law. Each judicial nominating commission shall consist of nine members, one of whom shall be a Judge of the Supreme Court who shall be designated by the Governor and shall act as chairman, but shall not be entitled to vote. The members of the bar of the state residing in the area from which the nominees are to be selected shall designate four of their number to serve as members of said commission, and the Governor shall appoint four citizens, not admitted to practice law before the courts of the state, from among the residents of the same geographical area to serve as members of said commission. Not more than four of such voting

members shall be of the same political party. The terms of office for members of each judicial nominating commission shall be staggered and shall be fixed by the Legislature. The nominees of any such commission cannot include a member of such commission or any person who has served as a member of such commission within a period of two years immediately preceding his nomination or for such additional period as the Legislature shall provide. The names of candidates shall be released to the public prior to a public hearing.

(5) Members of the nominating commission shall vote for the nominee of their choice by roll call. Each candidate must receive a majority of the voting members of the nominating commission to have his name submitted to the Governor.

Source: Neb. Const. art. VI, sec. 21 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 21; Amended 1962, Laws 1961, c. 252, sec. 2(2), p. 742; Amended 1972, Laws 1972, LB 1199, sec. 1.

Pursuant to subsection (1) of this section, judicial offices are filled by appointment. Neb. Account. & Disc. Comm. v. Citizens for Resp. Judges, 256 Neb. 95, 588 N.W.2d 807 (1999).

Judge appointed pursuant to this section appointed to independent term and enters upon full term of office upon appointment and qualification. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

Vacancies in office of municipal judge are to be filled under this section. State ex rel. Hunter v. Maguire, 136 Neb. 365, 285 N.W. 921 (1939).

Where no time to nominate candidates to fill vacancies in Supreme Court, Governor's appointee holds until successor is regularly elected. State ex rel. Oleson v. Minor, 105 Neb. 228, 180 N.W. 84 (1920).

Where one elected to office of county judge failed to take oath and file bond within required time, but soon thereafter qualified, before any vacancy declared, right to office was not forfeited. Duffy v. State ex rel. Edson, 60 Neb. 812, 84 N.W. 264 (1900).

Vacancy in office of county judge is filled under provisions of general election law. State ex rel. Berge v. Lansing, 46 Neb. 514, 64 N.W. 1104 (1895).

Sec. 22. State may sue and be sued.

The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.

Source: Neb. Const. art. VI, sec. 22 (1875); Transferred by Constitutional Convention, 1919-1920, art. V, sec. 22.

1. Suit by state
2. Suit against state
3. Appeal from disallowance of claim

1. Suit by state

State may sue in its own name to seek enforcement of public right or restrain public wrong. State v. Pacific Express Co., 80 Neb. 823, 115 N.W. 619 (1908).

When state invokes judgment of court it lays aside its sovereignty. State ex rel. Smyth v. Kennedy, 60 Neb. 300, 83 N.W. 87 (1900).

Constitutional provision that state may sue and be sued is not self-executing. O'Connor v. Slaker, 22 F.2d 147 (8th Cir. 1927).

2. Suit against state

This section is not self-executing, but requires legislative action for waiver of a state's sovereign immunity. Riley v. State, 244 Neb. 250, 506 N.W.2d 45 (1993).

This provision, concerning a waiver of sovereign immunity, is not self-executing, but requires legislative action to waive the state's sovereign immunity. Concerned Citizens v. Department of Environ. Contr., 244 Neb. 152, 505 N.W.2d 654 (1993).

Trial court erred in assessing fees and expenses incurred by a special prosecutor in a civil child support action in the absence of a statute permitting such an award. State on behalf of Garcia v. Garcia, 238 Neb. 455, 471 N.W.2d 388 (1991).

This section is not self-executing. Legislative action is necessary to make it available. Gentry v. State, 174 Neb. 515, 118 N.W.2d 643 (1962).

Legislative consent is not necessary to maintenance of suit against state seeking to recover under the Constitution damages arising as the result of improper construction of state highway. Schmutte v. State, 147 Neb. 193, 22 N.W.2d 691 (1946).

In a workmen's compensation case, special appearance of state should have been sustained in view of fact that Legislature had failed to provide manner in which service of process may be had against the state or a department of state government. Callen v. State, 137 Neb. 192, 288 N.W. 547 (1939).

Constitutional provision relating to suits against state is not self-executing and legislative action is necessary to make it available. Anstine v. State, 137 Neb. 148, 288 N.W. 525 (1939).

Legislature cannot by special act waive sovereignty of state in favor of an individual and authorize such individual to sue for damages due to negligence of state's agents and servants. Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938).

Suit to foreclose mortgage involving real estate to which state has legal title cannot be maintained against state without its consent. Northwestern Mutual Life Ins. Co. v. Nordhues, 129 Neb. 379, 261 N.W. 687 (1935).

Immunity of state from suit does not apply to injunction proceeding to prevent administrative department and its employees from taking possession of land under void award in eminent domain proceedings. Goergen v. Department of Public Works, 123 Neb. 648, 243 N.W. 886 (1932).

Where statutes provide exclusive remedy against state and particular form, one branch of Legislature alone cannot extend jurisdiction beyond that limited by statute or to another forum. McNeel v. State, 120 Neb. 674, 234 N.W. 786 (1931).

Prior to amendment of Workmen's Compensation Act by 1935 special session, neither state nor administrative department thereof could be sued on claim under Workmen's Compensation Act. Eidenmiller v. State, 120 Neb. 430, 233 N.W. 447 (1930).

Resolution by Legislature authorizing recovery for negligence of state employee does not render state liable and no recovery can be had until Legislature by law establishes liability of state therefor. Shear v. State, 117 Neb. 865, 223 N.W. 130 (1929).

State's immunity from suit cannot be waived by voluntary general appearance by Attorney General. McShane v. Murray, 106 Neb. 512, 184 N.W. 147 (1921).

Resolution by Legislature is sufficient authority for claimant to sue state. Lancaster County v. State, 74 Neb. 211, 104 N.W. 187 (1905), affirmed on rehearing 74 Neb. 215, 107 N.W. 388 (1906).

This section has been sufficiently supplemented to permit suits by or against the state. In re Petition of Attorney General, 40 Neb. 402, 58 N.W. 945 (1894).

3. Appeal from disallowance of claim

Claims against the state founded on a contract, express or implied, must be presented to the Auditor of Public Accounts, with right of appeal to the courts, but may not be presented to the courts in the first instance. Scotts Bluff County v. State, 133 Neb. 508, 276 N.W. 185 (1937).

To confer jurisdiction on appeal from rejection of claim against state, certified transcript of proceedings before auditor and Secretary of State must be filed in district court. Pickus v. State, 115 Neb. 869, 215 N.W. 129 (1927).

State may be sued in district court where capital located, on claim based on contract with Department of Public Works after disallowance of claim by auditor. Peterson v. State, 113 Neb. 546, 203 N.W. 1002 (1925).

State cannot be sued until after auditor refuses to adjust claim. State v. Lancaster County Bank, 8 Neb. 218 (1879).

Sec. 23. Jurisdiction of judges at chambers.

The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law.

Source: Neb. Const. art. VI, sec. 23 (1875); Transferred by Constitutional Convention, 1919-1920, art. V, sec. 23.

Without a written stipulation of the parties, a district judge can hear application to modify an award of child support in county where the proceeding is pending only. Hanson v. Hanson, 195 Neb. 836, 241 N.W.2d 131 (1976).

Judges at chambers have no inherent authority to rule on motion for new trial. Vasa v. Vasa, 163 Neb. 642, 80 N.W.2d 696 (1957); Mueller v. Keeley, 163 Neb. 613, 80 N.W.2d 707 (1957).

District judges may be given jurisdiction in chambers to impose sentence on plea of guilty. Duggan v. Olson, 146 Neb. 248, 19 N.W.2d 353 (1945).

District judge in chambers had jurisdiction under independent act to enter orders in connection with liquidation of insolvent bank. County of Morrill v. Bliss, 125 Neb. 97, 249 N.W. 98 (1933).

Establishment of municipal court without powers to the judge at chambers does not violate this section. State ex rel. Magney v. Hunter, 99 Neb. 520, 156 N.W. 975 (1916).

Constitution confers no judicial powers on judge of district court at chambers. He can exercise such authority alone as is given by Legislature. Hodgin v. Whitcomb, 51 Neb. 617, 71 N.W. 314 (1897).

Sec. 24. Style of process.

All process shall run in the name of ''The State of Nebraska,'' and all prosecutions shall be carried on in the name of ''The State of Nebraska.''

Source: Neb. Const. art. VI, sec. 24 (1875); Transferred by Constitutional Convention, 1919-1920, art. V, sec. 24.

This section applies in mandamus. State ex rel. Hansen v. Carrico, 86 Neb. 448, 125 N.W. 1110 (1910).

All criminal prosecutions must be by, and carried on in, the name of the ''State of Nebraska.'' Worthen v. County of Johnson, 62 Neb. 754, 87 N.W. 909 (1901).

''State of Nebraska, Gage County, to the Sheriff of said County'' complies with this section. Hoyt v. Little, 55 Neb. 71, 75 N.W. 56 (1898).

Under Constitution of 1866 requiring all process to run in the name of ''The People of the State of Nebraska,'' a prosecution under a city ordinance ''In the Name of the City'' is void. City of Brownville v. Cook, 4 Neb. 101 (1875).

Sec. 25. Supreme Court to promulgate rules of practice; to make recommendations to Legislature.

For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end, the court may, and when

requested by the Legislature by resolution shall, certify to the Legislature its conclusions as to desirable amendments or changes in the general laws governing such practice and proceedings.

Source: Neb. Const. art. VI, sec. 25 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 25; Amended 2000, Laws 1999, LR 18CA, sec. 3.

1. Power of Supreme Court
2. Rules of practice
3. Miscellaneous

1. Power of Supreme Court

The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. In re Application of Brown, 270 Neb. 891, 708 N.W.2d 251 (2006).

The Nebraska Supreme Court, and only that court, is invested with the power to admit persons to the practice of law and to fix qualifications for admission to the bar. Thus, it has the responsibility to adopt and implement systems designed to protect the public and safeguard the judicial system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies. In re Application of Majorek, 244 Neb. 595, 508 N.W.2d 275 (1993).

Rulemaking power of Supreme Court may not be used to change venue set by statute. Peck v. Dunlevey, 184 Neb. 812, 172 N.W.2d 613 (1969).

This section does not limit the judicial power with respect to making rules as qualifications for admission to the bar. State ex rel. Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942).

Supreme Court is vested with sole power to admit persons to practice law and fix their qualifications. State ex rel. Wright v. Hinckle, 137 Neb. 735, 291 N.W. 68 (1940).

Supreme Court is vested with sole powers to admit persons to practice law and fix qualifications for admission to the bar, and possesses inherent power to punish for contempt any person assuming to practice law without having been duly licensed to do so. State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936).

Supreme Court is precluded by law from promulgating rules of practice and procedure empowering trial courts to enter nonsuit on conclusion of opening statements to jury. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N.W. 349 (1934).

2. Rules of practice

Rule of practice promulgated, with reference to procurement, service, return, and settlement of bill of exceptions. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, 74 N.W.2d 854 (1956).

Rule of practice that court determines punishment to be inflicted on conviction of subsequent offense adhered to. Poppe v. State, 155 Neb. 527, 52 N.W.2d 422 (1952).

Rule of practice established for all courts that imposition of increased penalty for subsequent offense is matter for court and not jury. Haffke v. State, 149 Neb. 83, 30 N.W.2d 462 (1948).

Rule of practice to the effect that plaintiff may, in personal injury action, establish on cross-examination that defendant is indemnified from loss by insurance company, was revoked. Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N.W. 726 (1936).

Information charging murder in first degree, following statute and form approved by Supreme Court, was sufficient. Hansen v. State, 121 Neb. 169, 236 N.W. 329 (1931).

Pursuant to its right to promulgate rules of practice, Supreme Court had power to prescribe short form of information for murder. Nichols v. State, 109 Neb. 335, 191 N.W. 333 (1922).

Rule of practice that party may not contradict testimony of his own witness set aside, and party may, within court's discretion, be permitted to show contradictory statements by witness before trial. Penhansky v. Drake Realty Constr. Co., 109 Neb. 120, 190 N.W. 265 (1922).

3. Miscellaneous

Where a rule of practice promulgated by the Supreme Court is later abrogated and a new rule is promulgated effective on a certain date, the new rule is not retroactive and applicable to cases tried under the former rule. Heineman v. Wilson, 132 Neb. 159, 271 N.W. 346 (1937).

Sec. 26. Proviso as to effect of amendment.

If the foregoing amendment shall be adopted by the electors, all existing courts which are not in the foregoing amendment specifically enumerated and concerning which no other provision is herein made, shall continue in existence and exercise their present jurisdiction, and the judges thereof shall receive their present compensation, until otherwise provided by law; and such judges or appointees to fill vacancies shall hold their offices until their successors shall be elected and qualified.

Source: Neb. Const. art. VI, sec. 26 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 15; Transferred by Constitutional Convention, 1919-1920, art. V, sec. 26.

Sec. 27. Juvenile courts; authorization.

Notwithstanding the provisions of section 9 of this Article, the Legislature may establish courts to be known as juvenile courts, with such jurisdiction and

powers as the Legislature may provide. The term, qualification, compensation, and method of appointment or election of the judges of such courts, and the rules governing proceedings therein, may be fixed by the Legislature. The state shall be divided into juvenile court judicial districts that correspond to district court judicial districts until otherwise provided by law. No such court shall be established or afterwards abolished in any juvenile court judicial district unless approved by a majority of those voting on the issue.

Source: Neb. Const. art. V, sec. 27 (1958); Adopted 1958, Laws 1957, c. 217, sec. 1, p. 754; Amended 1972, Laws 1971, LB 305, sec. 1.

Legislature may establish separate juvenile courts. State ex rel. Weiner v. Hans, 174 Neb. 612, 119 N.W.2d 72 (1963).

Sec. 28. Commission on Judicial Qualifications; appointment; composition; qualifications.

The Legislature shall provide for a Commission on Judicial Qualifications consisting of: (1) Three judges, including one district court judge, one county court judge, and one judge of any other court inferior to the Supreme Court as now exists or may hereafter be created by law, all of whom shall be appointed by the Chief Justice of the Supreme Court; (2) three members of the Nebraska State Bar Association who shall have practiced law in this state for at least ten years and who shall be appointed by the Executive Council of the Nebraska State Bar Association; (3) three citizens, none of whom shall be a Justice or Judge of the Supreme Court or judge of any court, active or retired, nor a member of the Nebraska State Bar Association, and who shall be appointed by the Governor; and (4) the Chief Justice of the Supreme Court, who shall serve as its chairperson.

Source: Neb. Const. art. V, sec. 28 (1966); Adopted 1966, Laws 1965, c. 301, sec. 1, p. 848; Amended 1980, Laws 1980, LB 82, sec. 1.

Sec. 29. Commission on Judicial Qualifications; vote of majority required for action.

The commission shall act by a vote of the majority of its members and no action of the commission shall be valid unless concurred in by the majority of its members.

Source: Neb. Const. art. V, sec. 29 (1966); Adopted 1966, Laws 1965, c. 301, sec. 1, p. 848; Amended 1980, Laws 1980, LB 82, sec. 1.

Sec. 30. Judges; discipline; removal from office; grounds; procedure.

(1) A Justice or Judge of the Supreme Court or judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time, not to exceed six months, or removed from office for (a) willful misconduct in office, (b) willful disregard of or failure to perform his or her duties, (c) habitual intemperance, (d) conviction of a crime involving moral turpitude, (e) disbarment as a member of the legal profession licensed to practice law in the State of Nebraska, or (f) conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or he or she may be retired for physical or mental disability seriously interfering with the performance of his or her duties if such disability is determined to be permanent or reasonably likely to become permanent. Any citizen of the State of Nebraska may request the Commission on Judicial Qualifications to consider

the qualifications of any Justice or Judge of the Supreme Court or other judge, and in such event the commission shall make such investigation as the commission deems necessary and shall, upon a finding of probable cause, reprimand such Justice or Judge of the Supreme Court or other judge or order a formal open hearing to be held before it concerning the reprimand, discipline, censure, suspension, removal, or retirement of such Justice or Judge of the Supreme Court or other judge. In the alternative or in addition, the commission may request the Supreme Court to appoint one or more special masters who shall be judges of courts of record to hold a formal open hearing to take evidence in any such matter, and to report to the commission. If, after formal open hearing, or after considering the record and report of the masters, the commission finds that the charges are established by clear and convincing evidence, it shall recommend to the Supreme Court that the Justice or Judge of the Supreme Court or other judge involved shall be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, removed, or retired as the case may be.

(2) The Supreme Court shall review the record of the proceedings and in its discretion may permit the introduction of additional evidence. The Supreme Court shall make such determination as it finds just and proper, and may order the reprimand, discipline, censure, suspension, removal, or retirement of such Justice or Judge of the Supreme Court or other judge, or may wholly reject the recommendation. Upon an order for retirement, the Justice or Judge of the Supreme Court or other judge shall thereby be retired with the same rights and privileges as if he or she had retired pursuant to statute. Upon an order for removal, the Justice or Judge of the Supreme Court or other judge shall be removed from office, his or her salary shall cease from the date of such order, and he or she shall be ineligible for judicial office. Upon an order for suspension, the Justice or Judge of the Supreme Court or other judge shall draw no salary and shall perform no judicial functions during the period of suspension. Suspension shall not create a vacancy in the office of Justice or Judge of the Supreme Court or other judge.

(3) Upon order of the Supreme Court, a Justice or Judge of the Supreme Court or other judge shall be disqualified from acting as a Justice or Judge of the Supreme Court or other judge, without loss of salary, while there is pending (a) an indictment or information charging him or her in the United States with a crime punishable as a felony under Nebraska or federal law or (b) a recommendation to the Supreme Court by the Commission on Judicial Qualifications for his or her removal or retirement.

(4) In addition to the procedure set forth in subsections (1) and (2) of this section, on recommendation of the Commission on Judicial Qualifications or on its own motion, the Supreme Court (a) shall remove a Justice or Judge of the Supreme Court or other judge from office when in any court in the United States such justice or judge pleads guilty or no contest to a crime punishable as a felony under Nebraska or federal law, and (b) may suspend a Justice or Judge of the Supreme Court or other judge from office without salary when in any court in the United States such justice or judge is found guilty of a crime punishable as a felony under Nebraska or federal law or of any other crime that involves moral turpitude. If his or her conviction is reversed, suspension shall terminate and he or she shall be paid his or her salary for the period of suspension. If he or she is suspended and his or her conviction becomes final the Supreme Court shall remove him or her from office.

(5) All papers filed with and proceedings before the commission or masters appointed by the Supreme Court pursuant to this section prior to a reprimand or formal open hearing shall be confidential. The filing of papers with and the testimony given before the commission or masters or the Supreme Court shall be deemed a privileged communication.

When the Commission on Judicial Qualifications determines that disciplinary action is warranted, whether it be a reprimand or otherwise, the Commission on Judicial Qualifications shall issue one or more short announcements confirming that a complaint has been filed; stating the subject and nature of the complaint, the disciplinary action recommended or reprimand issued, or the date of the hearing; clarifying the procedural aspects; and reciting the right of a judge to a fair hearing.

When the Commission on Judicial Qualifications determines that disciplinary action is not warranted, and the existence of any investigation or complaint has become publicly known, the judge against whom a complaint has been filed or investigation commenced may waive the confidentiality of papers and proceedings under this subsection.

The Supreme Court shall by rule provide for procedure under this section before the commission, the masters, and the Supreme Court.

(6) No Justice or Judge of the Supreme Court or other judge shall participate, as a member of the commission, or as a master, or as a member of the Supreme Court, in any proceedings involving his or her own reprimand, discipline, censure, suspension, removal, or retirement.

Source: Neb. Const. art. V, sec. 30 (1966); Adopted 1966, Laws 1965, c. 301, sec. 1, p. 848; Amended 1980, Laws 1980, LB 82, sec. 1; Amended 1984, Laws 1984, LR 235, sec. 1.

Subdivision (1)(e) of this section does not grant authority to the Nebraska State Bar Association to commence disciplinary actions against sitting judges. State ex rel. NSBA v. Krepela, 259 Neb. 395, 610 N.W.2d 1 (2000).

Subsection (3) of this section does not limit suspension with pay to the two instances listed; suspension may be imposed in other instances pursuant to article V, section 1, of the Nebraska Constitution. In re Complaint Against Jones, 255 Neb. 1, 581 N.W.2d 876 (1998).

Sec. 31. Judges; procedure for removal from office cumulative.

These amendments are alternative to and cumulative with the methods of removal of Justices and judges provided in Article III, section 17, and Article IV, section 5, of this Constitution, and any other provision of law relating to the methods and manner of the removal of Justices, Judges, and judges of the courts of this state.

Source: Neb. Const. art. V, sec. 31 (1966); Adopted 1966, Laws 1965, c. 301, sec. 1, p. 848.

ARTICLE VI

SUFFRAGE

Section
1. Qualifications of electors.
2. Who disqualified.
3. Military or naval service; place and manner of voting.
4. Repealed 1972. Laws 1971, LB 339, sec. 1.
5. Electors; privileged from arrest.
6. Votes, how cast.

Sec. 1. Qualifications of electors.

Every citizen of the United States who has attained the age of eighteen years on or before the first Tuesday after the first Monday in November and has resided within the state and the county and voting precinct for the terms provided by law shall, except as provided in section 2 of this article, be an elector for the calendar year in which such citizen has attained the age of eighteen years and for all succeeding calendar years.

Source: Neb. Const. art. VII, sec. 1 (1875); Amended 1910, Laws 1909, c. 199, sec. 1, p. 666; Amended 1918, Laws 1918, Thirty-sixth Extraordinary Session, c. 11, sec. 1, p. 53; Amended 1920, Constitutional Convention, 1919-1920, No. 18; Transferred by Constitutional Convention, 1919-1920, art. VI, sec. 1; Amended 1970, Laws 1969, c. 422, sec. 1, p. 1438; Amended 1972, Laws 1971, LB 221, sec. 1; Amended 1972, Laws 1971, LB 339, sec. 1; Amended 1988, Laws 1988, LR 248, sec. 1.

1. Electors
2. Miscellaneous

1. Electors

The question of determining a voter's residence or domicile is a judicial one and should be determined in accordance with principles which were determinative at the time the Constitution was adopted. Dilsaver v. Pollard, 191 Neb. 241, 214 N.W.2d 478 (1974).

This section has no application to a public corporation or political subdivision where it operates in a proprietary capacity. Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966).

Election commissioner may be compelled by mandamus to receive oral testimony as to citizenship of applicant for registration as voter. State ex rel. Williams v. Moorhead, 96 Neb. 559, 148 N.W. 552 (1914).

One temporarily living within state or performing labor therein, whose family resides in another state, is not resident of Nebraska within this section. White v. Slama, 89 Neb. 65, 130 N.W. 978 (1911).

Question of residence is judicial, not one for Legislature. Residence is defined to mean place where one has established his home and is habitually present. Berry v. Wilcox, 44 Neb. 82, 62 N.W. 249 (1895).

Indians are citizens under this section upon compliance with United States laws upon that subject. State ex rel. Crawford v. Norris, 37 Neb. 299, 55 N.W. 1086 (1893).

2. Miscellaneous

Levy of tax for municipal university did not violate this section. Ratigan v. Davis, 175 Neb. 416, 122 N.W.2d 12 (1963).

A statute substituting municipal court for justice of peace courts, the election of judge of which court is limited to electors of city where court sits, excluding electors outside city but within jurisdiction of such court, contravenes the Constitution. State ex rel. Wright v. Brown, 131 Neb. 239, 267 N.W. 466 (1936).

This section does not relate to qualifications to hold office. State ex rel. Jordan v. Quible, 86 Neb. 417, 125 N.W. 619 (1910).

Provisions of this section do not apply to elections of officers of local drainage district. State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N.W. 294 (1908).

Provision of Australian Ballot Law requiring signature of two election judges upon ballot is not unconstitutional. Orr v. Bailey, 59 Neb. 128, 80 N.W. 495 (1899).

This section requires residence of six months prior to date of election rather than date of beginning of term of office. Richards v. McMillin, 36 Neb. 352, 54 N.W. 566 (1893).

Status and identification for suffrage purposes are governed by this section. League of Nebraska Municipalities v. Marsh, 253 F.Supp. 27 (D. Neb. 1966).

Sec. 2. Who disqualified.

No person shall be qualified to vote who is non compos mentis, or who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights.

Source: Neb. Const. art. VII, sec. 2 (1875); Transferred by Constitutional Convention, 1919-1920, art. VI, sec. 2.

Sec. 3. Military or naval service; place and manner of voting.

Every elector in the military or naval service of the United States or of this state may exercise the right of suffrage at such place and under such regulations as may be provided by law.

Source: Neb. Const. art. VII, sec. 3 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 19; Transferred by Constitutional Convention, 1919-1920, art. VI, sec. 3.

Sec. 4. Repealed 1972. Laws 1971, LB 339, sec. 1.

Sec. 5. Electors; privileged from arrest.

Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and going to and returning from the same.

Source: Neb. Const. art. VII, sec. 5 (1875); Transferred by Constitutional Convention, 1919-1920, art. VI, sec. 5; Amended 1972, Laws 1971, LB 339, sec. 1.

Sec. 6. Votes, how cast.

All votes shall be by ballot or by other means authorized by the Legislature whereby the vote and the secrecy of the elector's vote will be preserved.

Source: Neb. Const. art. VII, sec. 6 (1875); Transferred by Constitutional Convention, 1919-1920, art. VI, sec. 6; Amended 1972, Laws 1971, LB 339, sec. 1.

Secrecy as to how any elector votes is basic to electoral process. Dugan v. Vlach, 195 Neb. 81, 237 N.W.2d 104 (1975).

ARTICLE VII
EDUCATION

Section
1. Legislature; free instruction in common schools; provide.
2. State Department of Education; general supervision of school system.
3. State Board of Education; members; election; manner of election; term of office.
4. State Board of Education; Commissioner of Education; appointment; powers; duties.
5. Fines, penalties, and license money; allocation; use of forfeited conveyances.
6. Educational lands; management; Board of Educational Lands and Funds; members; appointment; sale of lands.
7. Perpetual funds enumerated.
8. Trust funds belong to state for educational purposes; use; investment.
9. Educational funds; trust funds; use; early childhood education endowment fund; created; use; early childhood education, defined.
10. University of Nebraska; government; Board of Regents; election; student membership; terms.
11. Appropriation of public funds; handicapped children; sectarian instruction; religious test of teacher or student.
12. Education and reform of minors.
13. State colleges; government; board; name; selection; duties; compensation.
14. Coordinating Commission for Postsecondary Education; membership; powers and duties; coordination, defined.
15. Omitted.
16. Repealed 1972. Laws 1972, LB 1023, sec. 1.
17. Repealed 1972. Laws 1972, LB 1023, sec. 1.

Sec. 1. Legislature; free instruction in common schools; provide.

The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years. The Legislature may provide for the education of other persons in educational institutions owned and controlled by the state or a political subdivision thereof.

Source: Neb. Const. art. VIII, sec. 1 (1875); Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 1; Amended 1940, Laws

1939, c. 109, sec. 1, p. 477; Amended 1952, Laws 1951, c. 164, sec. 2(3), p. 646; Amended 1954, Laws 1953, c. 174, sec. 1, p. 554; Amended 1970, Laws 1969, c. 423, sec. 1, p. 1439; Amended 1972, Laws 1972, LB 1023, sec. 1.

1. Free instruction
2. Miscellaneous

1. Free instruction

In the context of student discipline cases, no fundamental right to education exists in Nebraska. The term ''free instruction'' is construed in right to education cases as pertinent to the issue of the constitutionality of school financing, including collection of fees, tuition, and taxes. Kolesnick v. Omaha Pub. Sch. Dist., 251 Neb. 575, 558 N.W.2d 807 (1997).

Parents of school children occupying federal farmstead project are residents of public school district in which such lands are situated, and such children are entitled to common school privileges without payment of tuition. Tagge v. Gulzow, 132 Neb. 276, 271 N.W. 803 (1937).

Establishment of municipal university in Omaha was a matter of state concern in accord with duty to provide free instruction in public schools. Carlberg v. Metcalfe, 120 Neb. 481, 234 N.W. 87 (1930).

High school district that receives pupils from another district cannot collect additional tuition fee beyond that fixed by the Legislature. State ex rel. Baldwin v. Dorsey, 108 Neb. 134, 187 N.W. 879 (1922).

Child living with married sister, resident of district, is entitled to attend school without paying tuition. Martins v. School Dist. No. 30 of Cuming County, 101 Neb. 258, 162 N.W. 631 (1917).

Mandamus will not lie to compel school district officers to set aside entire revenue for payment of registered warrants, if effect would be to deprive children of free education. State ex rel. Collins v. Gardner, 79 Neb. 101, 112 N.W. 373 (1907).

Statutes with reference to education should be liberally and broadly construed to provide for free instruction. McNish v. State ex rel. Dimick, 74 Neb. 261, 104 N.W. 186 (1905).

The method and means to be adopted to furnish free instruction is left to the Legislature. Affholder v. State ex rel. McMullen, 51 Neb. 91, 70 N.W. 544 (1897).

Under requirement for free school instruction, public lands were designed to provide funds therefor. It is the duty of Legislature, by proper law, to encourage sale of public lands at best possible price. Washington County v. Fletcher, 12 Neb. 356, 11 N.W. 460 (1882).

2. Miscellaneous

Statutory provision authorizing transfer of land from a nonaccredited to an accredited high school district was constitutional. De Jonge v. School Dist. of Bloomington, 179 Neb. 539, 139 N.W.2d 296 (1966).

Matters pertaining to creation and dissolution of school districts are vested in the Legislature. Farrell v. School Dist. No. 54 of Lincoln County, 164 Neb. 853, 84 N.W.2d 126 (1957).

Denial of approval of high school, based on invalid regulation, violated this section. School Dist. No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955).

Delegation of legislative powers to a county committee to fix boundaries of school district was constitutional. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

In enacting legislation under this section, Legislature is restrained by other limitations of Constitution. Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85 (1952).

This provision is not self-executing. State ex rel. Shineman v. Board of Education of School Dist. No. 33, 152 Neb. 644, 42 N.W.2d 168 (1950).

Expulsion of pupil for contumacious behavior is not violative of this section. Smith v. Johnson, 105 Neb. 61, 178 N.W. 835 (1920).

Teaching of foreign language is not repugnant to theory of ''common school,'' and statute providing for such teaching upon petition of parents is not unconstitutional. State ex rel. Thayer v. School Dist. of Nebraska City, 99 Neb. 338, 156 N.W. 641 (1916).

Sec. 2. State Department of Education; general supervision of school system.

The State Department of Education shall be comprised of a State Board of Education and a Commissioner of Education. The State Department of Education shall have general supervision and administration of the school system of the state and of such other activities as the Legislature may direct.

Source: Neb. Const. art. VIII, sec. 2 (1875); Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 2; Amended 1972, Laws 1972, LB 1023, sec. 1.

Grant of administrative and executive power to the Department of Education is authorized. School Dist. No. 8 of Sherman County v. State Board of Education, 176 Neb. 722, 127 N.W.2d 458 (1964).

Sec. 3. State Board of Education; members; election; manner of election; term of office.

The State Board of Education shall be composed of eight members, who shall be elected from eight districts of substantially equal population as provided by the Legislature. Their term of office shall be for four years each. Their duties and powers shall be prescribed by the Legislature, and they shall receive no

compensation, but shall be reimbursed their actual expense incurred in the performance of their duties. The members of the State Board of Education shall not be actively engaged in the educational profession and they shall be elected on a nonpartisan ballot.

Source: Neb. Const. art. VIII, sec. 3 (1875); Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 3; Amended 1972, Laws 1972, LB 1023, sec. 1.

Powers and duties of State Board of Education are prescribed by law. School Dist. No. 8 of Sherman County v. State Board of Education, 176 Neb. 722, 127 N.W.2d 458 (1964).

Sec. 4. State Board of Education; Commissioner of Education; appointment; powers; duties.

The State Board of Education shall appoint and fix the compensation of the Commissioner of Education, who shall be the executive officer of the State Board of Education and the administrative head of the State Department of Education, and who shall have such powers and duties as the Legislature may direct. The board shall appoint all employees of the State Department of Education on the recommendation of the Commissioner of Education.

Source: Neb. Const. art. VIII, sec. 4 (1875); Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 4; Amended 1966, Laws 1965, c. 294, sec. 1, p. 836; Amended 1972, Laws 1972, LB 1023, sec. 1.

Sec. 5. Fines, penalties, and license money; allocation; use of forfeited conveyances.

(1) Except as provided in subsections (2) and (3) of this section, all fines, penalties, and license money arising under the general laws of the state, except fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways of this state, shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, bylaws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, except that all fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways shall be placed as follows: Seventy-five per cent in a fund for state highways and twenty-five per cent to the county general fund where the fine or penalty is paid.

(2) Fifty per cent of all money forfeited or seized pursuant to enforcement of the drug laws shall belong and be paid over to the counties for drug enforcement purposes as the Legislature may provide.

(3) Law enforcement agencies may use conveyances forfeited pursuant to enforcement of the drug laws as the Legislature may provide. Upon the sale of such conveyances, the proceeds shall be appropriated exclusively to the use and support of the common schools as provided in subsection (1) of this section.

Source: Neb. Const. art. VIII, sec. 5 (1875); Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 5; Amended 1956, Laws 1955, c. 195, sec. 1, p. 558; Amended 1984, Laws 1984, LR 2, sec. 1.

1. License money
2. Fines and penalties
3. Miscellaneous

1. License money

Statute requiring use of hunting and fishing license fees for other than school purposes sustained as constitutional. Wilcox v. Havekost, 144 Neb. 562, 13 N.W.2d 889 (1944).

License fees received by Liquor Control Commission, and imposed for benefit of state, do not go to school fund. School Dist. of Omaha v. Gass, 131 Neb. 312, 267 N.W. 528 (1936).

Act imposing license fees upon persons desiring to fish and hunt in state, and requiring such fees to be paid to State Treasurer for benefit of state school funds is not in conflict with this section. State ex rel. Stevens v. Nickerson, 97 Neb. 837, 151 N.W. 981 (1915).

Where sole purpose of occupation tax is to raise revenue, taxes received are not license money within the meaning of this section. State ex rel. School Dist., City of Auburn v. Boyd, 63 Neb. 829, 89 N.W. 417 (1902).

License money cannot be diverted from school fund under guise of occupation tax. State ex rel. School Dist. of City of Lincoln v. Aitken, 61 Neb. 490, 85 N.W. 395 (1901).

2. Fines and penalties

Court costs are not fines or penalties within the meaning of this Article and section of the Constitution of Nebraska. DeCamp v. City of Lincoln, 202 Neb. 727, 277 N.W.2d 83 (1979).

The provision of section 48-125, R.R.S.1943, for added amount for waiting time does not impose a penalty to an individual within prohibition of this section. University of Nebraska at Omaha v. Paustian, 190 Neb. 840, 212 N.W.2d 704 (1973).

Forfeited recognizances and cash bail bonds are penalties arising under the general laws of the state and should be distributed to the several school districts of the county. School Dist. of Omaha v. City of Omaha, 175 Neb. 21, 120 N.W.2d 267 (1963).

Fines, penalties, and license money arising under city ordinance are to be apportioned among all school districts in city in proportion to the number of children of school age residing in areas of districts within the city. School Dist. No. 54 of Douglas County ex rel. Hogan v. Howell, 172 Neb. 404, 110 N.W.2d 52 (1961).

Fines, penalties, and license money under general laws of state are apportioned among all school districts in county. School Dist. No. 54 of Douglas County ex rel. Hogan v. School Dist. of Omaha, 171 Neb. 769, 107 N.W.2d 744 (1961).

Collections from violations for overparking under parking-meter ordinance were penalties belonging to school fund. School District of McCook v. City of McCook, 163 Neb. 817, 81 N.W.2d 224 (1957).

Words ''fines, penalties, and license money'' refer to and include fines imposed in punishment of crimes and misdemeanors and exactions imposed for violation of ordinances having the characteristics of a criminal proceeding, and do not include penalties provided for failure to pay taxes. School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N.W.2d 24 (1947).

Act that provides for recovery of penalty by county, but does not provide manner of distribution of penalty, does not violate this section. In re Estate of Rogers, 147 Neb. 1, 22 N.W.2d 297 (1946).

Statute making railroad liable to shipper for penalty for delay, in addition to actual damages is void, as all penalties must go to school funds. Sunderland Bros. Co. v. Chicago, B. & Q. R. R. Co., 104 Neb. 319, 179 N.W. 546 (1920).

Statute providing for tax against owner and building adjudged to be liquor nuisance is void as diverting penalty from school fund. State ex rel. McGuire v. Macfarland, 104 Neb. 42, 175 N.W. 663 (1919); State ex rel. English v. Fanning, 97 Neb. 224, 149 N.W. 413 (1914), reversing 96 Neb. 123, 147 N.W. 215 (1914).

Statute imposing only compensatory damages for delay in nature of liquidated damages is valid. Cram v. Chicago, B. & Q. Ry. Co., 85 Neb. 586, 123 N.W. 1045 (1909), 84 Neb. 607, 122 N.W. 31 (1909), affirmed in Chicago, B. & Q. Ry. Co. v. Cram, 228 U.S. 70 (1913).

All fines and penalties, when collected, are required to be paid into the school fund. Sothman v. State, 66 Neb. 302, 92 N.W. 303 (1902).

Act allowing compensation and damages to injured party in case of embezzlement is not a fine or penalty within the meaning of this section. Everson v. State, 66 Neb. 154, 92 N.W. 137 (1902).

Statute fixing fifty dollars damage for failure and refusal of mortgagee to release chattel mortgage is not in conflict with this section. Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N.W. 133 (1895).

3. Miscellaneous

While ordinarily, with respect to state causes of action, punitive damages contravene this section and are not allowed, punitive damages are recoverable in a suit filed in Nebraska state court pursuant to 42 U.S.C. section 1983. State ex rel. Cherry v. Burns, 258 Neb. 216, 602 N.W.2d 477 (1999).

Statute providing for recovery of treble damages in civil action was unconstitutional. Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960).

Statutory provision making contract wholly void was remedial and not penal. Arthur v. Trindel, 168 Neb. 429, 96 N.W.2d 208 (1959).

This provision has no application to action by borrower asserting violation of Installment Loan Act. McNish v. General Credit Corp., 164 Neb. 526, 83 N.W.2d 1 (1957).

Officer collecting money belonging to school fund is custodian thereof and if he defaults he is ineligible to hold any office created by Constitution or statutes. State ex rel. Broatch v. Moores, 52 Neb. 770, 73 N.W. 299 (1897).

Money collected should be divided pro rata among school districts. King v. State ex rel. School Dist. No. 1, Hall County, 50 Neb. 66, 69 N.W. 307 (1896); Guthrie v. State ex rel. School Dist. No. 7, Sioux County, 47 Neb. 819, 66 N.W. 853 (1896).

Sec. 6. Educational lands; management; Board of Educational Lands and Funds; members; appointment; sale of lands.

No lands now owned or hereafter acquired by the state for educational purposes shall be sold except at public auction under such conditions as the Legislature shall provide. The general management of all lands set apart for educational purposes shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds. The members shall be appointed by the Governor, subject to the

approval of the Legislature, with such qualifications and for such terms and compensation as the Legislature may provide.

Source: Neb. Const. art. VIII, sec. 6 (1875); Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 6; Amended 1972, Laws 1972, LB 1023, sec. 1.

1. Powers of Legislature
2. Powers of board
3. State as trustee
4. Miscellaneous

1. Powers of Legislature

This section authorizes Legislature to direct sale of school lands. State ex rel. Belker v. Board of Educational Lands & Funds, 185 Neb. 270, 175 N.W.2d 63 (1970).

Legislature has no power to make a grant in fee of, or an easement over, public school lands without compensation. State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N.W.2d 841 (1943).

Legislature cannot pass law providing for disposition of school lands otherwise than as provided by Constitution. State v. Tanner, 73 Neb. 104, 102 N.W. 235 (1905).

2. Powers of board

Board of Educational Lands and Funds has control and management of school lands. State v. Kidder, 173 Neb. 130, 112 N.W.2d 759 (1962); State v. Cooley, 156 Neb. 330, 56 N.W.2d 129 (1952); State v. Gardner, 156 Neb. 326, 56 N.W.2d 135 (1952).

While there has been change in composition of board, there has been no change in its functions since 1875. State ex rel. Bottcher v. Bartling, 149 Neb. 491, 31 N.W.2d 422 (1948).

Board of Commissioners, under direction of Legislature and subject to terms imposed by it, has power to lease school lands. State v. Platte Valley P. P. & I. Dist., 147 Neb. 289, 23 N.W.2d 300 (1946).

Board is by law in charge of and responsible for the investment of school funds. State v. Bass, 131 Neb. 592, 269 N.W. 68 (1936).

Board of Educational Lands and Funds has executive power over the sale, leasing and general management of school lands under legislative direction. Briggs v. Neville, 103 Neb. 1, 170 N.W. 188 (1918); Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N.W. 75 (1918).

Board of Educational Lands and Funds may, in exercise of reasonable discretion, reject appraisement if it appears too low. State ex rel. Rutledge v. Eaton, 78 Neb. 202, 110 N.W. 709 (1907).

Sole power to handle permanent school funds of state is lodged with board. State ex rel. Crounse v. Bartley, 40 Neb. 298, 58 N.W. 966 (1894).

Board has no jurisdiction or control over disposition of so-called saline lands of state. McMurtry v. Engelhardt, 5 Neb. Unof. 271, 98 N.W. 40 (1904).

3. State as trustee

Title to school lands was vested in state upon express trust for support of common schools. State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N.W.2d 392 (1954).

The state as trustee is without power to bestow a special benefit upon any person or corporation, public or private, at the expense of the cestui que trust, the public school system of the state. State v. Platte Valley Public Power & Irr. Dist., 143 Neb. 661, 10 N.W.2d 631 (1943).

Since state, and not the board or its individual members, is trustee of school fund, suit may not be brought against the board and its individual members for an accounting by a taxpayer, since the suit is essentially one against the state. State ex rel. Walker v. Board of Commissioners for Educational Lands & Funds, 141 Neb. 172, 3 N.W.2d 196 (1942).

4. Miscellaneous

Prior to 1940 amendment, Commissioner of Public Lands and Buildings, as statutory officer, had duties to perform. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937).

Where board is created by law, no one member having greater power than every other member, board can act only by majority vote. Follmer v. State, 94 Neb. 217, 142 N.W. 908 (1913).

Sec. 7. Perpetual funds enumerated.

The following are hereby declared to be perpetual funds for common school purposes, including early childhood educational purposes operated by or distributed through the common schools, of which the annual interest or income only can be appropriated, to wit:

First. Such percent as has been, or may hereafter be, granted by Congress on the sale of lands in this state.

Second. All money arising from the sale or leasing of sections number sixteen and thirty-six in each township in this state, and the lands selected, or that may be selected, in lieu thereof.

Third. The proceeds of all lands that have been, or may hereafter be, granted to this state, where by the terms and conditions of such grant the same are not to be otherwise appropriated.

Fourth. The net proceeds of lands and other property and effects that may come to this state, by escheat or forfeiture, or from unclaimed dividends, or distributive shares of the estates of deceased persons.

Fifth. All other property of any kind now belonging to the perpetual fund.

Source: Neb. Const. art. VIII, sec. 7 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 20; Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 7; Amended 1972, Laws 1972, LB 1023, sec. 1; Amended 2006, Laws 2006, LB 1006, sec. 1.

Legislative act providing for offsetting of capital gains against past capital losses held unconstitutional. State ex rel. Bottcher v. Bartling, 149 Neb. 491, 31 N.W.2d 422 (1948).

Act providing for payment out of state school funds of tuition of children whose parent is in military service of United States, stationed in Nebraska, was void. Taylor v. School Dist. of City of Lincoln, 128 Neb. 437, 259 N.W. 168 (1935).

Constitution recognizes the right of the state to acquire land by escheat. In re Estate of O'Connor, 126 Neb. 182, 252 N.W. 826 (1934).

School in part sectarian was not eligible to receive portion of state common school trust funds. State ex rel. Public School Dist. No. 6, Cedar County v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932).

Saline lands granted to state by United States are not included in educational lands under control of Board of Educational Lands and Funds. Chicago, B. & Q. R. R. Co. v. Neville, 102 Neb. 817, 170 N.W. 176 (1918).

Teaching of foreign language is not contrary to public policy of state to provide common schools. State ex rel. Thayer v. School Dist. of Nebraska City, 99 Neb. 338, 156 N.W. 641 (1916).

Sale of school lands to pay special assessment for drainage purposes does not affect right of state in such lands. Morehouse v. Elkhorn River Drainage Dist., 90 Neb. 406, 133 N.W. 446 (1911); McMurtry v. Engelhardt, 5 Neb. Unof. 271, 98 N.W. 40 (1904).

Act of Legislature is not necessary to appropriation and use of funds in order to expend same for purposes expressed in grant. State ex rel. Spencer Lens Co. v. Searle, 77 Neb. 155, 109 N.W. 770 (1906).

Returns of unsold school lands must be applied to support of common schools and not be vested in permanent school fund. State ex rel. McKenzie v. McBride, 5 Neb. 102 (1876).

Sec. 8. Trust funds belong to state for educational purposes; use; investment.

All funds belonging to the state for common school purposes, including early childhood educational purposes operated by or distributed through the common schools, the interest and income whereof only are to be used, shall be deemed trust funds. Such funds with the interest and income thereof are hereby solemnly pledged to the purposes for which they are granted and set apart and shall not be transferred to any other fund for other uses. The state shall supply any net aggregate losses thereof realized at the close of each calendar year that may in any manner accrue. Notwithstanding any other provisions in this Constitution, such funds shall be invested as the Legislature may by statute provide.

Source: Neb. Const. art. VIII, sec. 8 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 21; Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 8; Amended 1972, Laws 1972, LB 1023, sec. 1; Amended 2006, Laws 2006, LB 1006, sec. 1.

The public school lands are held in trust for educational purposes. State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N.W.2d 392 (1954); State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N.W.2d 520 (1951).

Lease of school land under unconstitutional law was void from inception. Board of Educational Lands & Funds v. Gillett, 158 Neb. 558, 64 N.W.2d 105 (1954).

Persons dealing with school lands do so subject to trust obligation of state. Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N.W.2d 653 (1952).

State is under obligation to replace losses in permanent school fund, which cannot be diminished by application of capital gains. State ex rel. Bottcher v. Bartling, 149 Neb. 491, 31 N.W.2d 422 (1948).

While there is an obligation on the part of the state as trustee to replace shortages in the school fund, the obligation is not self-executing. State ex rel. Walker v. Board of Commissioners for Educational Lands & Funds, 141 Neb. 172, 3 N.W.2d 196 (1942).

Educational funds of state are trust funds, and can only be paid out for purposes specified. Taylor v. School Dist. of City of Lincoln, 128 Neb. 437, 259 N.W. 168 (1935).

Funds derived from grant by Congress of public lands, by contract with the federal government, are held by the state as trustee to carry out the object of the grant. State ex rel. Ledwith v. Brian, 84 Neb. 30, 120 N.W. 916 (1909).

School lands are held in trust by the state. United States v. 78.61 Acres of Land in Dawes & Sioux Counties, 265 F.Supp. 564 (D. Neb. 1967).

Sec. 9. Educational funds; trust funds; use; early childhood education endowment fund; created; use; early childhood education, defined.

(1) The following funds shall be exclusively used for the support and maintenance of the common schools in each school district in the state or for early childhood education operated by or distributed through the common schools as provided in subsection (3) of this section, as the Legislature shall provide:

(a) Income arising from the perpetual funds;

(b) The income from the unsold school lands, except that costs of administration shall be deducted from the income before it is so applied;

(c) All other grants, gifts, and devises that have been or may hereafter be made to the state which are not otherwise appropriated by the terms of the grant, gift, or devise; and

(d) Such other support as the Legislature may provide.

(2) No distribution or appropriation shall be made to any school district for the year in which school is not maintained for the minimum term required by law.

(3)(a) An early childhood education endowment fund shall be created for the purpose of supporting early childhood education in this state as provided by the Legislature.

(b) An amount equal to forty million dollars of the funds belonging to the state for common school and early childhood educational purposes operated by or distributed through the common schools described in Article VII, section 7, of this Constitution shall be allocated for the early childhood education endowment fund.

(c) Only interest or income on such early childhood education endowment fund may be appropriated as provided by the Legislature for the benefit of the common schools and for the exclusive purpose of supporting early childhood education in this state.

(d) For purposes of Article VII of this Constitution, early childhood education means programs operated by or distributed through the common schools promoting development and learning for children from birth to kindergarten-entrance age.

(e) If the annual income from twenty million dollars of private funding is not irrevocably committed by July 1, 2011, to the use of the early childhood education endowment fund, then the forty-million-dollar allocation pursuant to subdivision (3)(b) of this section may revert to the use of the common schools as the Legislature shall determine.

Source: Neb. Const. art. VIII, sec. 9 (1875); Amended 1908, Laws 1907, c. 201, sec. 1, p. 580; Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 9; Amended 1966, Laws 1965, c. 302, sec. 2(1), p. 852; Amended 1970, Laws 1969, c. 423, sec. 1, p. 1439; Amended 1972, Laws 1972, LB 1023, sec. 1; Amended 2006, Laws 2006, LB 1006, sec. 1.

1. Grants, gifts, and devises
2. Miscellaneous

1. Grants, gifts, and devises

Primary purpose of trust is production of income for the support and maintenance of common schools. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N.W.2d 520 (1951).

Profit on sale of securities becomes a part of permanent school fund. State ex rel. Bottcher v. Bartling, 149 Neb. 491, 31 N.W.2d 422 (1948).

Since state, and not the board or its individual members, is trustee of school fund, suit may not be brought against the board and its individual members for an accounting by a tax-

payer, since the suit is essentially one against the state. State ex rel. Walker v. Board of Commissioners for Educational Lands & Funds, 141 Neb. 172, 3 N.W.2d 196 (1942).

Act providing for payment out of state school funds of tuition of children whose parent is in military service of United States, stationed in Nebraska, was void. Taylor v. School Dist. of City of Lincoln, 128 Neb. 437, 259 N.W. 168 (1935).

State school fund is a trust fund and can be used only for purposes specified. Taylor v. School Dist. of City of Lincoln, 128 Neb. 437, 259 N.W. 168 (1935).

Saline lands granted to state by United States are not included in educational lands. Chicago, B. & Q. R. R. Co. v. Neville, 102 Neb. 817, 170 N.W. 176 (1918).

Funds derived from certain grants for specified purposes cannot be converted to General Fund of the state. Olive v. School District No. 1, 86 Neb. 135, 125 N.W. 141 (1910); State ex rel. Ledwith v. Brian, 84 Neb. 30, 120 N.W. 916 (1909); State ex rel. McKenzie v. McBride, 5 Neb. 102 (1876); McMurtry v. Engelhardt, 5 Neb. Unof. 271, 98 N.W. 40 (1904).

All lands, money or other property bequeathed, or in any manner conveyed to state for educational purposes, shall be used and expended in accord with terms of grant and cannot be diverted to general fund or other uses. State ex rel. Ledwith v. Brian, 84 Neb. 30, 120 N.W. 916 (1909).

2. Miscellaneous

Constitutionality of a retroactive statute generally depends upon reasonableness. Relevant factors to consider are the nature and strength of the public interest, the extent of modification of the asserted pre-enactment right, and the nature of the right altered by the statute. Hiddleston v. Nebraska Jewish Education Soc., 186 Neb. 786, 186 N.W.2d 904 (1971).

Law having for its object diversion of any funds raised by taxation for school purposes to different purpose is unconstitutional and void. State ex rel. Ahern v. Walsh, 31 Neb. 469, 48 N.W. 263 (1891).

In proceedings by United States to condemn state school lands, measure of compensation is the fair market value of the property in fee, irrespective of number and kind of interests existing therein. State of Nebraska v. United States, 164 F.2d 866 (8th Cir. 1947).

Sec. 10. University of Nebraska; government; Board of Regents; election; student membership; terms.

The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six nor more than eight regents to be designated the Board of Regents of the University of Nebraska, who shall be elected from and by districts as herein provided and three students of the University of Nebraska who shall serve as nonvoting members. Such nonvoting student members shall consist of the student body president of the University of Nebraska at Lincoln, the student body president of the University of Nebraska at Omaha, and the student body president of the University of Nebraska Medical Center. The terms of office of elected members shall be for six years each. The terms of office of student members shall be for the period of service as student body president. Their duties and powers shall be prescribed by law; and they shall receive no compensation, but may be reimbursed their actual expenses incurred in the discharge of their duties.

The Legislature shall divide the state, along county lines, into as many compact regent districts, as there are regents provided by the Legislature, of approximately equal population, which shall be numbered consecutively.

The Legislature shall redistrict the state after each federal decennial census. Such districts shall not be changed except upon the concurrence of a majority of the members of the Legislature. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature. Whenever the state is so redistricted the members elected prior to the redistricting shall continue in office, and the law providing for such redistricting shall where necessary specify the newly established district which they shall represent for the balance of their term.

Source: Neb. Const. art. VIII, sec. 10 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 22; Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 10; Amended 1968, Laws 1967, c. 320, sec. 1, p. 853; Amended 1974, Laws 1974, LB 323, sec. 1.

This section requires the Legislature to vest the general government of the University in the Board of Regents. Board of Regents v. Exon, 199 Neb. 146, 256 N.W.2d 330 (1977).

Government of University of Nebraska is vested in the Board of Regents, subject to direction of the Legislature. Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N.W.2d 221 (1951).

This section does not prohibit Legislature from imposing new duties on regents, or from requiring them to establish and conduct hog-cholera serum plant. Fisher v. Board of Regents of University of Nebraska, 108 Neb. 666, 189 N.W. 161 (1922).

Legislature in 1869, in accordance with this section, established the University of Nebraska, and provided the general powers of Board of Regents. Stewart v. Barton, 91 Neb. 96, 135 N.W. 381 (1912).

It was the duty of Board of Regents to establish experimental substations as directed by Legislature. State ex rel. Bushee v. Whitmore, 85 Neb. 566, 123 N.W. 1051 (1909).

This Article and section 85-105, R.R.S.1943, do not grant power to waive immunity from suit in federal court. Board of Regents of University of Nebraska v. Dawes, 370 F.Supp. 1190 (D. Neb. 1974).

Sec. 11. Appropriation of public funds; handicapped children; sectarian instruction; religious test of teacher or student.

Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; *Provided*, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.

All public schools shall be free of sectarian instruction.

The state shall not accept money or property to be used for sectarian purposes; *Provided*, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto.

A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.

Source: Neb. Const. art. VIII, sec. 11 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 23; Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 11; Amended 1972, Laws 1971, LB 656, sec. 1; Amended 1976, Laws 1976, LB 666, sec. 1.

Note: Pursuant to Cunningham v. Exon, 207 Neb. 513, 300 N.W.2d 6 (1980), the third paragraph in this section has been reinstated.

1. Grant of public funds
2. Constitutionality of certain practices
3. Miscellaneous

1. Grant of public funds

The provisions of section 79-487 authorizing the transportation of nonprofit private school students on public school buses do not violate the provisions of this section in that they do not appropriate public funds to a nonpublic institution. State ex rel. Bouc v. School Dist. of City of Lincoln, 211 Neb. 731, 320 N.W.2d 472 (1982).

No appropriation or grant of public funds or property shall be made to any educational institution which is not owned and controlled by the state or a governmental subdivision thereof. Gaffney v. State Department of Education, 192 Neb. 358, 220 N.W.2d 550 (1974).

2. Constitutionality of certain practices

An act which indirectly benefits private institutions through public grants to students is unconstitutional. State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d 726 (1974).

It is not unconstitutional for a public school district to lease classrooms in a church or other sectarian building if the classrooms are under the control and operation of the public school authorities and the instruction offered is nonsectarian. State ex rel. School Dist. of Hartington v. State Board of Education, 188 Neb. 1, 195 N.W.2d 161 (1972).

Reading from Bible, singing of hymns and offering prayer, in accordance with doctrines of religious organizations, is prohibited in public schools by this section. State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902), judgment adhered to 65 Neb. 876, 93 N.W. 169 (1903).

3. Miscellaneous

The age of twenty-one years is reached upon a person's twenty-first birthday, and, therefore, the term ''under the age of twenty-one years'' excludes any persons who have reached their twenty-first birthday. Monahan v. School Dist. No. 1 of Douglas County, 229 Neb. 139, 425 N.W.2d 624 (1988).

This section does not prohibit the State from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose. State ex rel. Creighton Univ. v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984).

Adoption of 1976 amendment to allow for state contracting with institutions not wholly owned or controlled by the state or any political subdivision for nonsectarian services for handicapped children did not repeal third full paragraph of original section 11, which forbids state to match federal grants to nonpublic institutions with public money. Cunningham v. Exon, 207 Neb. 513, 300 N.W.2d 6 (1980).

A citizen taxpayer has standing to maintain an action for a declaratory judgment to challenge the accuracy and validity of the proclamation, publication, and incorporation of an amendment to this Article and section of the Constitution of Nebraska. Cunningham v. Exon, 202 Neb. 563, 276 N.W.2d 213 (1979).

Legislature cannot authorize donations by public corporations for religious or charitable purposes. United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).

Section is applicable to school in part sectarian. State ex rel. Public School Dist. No. 6, Cedar County v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932).

Sec. 12. Education and reform of minors.

The Legislature may provide by law for the establishment of a school or schools for the safe keeping, education, employment and reformation of all children under the age of eighteen years, who, for want of proper parental care, or other cause, are growing up in mendicancy or crime.

Source: Neb. Const. art. VIII, sec. 12 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 24; Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 12.

Establishment of Boys' Training School is authorized by this section. Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955).

Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated the law. State v. McCoy, 145 Neb. 750, 18 N.W.2d 101 (1945).

Under former section Legislature was without power to authorize commitment to state industrial school of children over sixteen who had not been convicted of crime. Scott v. Flowers, 61 Neb. 620, 85 N.W. 857 (1901), reversing 60 Neb. 675, 84 N.W. 81 (1900).

Sec. 13. State colleges; government; board; name; selection; duties; compensation.

The general government of the state colleges as now existing, and such other state colleges as may be established by law, shall be vested, under the direction of the Legislature, in a board of seven members to be styled as designated by the Legislature, six of whom shall be appointed by the Governor, with the advice and consent of the Legislature, two each for a term of two, four, and six years, and two each biennium thereafter for a term of six years, and the Commissioner of Education shall be a member ex officio. The duties and powers of the board shall be prescribed by law, and the members thereof shall receive no compensation for the performance of their duties, but may be reimbursed their actual expenses incurred therein.

Source: Neb. Const. art. VIII, sec. 13 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 25; Transferred by Constitutional Convention, 1919-1920, art. VII, sec. 13; Amended 1952, Laws 1951, c. 164, sec. 2(4), p. 646; Amended 1968, Laws 1967, c. 315, sec. 1, p. 845.

Board of Education of State Normal Schools was established in 1920. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

Teacher, head of department in state normal school, dismissed by president without action by board, is entitled to test, by quo warranto, the right of teacher employed to take his place. Eason v. Majors, 111 Neb. 288, 196 N.W. 133 (1923).

Upon showing that college administrative body acted from honest conviction upon belief facts showed it was for best interests of the school, and there was no showing that act was arbitrary or generated by ill will, fraud, coercion, or other such motives, court will not interfere. Levitt v. Board of Trustees of Nebraska State Colleges, 376 F.Supp. 945 (D. Neb. 1974).

Sec. 14. Coordinating Commission for Postsecondary Education; membership; powers and duties; coordination, defined.

On January 1, 1992, there shall be established the Coordinating Commission for Postsecondary Education which shall, under the direction of the Legislature, be vested with the authority for the coordination of public postsecondary educational institutions. Public postsecondary educational institutions shall

include each postsecondary educational campus or institution which is governed by the Board of Regents of the University of Nebraska, the Board of Trustees of the Nebraska State Colleges, any board or boards established for the community colleges, or any other governing board for any other public postsecondary educational institution which may be established by the Legislature.

Coordination shall mean:

(1) Authority to adopt, and revise as needed, a comprehensive statewide plan for postsecondary education which shall include (a) definitions of the role and mission of each public postsecondary educational institution within any general assignments of role and mission as may be prescribed by the Legislature and (b) plans for facilities which utilize tax funds designated by the Legislature;

(2) Authority to review, monitor, and approve or disapprove each public postsecondary educational institution's programs and capital construction projects which utilize tax funds designated by the Legislature in order to provide compliance and consistency with the comprehensive plan and to prevent unnecessary duplication; and

(3) Authority to review and modify, if needed to promote compliance and consistency with the comprehensive statewide plan and prevent unnecessary duplication, the budget requests of the Board of Regents of the University of Nebraska, the Board of Trustees of the Nebraska State Colleges, any board or boards established for the community colleges, or any other governing board for any other public postsecondary educational institution which may be established by the Legislature.

The Legislature may provide the commission with additional powers and duties related to postsecondary education as long as such powers and duties do not invade the governance and management authority of the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges as provided in the Constitution of Nebraska, Article VII, sections 10 and 13. The Legislature may provide that coordination of the community colleges by the commission pursuant to this section may be conducted through a board or association representing all the community colleges.

Nothing in this section providing for statewide coordination shall limit or require the use of property tax revenue by and for community colleges.

The commission shall consist of eleven members, residents of the state or the districts for which appointed, who shall be appointed by the Governor with the approval of a majority of the Legislature. Six of the members shall be chosen from six districts of approximately equal population and five shall be chosen on a statewide basis.

The terms of the members of the commission shall be six years or until a successor is qualified and takes office, except that of the members initially appointed, four members shall serve for terms of two years and four members shall serve for terms of four years. The members of the commission shall receive no compensation for the performance of their duties but may be reimbursed their actual and necessary expenses.

Source: Neb. Const. art. VII, sec. 14 (1990); Adopted 1990, Laws 1990, LB 1141, sec. 1.

Sec. 15. Omitted.

Note: Article VII, section 15, of the Constitution of Nebraska, as adopted in 1992 by Initiative 407, has been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 245 Neb. 907, 515 N.W.2d 788 (1994).

Note: Article VII, section 15, of the Constitution of Nebraska, as adopted in 1992 by Initiative 408, has been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Sec. 16. Repealed 1972. Laws 1972, LB 1023, sec. 1.

Sec. 17. Repealed 1972. Laws 1972, LB 1023, sec. 1.

ARTICLE VIII

REVENUE

Section

Sec. 1. Revenue; raised by taxation; legislative powers.

The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 4, of this Constitution or any other provision of this Constitution to the contrary: (1) Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution; (2) tangible personal property, as defined by the Legislature, not exempted by this Constitution or by legislation, shall all be taxed at depreciated cost using the same depreciation method with reasonable class lives, as determined by the Legislature, or shall all be taxed by valuation uniformly and proportionately; (3) the Legislature may provide for a different method of taxing motor vehicles and may also establish a separate class of motor vehicles consisting of those owned and held for resale by motor vehicle dealers which shall be taxed in the manner and to the extent provided by the Legislature and may also establish a separate class for trucks, trailers, semitrailers, truck-tractors, or combinations thereof, consisting of those owned by residents and nonresidents of this state, and operating in interstate commerce, and may provide reciprocal and proportionate taxation of such vehicles. The tax proceeds from motor vehicles taxed in each county shall be allocated to the county and the cities, villages, and school districts of such county; (4) the Legislature may provide that agricultural land and horticultural land, as

defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land; (5) the Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall for property tax purposes be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses; (6) the Legislature may prescribe standards and methods for the determination of the value of real property at uniform and proportionate values; (7) in furtherance of the purposes for which such a law of the United States has been adopted, whenever there exists a law of the United States which is intended to protect a specifically designated type, use, user, or owner of property or franchise from discriminatory state or local taxation, such property or franchise shall constitute a separate class of property or franchise under the laws of the State of Nebraska, and such property or franchise may not be taken into consideration in determining whether taxes are levied by valuation uniformly or proportionately upon any property or franchise, and the Legislature may enact laws which statutorily recognize such class and which tax or exempt from taxation such class of property or franchise in such manner as it determines; and (8) the Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation and may further provide for reciprocal and proportionate taxation of livestock located in this state for only part of a year. Each actual property tax rate levied for a governmental subdivision shall be the same for all classes of taxed property and franchises. Taxes uniform as to class of property or the ownership or use thereof may be levied by valuation or otherwise upon classes of intangible property as the Legislature may determine, and such intangible property held in trust or otherwise for the purpose of funding pension, profit-sharing, or other employee benefit plans as defined by the Legislature may be declared exempt from taxation. Taxes other than property taxes may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature.

Source: Neb. Const. art. IX, sec. 1 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 26; Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 1; Amended 1952, Laws 1951, c. 160, sec. 1, p. 636; Amended 1954, Laws 1954, Sixty-sixth Extraordinary Session, c. 3, sec. 1, p. 61; Amended 1960, Laws 1959, c. 238, sec. 1, p. 823; Amended 1964, Laws 1963, c. 298, sec. 1, p. 887; Amended 1964, Laws 1963, c. 301, sec. 1, p. 892; Amended 1972, Laws 1972, LB 837, sec. 1; Amended 1978, Laws 1978, First Spec. Sess., LR 1, sec. 1; Amended 1984, Laws 1984, First Spec. Sess., LR 7, sec. 1; Amended 1990, Laws 1989, LR 2, sec. 1; Amended 1992, Laws 1992, LR 219CA, sec. 1; Amended 1998, Laws 1998, LR 45CA, sec. 1.

1. Uniformity
2. Valuation
3. Classification
4. Property taxes
5. Occupation taxes
6. Excise and license taxes
7. Tax on corporate franchises

1. Uniformity

The object of the uniformity clause is accomplished if all the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value. No difference in the method of determining the valuation or rate of tax to be imposed can be allowed unless separate classifications rest on some reason of public policy or some substantial difference of situation or circumstance that would naturally suggest justice or expediency of diverse legislation with respect to the objects to be classified. Evidence of ''sales chasing'' may justify differential treatment accorded to a particular county. County of Douglas v. Nebraska Tax Equal. & Rev. Comm., 262 Neb. 578, 635 N.W.2d 413 (2001).

The county violated the Nebraska Constitution's uniformity clause by its selective imposition of an increased value and assessment of the taxpayer's property containing mineral interests based solely on the ownership or control of the property. Lyman-Richey Corp. v. Cass Cty. Bd. of Equal., 258 Neb. 1003, 607 N.W.2d 806 (2000); Ash Grove Cement Co. v. Cass Cty. Bd. of Equal., 258 Neb. 990, 607 N.W.2d 810 (2000).

The constitutional requirement of uniformity extends to both rate and valuation. Real property taxes may not be equalized by merely classifying property and then arbitrarily applying a given value to all properties of that classification; the mere fact that a formula is devised, by which property is nonuniformly and disproportionately assessed, does not satisfy the constitutional requirement. The object of the uniformity clause is accomplished if all of the property within a taxing jurisdiction is assessed and taxed at a uniform value; differential tax treatment can only be based on the use or nature of the property, not upon who controls the property. Constructors, Inc. v. Cass Cty. Bd. of Equal., 258 Neb. 866, 606 N.W.2d 786 (2000).

The Class VI school system tax levy set forth in section 79-1078 (formerly section 79-438.13) does not violate this provision requiring uniform taxation. Swanson v. State, 249 Neb. 466, 544 N.W.2d 333 (1996).

A taxpayer who seeks a refund of taxes which are claimed to have been invalid as in violation of the constitutional provision requiring uniformity and proportionality in the taxation of tangible property is at most entitled to a refund of the difference between the taxes levied against the property and the taxes if all of the property treated as exempt had been placed on the rolls and taxed. Trailblazer Pipeline Co. v. Balka, 246 Neb. 221, 518 N.W.2d 646 (1994).

Real and personal property are in the same class for purposes of uniformity. A statute exempting all but a small sliver of personal property from the property tax rolls is unconstitutional under the uniformity clause because it improperly shifts the property tax burden to real property owners. Jaksha v. State, 241 Neb. 106, 486 N.W.2d 858 (1992).

Personal property and real property are both ''tangible property'' and must be equalized and taxed uniformly pursuant to this provision. MAPCO Ammonia Pipeline v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991).

It is the function of the county board of equalization to determine the actual value of locally assessed property for tax purposes. In carrying out this function, the county board must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county. Individual discrepancies and inequalities within the county must be corrected and equalized by the county board of equalization. AT&T Information Sys. v. State Bd. of Equal., 237 Neb. 591, 467 N.W.2d 55 (1991).

The taxation of personal property must be uniform not only to the rate of taxation, but to the valuation of property as well. Xerox Corp. v. Karnes, 217 Neb. 728, 350 N.W.2d 566 (1984).

The requirement that taxes be assessed uniformly and proportionately does not preclude the result that the property is assessed at less than actual value. Konicek v. Board of Equalization, 212 Neb. 648, 324 N.W.2d 815 (1982).

A mobile home as defined in section 60-1601.01 is not a motor vehicle within the exception to the constitutional provision providing for uniform and proportionate taxation of personal property. Gates v. Howell, 204 Neb. 256, 282 N.W.2d 22 (1979).

Under this section, the taxation of personal property, except as otherwise authorized herein, must be uniform both as to rate of taxation and valuation of property. State ex rel. Meyer v. Peters, 191 Neb. 330, 215 N.W.2d 520 (1974).

Free port law does not violate constitutional provisions for uniformity and against special privileges. Norden Laboratories, Inc. v. County Board of Equalization, 189 Neb. 437, 203 N.W.2d 152 (1973).

Harm caused by statute permitting independent hospital district to fractionate territory of counties insufficient to constitute violation of this section. Shadbolt v. County of Cherry, 185 Neb. 208, 174 N.W.2d 733 (1970).

It is the duty of the State Board of Equalization and Assessment to give effect to the requirement that all taxes be levied uniformly and proportionately upon all tangible property. Hanna v. State Board of Equalization & Assessment, 181 Neb. 725, 150 N.W.2d 878 (1967).

The Constitution requires taxes on all tangible property to be levied by valuation, uniformly and proportionately. H/K Company v. Board of Equalization, 175 Neb. 268, 121 N.W.2d 382 (1963).

Tax upon motor vehicle dealers violated rule of uniformity as to class and was unconstitutional. State ex rel. Meyer v. Story, 173 Neb. 741, 114 N.W.2d 769 (1962).

Rule of uniformity applies to valuation of railroad property. Union P. R. R. Co. v. State Bd. of Equal & Assess., 170 Neb. 139, 101 N.W.2d 892 (1960); Chicago & N. W. Ry. Co. v. State Bd. of Equal. & Assess., 170 Neb. 106, 101 N.W.2d 873 (1960); Chicago, B. & Q. R. R. Co. v. State Bd. of Equal. & Assess., 170 Neb. 77, 101 N.W.2d 856 (1960).

Taxes are required to be levied by valuation uniformly and proportionately upon all tangible property. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N.W.2d 408 (1959).

Taxes on tangible property must be levied by valuation uniformly and proportionately. K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N.W.2d 381 (1957).

Substantial compliance as to value and uniformity is all that is required. LeDioyt v. County of Keith, 161 Neb. 615, 74 N.W.2d 455 (1956).

Uniformity as to class is required of tax on intangible property. Omaha Nat. Bank v. Heintze, 159 Neb. 520, 67 N.W.2d 753 (1954).

One of objectives is to secure a uniform and proportionate valuation. County of Buffalo v. State Board of Equalization & Assessment, 158 Neb. 353, 63 N.W.2d 468 (1954).

Uniform and proportionate valuation of farm lands is required. Laflin v. State Board of Equalization and Assessment, 156 Neb. 427, 56 N.W.2d 469 (1953).

Blanket Mill Tax Levy Act did not operate uniformly and proportionately, and was unconstitutional. Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85 (1952).

Tax Appraisal Board Act did not change uniformity requirements as to taxation of property and therefore did not violate this section. Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N.W.2d 174 (1950).

Taxes must be levied by valuation uniformly and proportionately upon all tangible property, and providing different method for fixing the actual value of real estate than that prescribed for

other tangible property violates this section. Homan v. Board of Equalization, 141 Neb. 400, 3 N.W.2d 650 (1942).

Act imposing annual tax on fire insurance companies based on gross premium receipts collected on policies of fire insurance on property located within corporate limits of cities or villages did not violate constitutional requirements of equality and uniformity. Continental Ins. Co. v. Smrha, 131 Neb. 791, 270 N.W. 122 (1936).

State authorizing tax levy on stock of banks was invalid as violating rule of uniformity as to class. State ex rel. Spillman v. Ord State Bank, 117 Neb. 189, 220 N.W. 265 (1928); Central Nat. Bank of Lincoln v. Sutherland, 113 Neb. 126, 202 N.W. 428 (1925); State Bank of Omaha v. Endres, 109 Neb. 753, 192 N.W. 322 (1923).

Assessment reasonably uniform and proportionate on all classes of property will not be set aside because all property is not assessed at actual value. Chicago, R. I & P. Ry. Co. v. State, 111 Neb. 362, 197 N.W. 114 (1923).

Rule of uniformity, applied to taxation of mortgages and of shares of stock in domestic corporations, inhibits discrimination between taxpayers in any manner. City Trust Co. of Omaha v. Douglas County, 101 Neb. 792, 165 N.W. 155 (1917).

Uniformity and equality in value of property of individuals and corporations is required. State ex rel. Breckenridge v. Fleming, 70 Neb. 529, 97 N.W. 1063 (1903).

Requirement of uniformity is accomplished if all the property within the taxing jurisdiction is assessed at uniform standard of value as compared with actual market value. State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N.W. 716 (1902).

This provision is command to Legislature to so enact laws that every person shall pay tax in proportion to value of his property. Scott v. Flowers, 60 Neb. 675, 84 N.W. 81 (1900); State ex rel. Sioux County v. Tucker, 38 Neb. 56, 56 N.W. 718 (1893).

Uniformity is satisfied if observed by each jurisdiction imposing tax. State ex rel. Young v. Osborn, 60 Neb. 415, 83 N.W. 357 (1900).

This section requires that both valuation of property and rate of levy be uniform in taxing district. High School District No. 137, Havelock v. Lancaster County, 60 Neb. 147, 82 N.W. 380 (1900); State ex rel. Ahern v. Walsh, 31 Neb. 469, 48 N.W. 263 (1891).

There must be uniformity as to persons or property within district for which tax is imposed. Clother v. Maher, 15 Neb. 1, 16 N.W. 902 (1883).

This provision requires uniform and proportionate assessment within the class of agricultural land; agricultural land is then divided into categories such as irrigated cropland, dry cropland, and grassland. Schmidt v. Thayer Cty. Bd. of Equal., 10 Neb. App. 10, 624 N.W.2d 63 (2001).

2. Valuation

If the State Board of Equalization and Assessment arbitrarily undervalues a particular class of centrally assessed property, so that another class of such property is valued disproportionately higher, the valuation of the latter class of property must be lowered so that it will be equalized with the other property. Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991).

This section requires that taxes upon tangible property shall be levied by valuation uniformly and proportionately. Lincoln Tel. & Tel. Co. v. County Board of Equalization, 209 Neb. 465, 308 N.W.2d 515 (1981).

Act which fixed value of agricultural income-producing machinery and equipment as those used by taxpayer in determining federal income tax violated this section. State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N.W.2d 596 (1970).

Legislature may prescribe standards and methods of determining value of tangible property for taxation. Carpenter v. State Board of Equalization & Assessment, 178 Neb. 611, 134 N.W.2d 272 (1965).

Assessment of too high a tax does not make it void, and taxpayer should first apply to Board of Equalization for relief. Power v. Jones, 126 Neb. 529, 253 N.W. 867 (1934).

Legislature may tax intangible property by valuation, uniformly, and without proportionate rates. Sommerville v. Board of County Comrs., 116 Neb. 282, 216 N.W. 815 (1927), affirmed on rehearing, 117 Neb. 507, 221 N.W. 433 (1928).

Legislature may fix basis of valuation for taxation. Beadle v. Sanders, 104 Neb. 427, 177 N.W. 789 (1920).

Constitutional provision for levying tax by valuation is not self-executing, and requires legislation to carry it into effect. Failure to provide method of valuing life insurance policies prevents their taxation. Laub v. Furnas County, 104 Neb. 402, 177 N.W. 749 (1920).

Taxpayer whose property alone is taxed at actual value is entitled to have his assessment reduced to the percentage of that value at which others are taxed. Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923).

3. Classification

A legislative classification must operate uniformly on all within a class which is reasonable. Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991).

The Legislature may, for the purpose of legislating, classify persons, places, objects, or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 466 N.W.2d 461 (1991).

Constitution flatly contradicts conclusion that real property taxes may be equalized if property classified in same values applied to same classifications. County of Gage v. State Board of Equalization & Assessment, 185 Neb. 749, 178 N.W.2d 759 (1970).

This section does not prohibit a graduated state income tax and specifically provides authorization for taxes other than property tax. Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967).

Business inventories and real estate are in the same class for purpose of taxation. Grainger Bros. Co. v. Board of Equalization, 180 Neb. 571, 144 N.W.2d 161 (1966).

Taxation on valuation of the capital stock of corporations is required to be uniform as to class. First Nat. Bank & Trust Co. of Lincoln v. County of Lancaster, 177 Neb. 390, 128 N.W.2d 820 (1964).

In classifying intangible property for taxation, there must be uniformity as to class. First Continental Nat. Bank & Trust Co. v. Davis, 172 Neb. 118, 108 N.W.2d 638 (1961).

Constitution recognizes that villages and cities are separate and distinct. Hueftle v. Eustis Cemetery Assn., 171 Neb. 293, 106 N.W.2d 400 (1960).

Separate listing and assessing of motor vehicles is authorized. Peterson v. Hancock, 166 Neb. 637, 90 N.W.2d 298 (1958).

Motor vehicles could be taxed as a separate class of tangible property. Boyd Motor Co. v. County of Box Butte, 159 Neb. 514, 67 N.W.2d 774 (1954).

State board was not required to treat ranch land as a separate class of property. County of Grant v. State Board of Equalization & Assessment, 158 Neb. 310, 63 N.W.2d 459 (1954).

Grain on hand in elevator was taxable in same manner as other tangible personal property. State v. T. W. Jones Grain Co., 156 Neb. 822, 58 N.W.2d 212 (1953).

Purpose of 1920 amendment was to provide for a separate classification of intangibles in order that this class of property might be dealt with separately, brought out of hiding and placed on the tax rolls. International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N.W.2d 620 (1945).

Legislature cannot define and tax as tangible property that which actually is intangible property. Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934).

Power of classification rests with the Legislature, and courts will not interfere therewith unless classification is artificial and baseless. Cunningham v. Douglas County, 104 Neb. 405, 177 N.W. 742 (1920).

Classification of persons dealing in grain as ''grain brokers'' for purpose of assessment and taxation, and taxing of ''average capital'' is not unconstitutional. Central Granaries Co. v. Lancaster County, 77 Neb. 319, 113 N.W. 199 (1907).

Different classes of property may be listed and valued by different modes and agencies. Western Union Telegraph Co. v. City of Omaha, 73 Neb. 527, 103 N.W. 84 (1905).

4. Property taxes

Raising of necessary revenue by taxation is one of duties of county board of equalization. Speer v. Kratzenstein, 143 Neb. 310, 12 N.W.2d 360 (1943).

Constitution permits mortgage interest in land to be taxed. Grand Lodge, Degree of Honor, A.O.U.W. of Nebraska v. Sarpy County, 99 Neb. 647, 157 N.W. 344 (1916).

Credits are by Constitution ''property'' and as such are to be taxed. Lancaster County v. McDonald, 73 Neb. 453, 103 N.W. 78 (1905).

Tax upon capital stock of corporation is in effect tax upon property and assets of company. State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N.W. 716 (1902).

5. Occupation taxes

Occupation taxes on corporations are authorized by this section. Licking v. Hayes Lumber Co., 146 Neb. 240, 19 N.W.2d 148 (1945).

Power to levy excise tax for use of highways was delegated by the people to the Legislature. Rocky Mountain Lines v. Cochran, 140 Neb. 378, 299 N.W. 596 (1941).

Occupation tax upon light, heat and power companies, without sufficient basis for classification, is void as discriminatory. City of Lincoln v. Lincoln Gas & Elec. Light Co., 100 Neb. 182, 158 N.W. 962 (1916).

Occupation tax may be levied upon the privilege of transacting the business of telegraphy within a city. City of Grand Island v. Postal Telegraph Cable Co., 92 Neb. 253, 138 N.W. 169 (1912).

Enumeration of occupations which may be taxed does not exclude other like enumerations. Mercantile Incorporating Co. v. Junkin, 85 Neb. 561, 123 N.W. 1055 (1909).

Occupation tax of five per cent of earnings of street railway company for municipal purposes was sustained. Lincoln Traction Co. v. City of Lincoln, 84 Neb. 327, 121 N.W. 435 (1909).

Constitution permits classification of occupations but imposition of taxes for persons of each class must be uniform. Rosenbloom v. State, 64 Neb. 342, 89 N.W. 1053 (1902).

Enumeration of business upon which occupation or license tax may be imposed does not limit such tax to business named. City of York v. Chicago, B. & Q. R. Co., 56 Neb. 572, 76 N.W. 1065 (1898).

This section does not deprive cities of power, under general law, of imposing occupation tax for municipal purposes. City of York v. Chicago, B. & Q. R. Co., 56 Neb. 572, 76 N.W. 1065 (1898); Templeton v. City of Tekamah, 32 Neb. 542, 49 N.W. 373 (1891); Magneau v. Fremont, 30 Neb. 843, 47 N.W. 280 (1890).

6. Excise and license taxes

The requirement of this provision that all taxes must be levied by valuation upon all tangible property and franchises, does not apply to excise taxes. State v. Garza, 242 Neb. 573, 496 N.W.2d 448 (1993).

Per head tax on cattle sold was an excise tax, not a property tax, and as such was not required to be levied by valuation uniformly and proportionately. State v. Galyen, 221 Neb. 497, 378 N.W.2d 182 (1985).

The imposition of an excise tax need not be uniform and proportionate but may be imposed upon each transaction. State v. Galyen, 221 Neb. 497, 378 N.W.2d 182 (1985).

Act imposing excise tax on imitation butter was not uniform upon all members of the class. Thorin v. Burke, 146 Neb. 94, 18 N.W.2d 664 (1945).

A tax on gross premiums of foreign insurance companies is not a tax on property but an excise tax on the privilege of doing business in this state. State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N.W. 555 (1937).

Statute providing for license fee on sale of tobacco and cigarettes was not a revenue measure under this section, and was constitutional. Nash-Finch Co. v. Beal, 124 Neb. 835, 248 N.W. 374 (1933).

Gasoline tax is excise tax and power to levy same is granted by this section. Pantorium v. McLaughlin, 116 Neb. 61, 215 N.W. 798 (1927).

Oil inspection fees, in excess of expense of enforcement, are invalid hereunder. Century Oil Co. v. Department of Agriculture, 110 Neb. 100, 192 N.W. 958 (1923); State v. Standard Oil Co., 100 Neb. 826, 161 N.W. 537 (1917).

Gross receipts of corporation may be taxed as license to do business but not as property tax. Western Union Telegraph Co. v. City of Omaha, 73 Neb. 527, 103 N.W. 84 (1905).

7. Tax on corporate franchises

Taxes on corporate franchises must be by valuation and in proportion to value. Western Union Telegraph Co. v. City of Omaha, 73 Neb. 527, 103 N.W. 84 (1905).

Corporate franchises are regarded as property and must be valued and taxed as such. State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N.W. 1063 (1903).

In computing value of corporate franchise, corporate indebtedness should not be deducted. State ex rel. Shriver v. Karr, 64 Neb. 514, 90 N.W. 298 (1902).

8. Tax on foreign corporations

Tax on shares of stock of foreign corporation was constitutional. Rehkopf v. Board of Equalization, 180 Neb. 90, 141 N.W.2d 462 (1966).

Foreign insurance companies may be treated as single class and taxed at different rate from domestic companies, but no discrimination should be made in taxes on their property within state. Aachen & Munich Fire Insurance Co. v. City of Omaha, 72 Neb. 518, 101 N.W. 3 (1904).

This section does not prevent Legislature from imposing tax, in nature of license or occupation tax, upon foreign corporations regardless of property valuation. State v. Insurance Co. of North America, 71 Neb. 320, 99 N.W. 36 (1904), demurrer sustained 71 Neb. 335, 100 N.W. 405 (1904), rehearing denied 71 Neb. 341, 102 N.W. 1022 (1905), judgment sustained 71 Neb. 348, 106 N.W. 767 (1906); State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N.W. 1063 (1903).

9. Special assessments

An act of Legislature which exempts a railroad company from payment of special assessments on benefits received but does not exempt it from payment of any general tax does not contravene the Constitution. Hinman v. Temple, 133 Neb. 268, 274 N.W. 605 (1937).

This section has no application to assessments levied for local improvements. Erickson v. Nine Mile Irr. Dist., 109 Neb. 189, 190 N.W. 573 (1922).

This section relates to revenue for general state and municipal government only, and has no application to taxes or assessments for local improvements such as irrigation works. Bd. of Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N.W. 1086 (1895).

10. Exemption from taxation

The partial exemption from taxation of classes of property specified in section 77-202.25, is not unreasonable, objectiona-

ble as discriminatory, or violative hereof. Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974).

Revenue from sale of water and gas by metropolitan utilities district not taxes. Evans v. Metropolitan Utilities Dist., 187 Neb. 261, 188 N.W.2d 851 (1971).

Lessee's interest in housing project located on federal air base was taxable. Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N.W.2d 382 (1955).

Housing authority created by statute for slum clearance is a governmental subdivision and, as such, exempt from taxation. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Legislature cannot release any corporation from payment of its proportion of taxes. State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N.W. 431 (1899).

11. Miscellaneous

This provision gives the Legislature two options with respect to tangible personal property: To tax the property on a depreciated cost basis using the same depreciation method with reasonable class lives or to tax all such property uniformly and proportionately. Pfizer Inc. v. Lancaster Cty. Bd. of Equal., 260 Neb. 265, 616 N.W.2d 326 (2000).

The proposed amendment to Article VIII, § 1 of the Nebraska Constitution adopted by the Legislature in Special Session in 1978 (LR 1) violates the equal protection clause of the 14th Amendment to the U.S. Constitution by creating nonuniform taxation and violates the due process clause of the 14th Amendment by failing to provide taxpayers with notice and an opportunity to be heard. It is therefore void. State ex rel. Douglas v. State Board of Equalization and Assessment, 205 Neb. 130, 286 N.W.2d 729 (1979).

Requiring registration of mobile homes and assessing a reasonable fee to defray cost of registration and inspection, if any, does not violate constitutional provision requiring uniform and proportionate taxation of personal property. Gates v. Howell, 204 Neb. 256, 282 N.W.2d 22 (1979).

The levying of taxes for accumulation of funds is within the constitutional provision that ''necessary revenue'' of the state and its governmental subdivisions be raised by taxation in such manner as the Legislature might direct. Banks v. Board of Education of Chase County, 202 Neb. 717, 277 N.W.2d 76 (1979).

Colonies of honey bees which were not in existence on January 1, which are brought into Nebraska from another state before July 1, are not subject to assessment in Nebraska where their progenitors were taxed for that year in another state. Knoefler Honey Farms v. County of Sherman, 196 Neb. 435, 243 N.W.2d 760 (1976).

Act establishing Court of Industrial Relations does not violate any constitutional provision and the standards for its guidance are adequate. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

L.B. 1003, Eighty-second Legislature, First Session, sections 23-2601 to 23-2612 does not contravene this section. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

The formula set out in sections 79-486 and 79-4,102 for determining rates for nonresident tuition does not violate sections 1 or 4 of this Article. Mann v. Wayne County Board of Equalization, 186 Neb. 752, 186 N.W.2d 729 (1971).

Act which fixed value of agricultural income-producing machinery and equipment as those used by taxpayer in determining federal income tax violated this section. State ex rel. Meyer v. McNeil, 185 Neb. 586, 177 N.W.2d 596 (1970).

Harm caused by statute permitting independent hospital district to fractionate territory of counties insufficient to constitute violation of this section. Shadbolt v. County of Cherry, 185 Neb. 208, 174 N.W.2d 733 (1970).

Act authorizing appointed members of school board to levy a tax of not exceeding two mills and to certify the same directly to county treasurer for collection does not constitute an unconstitutional delegation of the legislative power of taxation. Campbell v. Area Vocational Technical School No. 2, 183 Neb. 318, 159 N.W.2d 817 (1968).

This section does not prohibit a graduated state income tax and specifically provides authorization for taxes other than property tax. Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967).

Airport Authority Act did not violate this section. Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 105 (1967).

Amount deducted from salary of state employee for retirement fund is not a tax within the meaning of this section. Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964).

Amendment to Constitution in 1920 provided for a different method of taxing intangibles. Stephenson School Supply Co. v. County of Lancaster, 172 Neb. 453, 110 N.W.2d 41 (1961).

This section has no application to the imposition of a penalty for failure to return property for taxation. Creigh v. Larsen, 171 Neb. 317, 106 N.W.2d 187 (1960).

Tax on motor vehicles should be allocated in the same proportion that levy of each political subdivision bears to total levy for all political subdivisions in which motor vehicle has a taxable situs. State ex rel. School Dist. of Scottsbluff v. Ellis, 168 Neb. 166, 95 N.W.2d 538 (1959).

The Legislature may prescribe standards for determination of actual value. S. S. Kresge Co. v. Jensen, 164 Neb. 833, 83 N.W.2d 569 (1957).

Payment of general taxes for school purposes may not operate, directly or indirectly, to secure immunity from the payment of state or county taxes, in whole or in part. Schulz v. Dixon County, 134 Neb. 549, 279 N.W. 179 (1938), overruling Schmidt v. Saline County, 122 Neb. 56, 239 N.W. 203 (1931).

Act of Legislature waiving penalty for nonpayment of taxes is not forbidden by Constitution. Tukey v. Douglas County, 133 Neb. 732, 277 N.W. 57 (1938).

Act providing for payment of delinquent taxes in installments did not violate provisions of this section. Steinacher v. Swanson, 131 Neb. 439, 268 N.W. 317 (1936).

Party invoking statute may not raise question of its constitutionality. Sommerville v. Board of County Comrs. of Douglas County, 116 Neb. 282, 216 N.W. 815 (1927).

Regarded as a tax, provision imposing three hundred dollars assessment against building enjoined as liquor nuisance was in conflict with this section. State ex rel. McGuire v. Macfarland, 104 Neb. 42, 175 N.W. 663 (1919).

This section has no application to statute authorizing levy for university campus extension, as same relates to ''corporate purposes'' of municipality. Sinclair v. City of Lincoln, 101 Neb. 163, 162 N.W. 488 (1917).

Enumeration of subjects of taxation is not exclusive. Legislature has power to provide for taxation upon inheritances. In re Estate of Sanford, 90 Neb. 410, 133 N.W. 870 (1911).

Credits of a nonresident partnership engaged in business in Nebraska are subject to taxation. Clay, Robinson & Co. v. Douglas County, 88 Neb. 363, 129 N.W. 548 (1911).

Inheritance tax law sustained as tax upon right of succession of property and not tax upon property of estate. State ex rel. Slabaugh v. Vinsonhaler, 74 Neb. 675, 105 N.W. 472 (1905).

Word ''property'' includes all intangible property of whatever description including franchise, and all physical or tangible property, and same must be assessed at uniform value. State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N.W. 716 (1902).

''Cedar Rust'' law does not violate this section, as charging owner of infected trees with cost of destruction is not a tax, but an incident to practical accomplishment of police power compelling him to abate a nuisance. Upton v. Felton, 4 F.Supp. 585 (D. Neb. 1932).

Sec. 1A. Levy of property tax for state purposes; prohibition.

The state shall be prohibited from levying a property tax for state purposes.

Source: Neb. Const. art. VIII, sec. 1A (1954); Adopted 1954, Laws 1954, Sixty-sixth Extraordinary Session, c. 5, sec. 1, p. 65; Amended 1966, Initiative Measure No. 301.

The Class VI school system tax levy set forth in section 79-1078 (formerly section 79-438.13) is not a levy for state purposes and therefore does not violate this provision. Swanson v. State, 249 Neb. 466, 544 N.W.2d 333 (1996).

Chapter 79, article 26, the Technical Community College Area Act, is not in violation of this provision of the Constitution. State ex rel. Western Technical Com. Col. Area v. Tallon, 196 Neb. 603, 244 N.W.2d 183 (1976).

Statutory provisions requiring counties to pay cost of maintaining a county court, prosecuting criminal law violations, and conducting state and national elections do not contravene the constitutional provision which prohibits property tax by state. State ex rel. Meyer v. County of Banner, 196 Neb. 565, 244 N.W.2d 179 (1976).

Where state and local purposes are commingled, the crucial issue turns upon a determination of whether the controlling purposes are state or local. Counties may be required to pay attorney's fees for one appointed to defend an indigent defendant. Kovarik v. County of Banner, 192 Neb. 816, 224 N.W.2d 761 (1975).

Where the state assumes control and the primary burden of financial support of a statewide system under provisions of the Nebraska Technical Community College Act, the property tax under section 79-2626 is for a state purpose under this Article. State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, 192 Neb. 201, 219 N.W.2d 454 (1974).

Statute authorizing or requiring a local subdivision to levy a property tax for local fire protection purposes does not contravene this section. R-R Realty Co. v. Metropolitan Utilities Dist., 184 Neb. 237, 166 N.W.2d 746 (1969).

County levies to support institutional patients in state facilities not violative of this section. Craig v. Board of Equalization of Douglas County, 183 Neb. 779, 164 N.W.2d 445 (1969).

Sec. 1B. Income tax; may be based upon the laws of the United States.

When an income tax is adopted by the Legislature, the Legislature may adopt an income tax law based upon the laws of the United States.

Source: Neb. Const. art. VIII, sec. 1B (1966); Adopted 1966, Laws 1965, c. 292, sec. 1, p. 833.

The Legislature has authority to enact state income tax laws which incorporate future income tax laws of the United States. Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967).

Sec. 2. Exemption of property from taxation; classification.

Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law; (2) the Legislature by general law may classify and exempt from taxation property owned by and used exclusively for agricultural and horticultural societies and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user; (3) household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part, as may be provided by general law, and the Legislature may prescribe a formula for the determination of value of household goods and personal effects; (4) the Legislature by general law may provide that the increased value of land by reason of shade or ornamental trees planted along the highway shall not be taken into account in the assessment of such land; (5) the Legislature, by general law and upon any terms, conditions, and restrictions it prescribes, may provide that the increased value of real property resulting from improvements designed primarily for energy conservation may be exempt from taxation; (6)

the value of a home substantially contributed by the United States Department of Veterans Affairs for a paraplegic veteran or multiple amputee shall be exempt from taxation during the life of such veteran or until the death or remarriage of his or her surviving spouse; (7) the Legislature may exempt from an intangible property tax life insurance and life insurance annuity contracts and any payment connected therewith and any right to pension or retirement payments; (8) the Legislature may exempt inventory from taxation; (9) the Legislature may define and classify personal property in such manner as it sees fit, whether by type, use, user, or owner, and may exempt any such class or classes of property from taxation if such exemption is reasonable or may exempt all personal property from taxation; (10) no property shall be exempt from taxation except as permitted by or as provided in this Constitution; (11) the Legislature may by general law provide that a portion of the value of any residence actually occupied as a homestead by any classification of owners as determined by the Legislature shall be exempt from taxation; and (12) the Legislature may by general law, and upon any terms, conditions, and restrictions it prescribes, provide that the increased value of real property resulting from improvements designed primarily for the purpose of renovating, rehabilitating, or preserving historically significant real property may be, in whole or in part, exempt from taxation.

Source: Neb. Const. art. IX, sec. 2 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 27; Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 2; Amended 1954, Laws 1954, Sixty-sixth Extraordinary Session, c. 4, sec. 1, p. 63; Amended 1964, Laws 1963, c. 300, sec. 1, p. 890; Amended 1966, Laws 1965, c. 303, sec. 1, p. 854; Amended 1968, Laws 1967, c. 318, sec. 1, p. 850; Amended 1970, Laws 1969, c. 425, sec. 1, p. 1443; Amended 1980, Laws 1980, LB 740, sec. 1; Amended 1992, Laws 1992, LR 219CA, sec. 1; Amended 1998, Laws 1998, LR 45CA, sec. 3; Amended 2004, Laws 2003, LR 2CA, sec. 1.

1. Governmental subdivision property

The statutes governing airports were not expressly or impliedly repealed by the passage of the 1998 constitutional amendment to this provision or subsection (1)(a) of section 77-202. Airports owned and operated by municipalities are exempt from taxation. City of York v. York Cty. Bd. of Equal., 266 Neb. 297, 664 N.W.2d 445 (2003).

Real property acquired by the city through enforcement of special assessment liens and offered for sale to the public at a price which does not exceed the delinquent special assessments and accrued interest is property that is used for a public purpose, and is therefore exempt from real estate taxation. City of Alliance v. Box Butte Cty. Bd. of Equal., 265 Neb. 262, 656 N.W.2d 439 (2003).

Under facts in this case improvements on Missouri River port and terminal area held to be owned by City of Omaha and not taxable. Sioux City & New Orleans Barge Lines, Inc. v. Board of Equalization, 186 Neb. 690, 185 N.W.2d 866 (1971).

Taxing open accounts due from school district is not a tax upon a governmental subdivision of the state. Stephenson School Supply Co. v. County of Lancaster, 172 Neb. 453, 110 N.W.2d 41 (1961).

Public corporation is not subject to taxation outside of scope of prohibition of this section unless power to tax is expressly conferred by Legislature. Consumers Public Power Dist. v. City of Lincoln, 168 Neb. 183, 95 N.W.2d 357 (1959).

A public power district is a governmental subdivision of the state. United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).

Leasehold of housing corporation was not exempt from taxation. Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N.W.2d 382 (1955).

Where school district acquired title to land before date taxes were levied, land was exempt from taxation. Madison County v. School Dist. No. 2 of Madison County, 148 Neb. 218, 27 N.W.2d 172 (1947).

Rightful ownership of property by a governmental subdivision is all that is required or necessary to extend to such property complete exemption and immunity from assessment and taxation. Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 Neb. 584, 14 N.W.2d 202 (1944).

Dredge used by contractors in excavation of reservoir for public power and irrigation district, under conditional sale

contract whereby contractors eventually become the owners, was not exempt from taxation. Minneapolis Dredging Co. v. Reikat, 141 Neb. 470, 3 N.W.2d 889 (1942).

Housing authority created by statute for slum clearance is a governmental subdivision and, as such, is exempt from taxation. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Nebraska State Board of Agriculture is not a governmental agency and its property is not exempt from taxation as such. Crete Mills v. Nebraska State Board of Agriculture, 132 Neb. 244, 271 N.W. 684 (1937).

Tax on shares of stock of bank was required to be paid, even though bank was insolvent and in hands of receiver. Farmers State Bank of Belden v. Nelson, 116 Neb. 541, 218 N.W. 393 (1928).

City warrants are exempt as property or instrumentality of government of subdivision of state, though owned by private citizen. Droll v. Furnas County, 108 Neb. 85, 187 N.W. 876 (1922).

Municipal water plant which supplies water to inhabitants of city is exempt from general state and county taxes. City of Omaha v. Douglas County, 96 Neb. 865, 148 N.W. 938 (1914).

Municipal or other public property is not exempt from assessments for local improvements. Herman v. City of Omaha, 75 Neb. 489, 106 N.W. 593 (1906).

2. Educational property

Houses used by college for rental to faculty members were not exempt from taxation. Doane College v. County of Saline, 173 Neb. 8, 112 N.W.2d 248 (1961).

Property of college fraternity was not exempt from taxation. Iota Benefit Assn. v. County of Douglas, 165 Neb. 330, 85 N.W.2d 726 (1957).

Farm and dairy property used by college for school purposes was not taxable. Central Union Conference Assn. of College View v. Lancaster County, 109 Neb. 106, 189 N.W. 982 (1922).

Business colleges, in which common school education is given, are entitled to exemption of that portion of their property so used. Rohrbough v. Douglas County, 76 Neb. 679, 107 N.W. 1000 (1906).

3. Religious or charitable purposes

This section, providing for tax exemption of certain property, is not self-executing, but requires action by the Legislature to carry such constitutional provision into effect. Indian Hills Comm. Ch. v. County Bd. of Equal., 226 Neb. 510, 412 N.W.2d 459 (1987).

Where a nursing home's association with two other companies did not result in financial gain or profit to either the owner or user, and the primary or dominant use of the nursing home continued to be for religious or charitable purposes, the property remains exempt from taxation. Bethesda Foundation v. County of Saunders, 200 Neb. 574, 264 N.W.2d 664 (1978).

A home for retired teachers under the facts in this case held not to be exempt from taxation. OEA Senior Citizens, Inc. v. County of Douglas, 186 Neb. 593, 185 N.W.2d 464 (1971).

Property owned and used exclusively for religious or charitable purposes and not owned or used for financial gain or profit is exempt from taxation. Christian Retirement Homes, Inc. v. Board of Equalization, 186 Neb. 11, 180 N.W.2d 136 (1970).

Property of rest home was exempt from taxation under this section. Evangelical Lutheran Good Samaritan Soc. v. County Board of Gage County, 181 Neb. 831, 151 N.W.2d 446 (1967).

Legislature is empowered to exempt from taxation property owned and used exclusively for religious and charitable purposes. Young Women's Christian Assn. v. City of Lincoln, 177 Neb. 136, 128 N.W. 2d 600 (1964).

Property owned and used primarily for furnishing of low-rent housing is not exempt as being owned and used exclusively for charitable purposes. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961).

Property of religious institution where used exclusively for religious and educational purposes was exempt from taxation. Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N.W.2d 50 (1958).

Property of hospital owned and used exclusively for charitable purposes is exempt. Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N.W.2d 86 (1955).

Property used exclusively for charitable purposes was exempt from assessment for street improvements. Hanson v. City of Omaha, 154 Neb. 72, 46 N.W.2d 896 (1951).

A tax on exempt property is void and where it is levied on property as a whole, part of which is exempt and part not, the assessment, if inseparable, is unauthorized and the whole tax is void. McDonald v. Masonic Temple Craft, 135 Neb. 48, 280 N.W. 275 (1938).

The power of a city under Home Rule Charter to assess and levy taxes does not extend to property that is exempt from taxation by virtue of constitutional provision. East Lincoln Lodge No. 210, A.F. & A.M. v. City of Lincoln, 131 Neb. 379, 268 N.W. 91 (1936).

Where two lower floors of building owned by religious, charitable and educational institution were rented for commercial purposes and not exempt from taxation, but two upper floors were exempt, one half of taxable value of lot could be considered in determining total taxable value of property. Masonic Temple Craft v. Bd. of Equalization, Lincoln County, 129 Neb. 293, 261 N.W. 569 (1935).

Property used exclusively for lodge purposes by Masonic organization is exempt. Ancient & Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N.W. 93 (1932), overruling Scottish Rite Bldg. Co. v. Lancaster County, 106 Neb. 95, 182 N.W. 574 (1921), and Mt. Moriah Lodge, A.F. & A.M. v. Otoe County, 101 Neb. 274, 162 N.W. 639 (1917).

Laundry property owned by a charitable institution, used exclusively for charitable purposes, was exempt. House of the Good Shepherd v. Bd. of Equalization of Douglas County, 113 Neb. 489, 203 N.W. 632 (1925).

Hospital used exclusively for religious and charitable purposes is exempt. St. Elizabeth Hospital v. Lancaster County, 109 Neb. 104, 189 N.W. 981 (1922).

That part of Y.M.C.A. building actually and necessarily used for the general purposes of the association is exempt. Young Men's Christian Assn. of Lincoln v. Lancaster County, 106 Neb. 105, 182 N.W. 593 (1921).

Masonic home for care of old and enfeebled members was exempt from taxation. Plattsmouth Lodge, No. 6, A.F. & A.M. v. Cass County, 79 Neb. 463, 113 N.W. 167 (1907).

Abandoned church property is not exempt. Holthaus v. Adams County, 74 Neb. 861, 105 N.W. 632 (1905).

Property held with future intention to build thereon is not exempt. Y.M.C.A. of Omaha v. Douglas County, 60 Neb. 642, 83 N.W. 924 (1900).

Exemption of religious property is confined to church edifices and related property, and not to property to be so used in future. First Christian Church of Beatrice, NE v. City of Beatrice, 39 Neb. 432, 58 N.W. 166 (1894).

4. Household goods and personal effects

Household goods and personal effects as defined by law referred to extant law and fixtures are not included. State ex rel. Meyer v. Peters, 191 Neb. 330, 215 N.W.2d 520 (1974).

Provision exempting from taxation household goods of the value of $200 is a limitation upon the power to tax but does not exempt such property from sale for payment of taxes properly assessed on other property not exempt from execution. Ryder v. Livingston, 145 Neb. 862, 18 N.W.2d 507 (1945).

5. Miscellaneous

In determining the validity of exemptions enacted under this section, a court must consider (1) whether the exemptions improperly shift the property tax burden to the remaining tax

base and (2) whether there is a substantial difference of situation or circumstance justifying differing legislation for the objects classified. Jaksha v. State, 241 Neb. 106, 486 N.W.2d 858 (1992).

Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974), holding that this provision prevails over the uniformity requirement of Neb. Const. art. VIII, section 1, is overruled. MAPCO Ammonia Pipeline v. State Bd. of Equal., 238 Neb. 565, 471 N.W.2d 734 (1991).

Requiring registration of mobile homes and assessing a reasonable fee to defray cost of registration and inspection, if any, does not violate constitutional provision requiring uniform and proportionate taxation of personal property. Gates v. Howell, 204 Neb. 256, 282 N.W.2d 22 (1979).

The partial exemption from taxation of classes of property specified in section 77-202.25, is not unreasonable, objectionable as discriminatory, or violative hereof. Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974).

The primary or dominant use of property is controlling in determining whether property is exempt from taxation. Lincoln Woman's Club v. City of Lincoln, 178 Neb. 357, 133 N.W.2d 455 (1965).

Tax on gross income of profit-sharing trust violated this section. First Continental Nat. Bank & Trust Co. v. Davis, 172 Neb. 118, 108 N.W.2d 638 (1961).

Construction of legislative act would not be adopted that would operate to exempt property from taxation. Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N.W.2d 582 (1953).

Status of exempt property is determined by date of levy, rather than date of assessment. American Province of Servants of Mary Real Estate Corp. v. County of Douglas, 147 Neb. 485, 23 N.W.2d 714 (1946).

Legislature was not authorized to exempt intangible property having situs in this state from taxation. International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N.W.2d 620 (1945).

Legislature may exempt railroad company from payment of special assessments on benefits received. Hinman v. Temple, 133 Neb. 268, 274 N.W. 605 (1937).

Constitutional provision does not apply to gasoline tax. State v. Cheyenne County, 127 Neb. 619, 256 N.W. 67 (1934).

Parties to suit cannot stipulate as to law of case in taxation matters so as to bind the court. North Platte Lodge No. 985, B.P.O.E. v. Board of Equalization of Lincoln County, 125 Neb. 841, 252 N.W. 313 (1934).

The reason for exemption from taxation has no application to assessments for local improvements. Drainage District No. 1 of Richardson County v. Richardson County, 86 Neb. 355, 125 N.W. 796 (1910); Beatrice v. Brethren Church of Beatrice, 41 Neb. 358, 59 N.W. 932 (1894).

It is exclusive use of the property which determines its exemption character. Academy of the Sacred Heart v. Irey, 51 Neb. 755, 71 N.W. 752 (1897).

By the enabling act, federal government obligated state that no taxes should be imposed upon federal owned property. Leasehold interest of tenant on public land is not exempt. State ex rel. Sioux County v. Tucker, 38 Neb. 56, 56 N.W. 718 (1893).

Sec. 2A. Exemption of personal property in transit in licensed warehouses or storage areas.

The Legislature may establish bonded and licensed warehouses or storage areas for goods, wares and merchandise in transit in the state which are intended for and which are shipped to final destinations outside this state upon leaving such warehouses or storage areas, and may exempt such goods, wares and merchandise from ad valorem taxation while in such storage areas.

Source: Neb. Const. art. VIII, sec. 2A (1960); Adopted 1960, Laws 1959, c. 239, sec. 1, p. 825.

Free port law does not violate constitutional provisions for uniformity and against special privileges. Norden Laboratories, Inc. v. County Board of Equalization of Lancaster County, 189 Neb. 437, 203 N.W.2d 152 (1973).

Sec. 3. Redemption from sales of real estate for taxes.

The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. Provided, that occupants shall in all cases be served with personal notice before the time of redemption expires.

Source: Neb. Const. art. IX, sec. 3 (1875); Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 3.

1. Right of redemption
2. Personal notice
3. Miscellaneous

1. Right of redemption

This provision is self-executing. County of Lancaster v. Schwarz, 153 Neb. 472, 45 N.W.2d 432 (1950).

This section is self-executing. No statute or decree is necessary to enforce it, or place it in operation. County of Douglas v. Christensen, 144 Neb. 899, 15 N.W.2d 53 (1944).

Owner of realty sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, is barred from the right of redemption on confirmation of judicial sale. Phelps County v. City of Holdrege, 133 Neb. 139, 274 N.W. 483 (1937).

Payment made to redeem to the county treasurer by the owner acts only in favor of the real estate and special assessments as shown by the county treasurer's books to be subject to redemption. Village of Winside v. Brune, 133 Neb. 80, 274 N.W. 212 (1937).

In a tax foreclosure proceeding by a county to recover delinquent taxes on land without making purchaser at a prior administrative sale a party, the purchaser at the foreclosure sale buys subject to the right of one having a valid lien upon the premises to redeem from such sale, and the one claiming a lien cannot be barred without a hearing. Smith v. Potter, 92 Neb. 39, 137 N.W. 854 (1912).

Two year period of redemption commences to run from confirmation of sale under decree, where foreclosure of lien was instituted prior to administrative sale. Bundy v. Wills, 88 Neb. 554, 130 N.W. 273 (1911).

The two years in which to redeem begins to run at date of sale under decree. Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N.W. 521 (1910).

Right of redemption is secured not only to the owner but to any person interested in the land. Douglas v. Hayes County, 82 Neb. 577, 118 N.W. 114 (1908).

Redemption applies to judicial as well as administrative sales. Selby v. Pueppka, 73 Neb. 179, 102 N.W. 263 (1905).

Provision for redemption is self-executing and right exists without statutory provision or procedure. Lincoln Street Railway Co. v. City of Lincoln, 61 Neb. 109, 84 N.W. 802 (1901).

Where land of person under disability is sold for taxes, right to redeem extends to two years after disability removed. Leavitt v. Bell, 55 Neb. 57, 75 N.W. 524 (1898).

2. Personal notice

Personal notice is not required in sales under tax foreclosure. County of Lincoln v. Provident Loan & Investment Co., 147 Neb. 169, 22 N.W.2d 609 (1946).

Personal service of notice is not required to be made upon a party who might have claimed the right to actual possession or occupancy but never in fact exercised that right. Kuska v. Kubat, 147 Neb. 139, 22 N.W.2d 484 (1946).

Personal notice is required in all cases where a tax deed is sought, but is not required in sales under tax foreclosures. Connely v. Hesselberth, 132 Neb. 886, 273 N.W. 821 (1937).

Statute authorizing counties to foreclose liens for taxes delinquent more than three years is not violative hereof. Personal notice required hereby as to tax sales is not required in sales in tax foreclosure actions. Douglas County v. Barker Co., 125 Neb. 253, 249 N.W. 607 (1933); Commercial Savings & Loan Assn. v. Pyramid Realty Co., 121 Neb. 493, 237 N.W. 575 (1931).

Notice is required only when tax deed is sought but is not necessary in order to maintain action to enforce tax lien. Van Etten v. Medland, 53 Neb. 569, 74 N.W. 33 (1898).

Requirements for notice to owner is mandatory and applies to all tax sales after adoption of Constitution. Hendrix v. Boggs, 15 Neb. 469, 20 N.W. 28 (1884).

3. Miscellaneous

Provisions of scavenger tax law regarding objections to confirmation of sale was enacted to give owner of property sold for taxes the rights guaranteed to him hereunder. State v. Several Parcels of Land, 94 Neb. 431, 143 N.W. 471 (1913).

Sale of lands for taxes by judicial sale, without previous sale by county treasurer, is not forbidden by Constitution. Logan County v. Carnahan, 66 Neb. 685, 92 N.W. 984 (1902), affirmed on rehearing 66 Neb. 693, 95 N.W. 812 (1903).

Legislature has no power to make tax deed conclusive evidence of jurisdictional facts. Thomsen v. Dickey, 42 Neb. 314, 60 N.W. 558 (1894); Larson v. Dickey, 39 Neb. 463, 58 N.W. 167 (1894).

Sec. 4. Legislature has no power to remit taxes; exception; cancellation of taxes on land acquired by the state.

Except as to tax and assessment charges against real property remaining delinquent and unpaid for a period of fifteen years or longer, the Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever; *Provided*, that the Legislature may provide by law for the payment or cancellation of taxes or assessments against real estate remaining unpaid against real estate owned or acquired by the state or its governmental subdivisions.

Source: Neb. Const. art. IX, sec. 4 (1875); Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 4; Amended 1958, Laws 1957, c. 214, sec. 1, p. 750; Amended 1966, Laws 1965, c. 299, sec. 1, p. 845.

1. Release or commutation
2. Redemption
3. Miscellaneous

1. Release or commutation

The Class VI school system tax levy set forth in section 79-1078 (formerly section 79-438.13) does not result in the commutation of taxes and therefore does not violate this provision. Swanson v. State, 249 Neb. 466, 544 N.W.2d 333 (1996).

Although the Legislature is prohibited from changing the methods of payment of any tax once levied, a tax enacted and put into effect prior to the tax levy dates does not violate the constitutional proscription against commutation of a tax. Jaksha v. State, 241 Neb. 106, 486 N.W.2d 858 (1992).

Legislature does not have the power to release or discharge a tax. State ex rel. Meyer v. Story, 173 Neb. 741, 114 N.W.2d 769 (1962).

Prohibition against release of taxes had no application to receipt by county officers of money under court decree. State ex

rel. Heintze v. County of Adams, 162 Neb. 127, 75 N.W.2d 539 (1956).

Blanket Mill Tax Levy Act operated to release and discharge taxes, and was unconstitutional. Peterson v. Hancock, 155 Neb. 801, 54 N.W.2d 85 (1952).

Where school district acquired title to land after tax became lien, lien could not be discharged without violating this section. Madison County v. School Dist. No. 2 of Madison County, 148 Neb. 218, 27 N.W.2d 172 (1947).

Intangible property of foreign corporation could not be released from taxation by Legislature. International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N.W.2d 620 (1945).

Sale of land to satisfy a tax sale certificate thereon is an extinguishment of the lien for taxes, becomes merged in the title, and does not constitute a release or commutation of taxes. Lincoln County v. Shuman, 138 Neb. 84, 292 N.W. 30 (1940).

Statutory provision that holder of certificate of tax sale in scavenger suit may surrender it to the county treasurer with request for its cancellation and such cancellation shall have effect of redemption from tax sale, is not a provision for the release or commutation of taxes within the constitutional prohibition. Marker v. Scotts Bluff County, 137 Neb. 360, 289 N.W. 534 (1939).

Interest, penalties and costs imposed for nonpayment of taxes are no part of the tax and may be remitted by the Legislature. Tukey v. Douglas County, 133 Neb. 732, 277 N.W. 57 (1938).

Sheriff, making a sale under a distress warrant to collect unpaid personal taxes, is justified in refusing a bid so inadequate as to amount to commutation of taxes. Krug v. Hopkins, 132 Neb. 768, 273 N.W. 221 (1937).

Statute providing that, under certain conditions, delinquent real estate taxes may be paid in ten equal annual installments contravenes constitutional provision prohibiting commutation of taxes in any form whatever. Steinacher v. Swanson, 131 Neb. 439, 268 N.W. 317 (1936).

Free high school instruction act does not violate this section. Wilkinson v. Lord, 85 Neb. 136, 122 N.W. 699 (1909); High School Dist. No. 137, Havelock v. Lancaster County, 60 Neb. 147, 82 N.W. 380 (1900).

Section does not apply to special assessment for local improvement. City may release same by compromise. Farnham v. City of Lincoln, 75 Neb. 502, 106 N.W. 666 (1906).

No tax can be released by purchase of the land at eminent domain proceedings. State v. Missouri Pac. Ry. Co., 75 Neb. 4, 105 N.W. 983 (1905).

''Release'' is extinguishment of debt. Sale of land for less than amount due is release within meaning of Constitution. Woodrough v. Douglas County, 71 Neb. 354, 98 N.W. 1092 (1904).

Statute attempting to exempt insurance companies from taxation is void. State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N.W. 431 (1899).

Taxes are perpetual lien on real estate and Legislature has no power to release any of same. County of Lancaster v. Trimble, 33 Neb. 121, 49 N.W. 938 (1891); Wood v. Helmer, 10 Neb. 65, 4 N.W. 968 (1880).

2. Redemption

Redemption from tax lien foreclosure cannot be made by paying amount of the bid, but only by paying full amount of taxes due with interest. City of Plattsmouth v. Hazzard, 132 Neb. 284, 271 N.W. 801 (1937).

Redemption from tax lien foreclosure by county may be made by owner or person interested only by paying full amount of taxes due with interest, not by paying only the amount bid at the sale. Commercial Savings & Loan Assn. v. Pyramid Realty Co., 121 Neb. 493, 237 N.W. 575 (1931).

On redemption owner must pay full amount of tax due. City of Beatrice v. Wright, 72 Neb. 689, 101 N.W. 1039 (1904).

3. Miscellaneous

A request for refund of invalid tax or one paid as a result of clerical error must be by a written claim upon which the county board acts quasi-judicially, and upon request for declaratory relief on ground resolution for refund was invalid, refusal thereof was within discretion of district court where there was no showing such claim had not been filed. Svoboda v. Hahn, 196 Neb. 21, 241 N.W.2d 499 (1976).

The partial exemption from taxation of classes of property specified in section 77-202.25, is not unreasonable, objectionable as discriminatory, or violative hereof. Stahmer v. State, 192 Neb. 63, 218 N.W.2d 893 (1974).

While a penalty is not a part of the tax, it does have some of the attributes of the tax at least with respect to its distribution. Misle v. Miller, 176 Neb. 113, 125 N.W.2d 512 (1963).

Housing authority created by statute for slum clearance is a governmental subdivision and, as such, is exempt from taxation. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

The state has an interest in the revenue of a county, and the Legislature may, for the public good, direct its application. City of Fremont v. Dodge County, 130 Neb. 856, 266 N.W. 771 (1936); City of Beatrice v. Gage County, 130 Neb. 850, 266 N.W. 777 (1936).

Lien for personal taxes against assets of an estate has priority over preferred claims in probate of estate. In re Estate of Badberg, 130 Neb. 216, 264 N.W. 467 (1936).

Priority of general taxes over special assessments is recognized by this section. Douglas County v. Shannon, 125 Neb. 783, 252 N.W. 199 (1934).

Banking authorities in control of state bank should pay taxes lawfully levied on bank's intangible property before depositors and creditors. Farmers State Bank of Belden v. Nelson, 116 Neb. 541, 218 N.W. 393 (1928).

Statute authorizing city to levy tax for university campus extension is for corporate purpose, and hence not violative of this section. Sinclair v. City of Lincoln, 101 Neb. 163, 162 N.W. 488 (1917).

Sec. 5. County taxes; limitation.

County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars of taxable value as determined by the assessment rolls, except for the payment of indebtedness existing at the adoption hereof, unless authorized by a vote of the people of the county.

Source: Neb. Const. art. IX, sec. 5 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 28; Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 5; Amended 1992, Laws 1992, LR 219CA, sec. 1.

1. Levy of taxes

2. Limitation on indebtedness
3. Miscellaneous

1. Levy of taxes

Levy in excess of constitutional limit to pay courthouse bonds required vote of people. State ex rel. Shelley v. Board of County Commissioners, 156 Neb. 583, 57 N.W.2d 129 (1953).

This section is a limitation upon the power of county authorities to tax. Chicago, B. & Q. R. R. Co. v. County of Gosper, 153 Neb. 805, 46 N.W.2d 147 (1951).

Law authorizing tax which, with other taxes, did not exceed constitutional limitation, is not invalid. Cunningham v. Douglas County, 104 Neb. 405, 177 N.W. 742 (1920).

Amount levied in excess of limitation is void. Dakota County v. Chicago, St. Paul, Minn. & Omaha Ry. Co., 63 Neb. 405, 88 N.W. 663 (1902); Chicago, B. & Q. R. R. Co. v. Nemaha County, 50 Neb. 393, 69 N.W. 958 (1897).

This section is not a grant of power but a limitation and operates upon both the county and the Legislature. Grand Island & Wyoming Central R. R. Co. v. County of Dawes, 62 Neb. 44, 86 N.W. 934 (1901).

Taxes levied to pay judgment against the county should be included. Chase County v. Chicago, B. & Q. R. R. Co., 58 Neb. 274, 78 N.W. 502 (1899).

Section means that except for special reasons mentioned, county is without authority to levy a tax in excess of limitation for county purposes. Chicago, B. & Q. R. R. Co. v. Klein, 52 Neb. 258, 71 N.W. 1069 (1897).

Road district tax should be included in ascertaining the maximum tax limit for the county. Dixon County v. Chicago, St. Paul, Minn. & Omaha Ry. Co., 1 Neb. Unof. 240, 95 N.W. 340 (1901).

2. Limitation on indebtedness

Recovery quantum meruit cannot be permitted in an amount in excess of the debt limitation imposed by this section. Warren v. County of Stanton, 147 Neb. 32, 22 N.W.2d 287 (1946).

County authorities are prohibited from issuing warrants in any one year in excess of maximum amount that can be assessed as taxes. Warren v. Stanton County, 145 Neb. 220, 15 N.W.2d 757 (1944).

County cannot be required to expend more for poor relief than it can obtain by taxation under constitutional limitations. State ex rel. Boxberger v. Burns, 132 Neb. 31, 270 N.W. 656 (1937).

Under the prohibition of this section the county cannot issue warrants in excess of limitation. In re House Roll 284, 31 Neb. 505, 48 N.W. 275 (1891).

3. Miscellaneous

Public building commission tax under section 23-2604, R.S.Supp.,1971, is not a county tax. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

Mother's Pension Act did not violate this section. Rumsey v. Saline County, 102 Neb. 302, 167 N.W. 66 (1918).

Sec. 6. Local improvements of cities, towns and villages.

The Legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements, including facilities for providing off-street parking for vehicles, by special assessments or by special taxation of property benefited, and to redetermine and reallocate from time to time the benefits arising from the acquisition of such off-street parking facilities, and the Legislature may vest the corporate authorities of cities and villages with power to levy special assessments for the maintenance, repair and reconstruction of such off-street parking facilities. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same, except that cities and villages may be empowered by the Legislature to assess and collect separate and additional taxes within off-street parking districts created by and within any city or village on such terms as the Legislature may prescribe.

Source: Neb. Const. art. IX, sec. 6 (1875); Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 6; Amended 1972, Laws 1972, LB 1429, sec. 1.

1. Special assessments
2. Occupation and license taxes
3. Miscellaneous

1. Special assessments

Statute authorizing paving in city of the second class did not violate this section. Elliott v. City of Auburn, 172 Neb. 1, 108 N.W.2d 328 (1961).

Sewerage service charges are not special assessments for a general improvement. Michelson v. City of Grand Island, 154 Neb. 654, 48 N.W.2d 769 (1951).

Paving assessments in excess of present or reasonable prospective benefits are unauthorized. Munsell v. City of Hebron, 117 Neb. 251, 220 N.W. 289 (1928).

This section leaves mode of application of power to make local improvements to be provided for by legislation. Whitla v. Connor, 114 Neb. 526, 208 N.W. 670 (1926).

Act authorizing private individuals to create and fix boundaries for improvement district is void. Elliott v. Wille, 112 Neb. 86, 200 N.W. 347 (1924).

This section by implication limits assessments for local improvements to lots or tracts affected. Brown Real Estate Co. v. Lancaster County, 110 Neb. 665, 194 N.W. 897 (1923).

Sewage disposal plant is for benefit of entire city and statute authorizing cost to be paid by special assessment on property is unconstitutional. Hurd v. Sanitary Sewer Dist. No. 1 of Harvard, 109 Neb. 384, 191 N.W. 438 (1922).

Statute authorizing creation of paving districts by city council without petition of property owners is not unconstitutional. Fitzgerald v. Sattler, 102 Neb. 665, 168 N.W. 599 (1918).

To sustain special assessments, property taxed must lie within the improved district. McCaffrey v. City of Omaha, 91 Neb. 184, 135 N.W. 552 (1912).

The basis of special assessment is that value of property has been correspondingly increased, without which no such assessment can be levied. Schneider v. Plum, 86 Neb. 129, 124 N.W. 1132 (1910).

Constitution here recognizes distinction between assessment for special benefits and taxes for general revenue purposes. Farnham v. City of Lincoln, 75 Neb. 502, 106 N.W. 666 (1906); City of Beatrice v. Brethren Church of Beatrice, 41 Neb. 358, 59 N.W. 932 (1894).

Special assessments may be levied to defray the cost of opening street in city. Parrotte v. City of Omaha, 61 Neb. 96, 84 N.W. 602 (1900).

It is not necessary that property assessed shall be platted. Medland v. Linton, 60 Neb. 249, 82 N.W. 866 (1900).

Right of municipal corporation to levy assessments on property is express power resting alone on constitutional authority. Hurford v. City of Omaha, 4 Neb. 336 (1876).

2. Occupation and license taxes

Gearing license and occupation taxes to the area of occupancy and not weighing other considerations does not offend the requirement that such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. Blackledge v. Richards, 194 Neb. 188, 231 N.W.2d 319 (1975).

Occupation tax need not be measured by profits from the business. It must, however, be reasonable. City of Grand Island v. Postal Telegraph Cable Co., 92 Neb. 253, 138 N.W. 169 (1912).

Occupation tax upon gross earnings of a business is authorized by this section. Lincoln Traction Co. v. City of Lincoln, 84 Neb. 327, 121 N.W. 435 (1909).

Legislature may delegate power to municipalities to tax foreign insurance companies. Aachen & Munich Fire Ins. Co. v. City of Omaha, 72 Neb. 518, 101 N.W. 3 (1904).

3. Miscellaneous

Act establishing Court of Industrial Relations does not violate any constitutional provision and the standards for its guidance are adequate. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

Ad valorem taxes must be uniform in respect to persons within the jurisdiction of the body imposing the tax. Lynch v. Howell, 165 Neb. 525, 86 N.W.2d 364 (1957).

Housing authority created by statute for slum clearance is a governmental subdivision and, as such, is exempt from taxation. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Act permitting cities and villages to levy taxes for building of viaducts is valid. Hinman v. Temple, 133 Neb. 268, 274 N.W. 605 (1937).

Statute authorizing levy of tax for university campus extension is for benefit of city and ''for corporate purposes.'' Sinclair v. City of Lincoln, 101 Neb. 163, 162 N.W. 488 (1917).

Power granted includes power to levy tax by counties to pay for drainage improvements. Drainage District No. 1, Richardson County v. Richardson County, 86 Neb. 355, 125 N.W. 796 (1910); Dodge County v. Acom, 61 Neb. 376, 85 N.W. 292 (1901); Darst v. Griffin, 31 Neb. 668, 48 N.W. 819 (1891).

Township is a municipal corporation within meaning of this section. Union Pac. R. R. Co. v. Howard County, 66 Neb. 663, 92 N.W. 579 (1902), reversed on rehearing 66 Neb. 667, 97 N.W. 280 (1903).

The rule of uniformity in municipal taxes is required by this section. State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N.W. 716 (1902).

Municipal taxes need not be levied or collected in the same manner as state taxes. State ex rel. Prout v. Aitken, 62 Neb. 428, 87 N.W. 153 (1901).

This section authorized Legislature, not to levy tax for municipal purposes, but to authorize municipalities themselves to do so. City of York v. Chicago, B. & Q. R. R. Co., 56 Neb. 572, 76 N.W. 1065 (1898).

City has power to drain property to abate nuisance of stagnant water and assess cost to property, but not without notice to owner. Horbach v. City of Omaha, 54 Neb. 83, 74 N.W. 434 (1898).

Land annexed to municipality is not exempt from taxation for preexisting debts. Gottschalk v. Becher, 32 Neb. 653, 49 N.W. 715 (1891).

Sec. 7. Private property not liable for corporate debts; municipalities and inhabitants exempt for corporate purposes.

Private property shall not be liable to be taken or sold for the payment of the corporate debts of municipal corporations. The Legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes.

Source: Neb. Const. art. IX, sec. 7 (1875); Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 7.

1. Tax for corporate purpose
2. Tax not for corporate purpose
3. Miscellaneous

1. Tax for corporate purpose

The prohibition in this section applies only where the levy is for corporate or proprietary purposes and is not levied by local authority and therefore is not contravened by L.B. 1003, Eighty-second Legislature, First Session, sections 23-2601 to 23-2612. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

Creating liability against a village for benefits to streets and alleys for drainage improvements within a drainage district is not in contravention of this section. Drainage District No. 1 in Lincoln County v. Village of Hershey, 145 Neb. 138, 15 N.W.2d 337 (1944).

Law imposing tax for operation by city of water and gas plants is unconstitutional hereunder. Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 93, 198 N.W. 858 (1924).

City ordinance imposing charge for support of fire departments is void. German-American Fire Insurance Co. v. City of Minden, 51 Neb. 870, 71 N.W. 995 (1897). See also Aachen & Munich Fire Insurance Co. v. City of Omaha, 72 Neb. 518, 101 N.W. 3 (1904).

Act imposing charge upon fire insurance company for support of fire departments is tax for corporate purposes and void. State v. Wheeler, 33 Neb. 563, 50 N.W. 770 (1891).

2. Tax not for corporate purpose

Creation of housing authorities by statute for slum clearance does not contravene constitutional inhibitions. Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N.W. 451 (1940).

Intangible tax law is not violative of provision against imposing taxes on municipalities for corporate purposes. Mehrens v. Greenleaf, 119 Neb. 82, 227 N.W. 325 (1929).

Law imposing on municipality obligation to levy tax to pay hydrant rentals was constitutional, not being for ''corporate purpose.'' State ex rel. Metropolitan Utilities Dist. v. City of Omaha, 112 Neb. 694, 200 N.W. 871 (1924).

Act authorizing county to levy tax to raise road fund is political power and not for corporate purposes within meaning of this section. City of Albion v. Boone County, 94 Neb. 494, 143 N.W. 749 (1913).

Act authorizing city to pension firemen and imposition of tax therefor does not violate this section. State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N.W. 196 (1911).

Act authorizing city to enforce assessment against street railway for pavement between its tracks does not violate this section. Lincoln Street Railway Co. v. City of Lincoln, 61 Neb. 109, 84 N.W. 802 (1901).

3. Miscellaneous

The prohibition in this section applies only where the levy is for corporate or proprietary purposes and is not levied by local authority and therefore is not contravened by L.B. 1003, Eighty-second Legislature, First Session, sections 23-2601 to 23-2612. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

The term municipal corporations herein refers only to those which exercise governmental as distinguished from proprietary functions. Evans v. Metropolitan Utilities Dist., 187 Neb. 261, 188 N.W.2d 851 (1971).

Cited but not discussed. R-R Realty Co. v. Metropolitan Utilities Dist., 184 Neb. 237, 166 N.W.2d 746 (1969).

Airport Authority Act did not violate this section. Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 105 (1967).

A county is not a ''municipal corporation'' within meaning of constitutional provision, and gasoline tax imposed thereon is valid. State v. Cheyenne County, 127 Neb. 619, 256 N.W. 67 (1934).

Sec. 8. Funding indebtedness; warrants.

The Legislature at its first session shall provide by law for the funding of all outstanding warrants, and other indebtedness of the state, at a rate of interest not exceeding eight per cent per annum.

Source: Neb. Const. art. IX, sec. 8 (1875); Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 8.

The sole object of this section is to provide for the payment of existing state debts, the execution of which exhausts the power conferred by this section. State ex rel. Omaha National Bank v. McBride, 6 Neb. 506 (1877).

Sec. 9. Claims upon treasury; adjustment; approval; appeal.

The Legislature shall provide by law that all claims upon the treasury shall be examined and adjusted as the Legislature may provide before any warrant for the amount allowed shall be drawn. Any party aggrieved by the action taken on a claim in which he has an interest may appeal to the district court.

Source: Neb. Const. art. IX, sec. 9 (1875); Transferred by Constitutional Convention, 1919-1920, art. VIII, sec. 9; Amended 1964, Laws 1963, c. 302, sec. 2(3), p. 896.

1. Appeal to district court
2. Miscellaneous

1. Appeal to district court

Certified transcript of proceedings before auditor and Secretary of State must be filed in district court to confer jurisdiction on appeal. Pickus v. State, 115 Neb. 869, 215 N.W. 129 (1927).

Word ''appeal'' signifies transfer of proceeding for review to district court. Hooper Tel. Co. v. Nebraska Tel. Co., 96 Neb. 245, 147 N.W. 674 (1914).

2. Miscellaneous

Nebraska State Board of Agriculture, through failure to have claims examined and allowed by Auditor of Public Accounts, disclosed administrative construction that it was not a governmental agency. Crete Mills v. Nebraska State Board of Agriculture, 132 Neb. 244, 271 N.W. 684 (1937).

Mandamus is proper remedy against state officers to enforce execution and delivery of warrant where appropriation therefor has been made by Legislature. State ex rel. National Surety Corp. v. Price, 129 Neb. 433, 261 N.W. 894 (1935).

Act providing for refunding of excess grain inspection fees was not in conflict herewith. Bollen v. Price, 129 Neb. 342, 261 N.W. 689 (1935).

Word ''claims'' means claims which state is or may be under legal obligation to pay. It does not include appropriation of

specific fund by Legislature to named person as donation, gift, or reward, or for which state was under no legal obligation. State ex rel. Sayre v. Moore, 40 Neb. 854, 59 N.W. 755 (1894).

This section was intended to restrict application of money raised by taxation and not as limitation upon discretion of Legislature in selecting agencies through which it is to be expended. State ex rel. Garneau v. Moore, 37 Neb. 507, 55 N.W. 1078 (1893), 56 N.W. 154 (1893).

Sec. 10. Taxation of grain and seed; alternative basis permitted.

Notwithstanding the other provisions of Article VIII, the Legislature is authorized to substitute a basis other than valuation for taxes upon grain and seed produced or handled in this state. Existing revenue laws not inconsistent with the Constitution shall continue in effect until changed by the Legislature.

Source: Neb. Const. art. VIII, sec. 10 (1956); Adopted 1956, Laws 1955, c. 197, sec. 1, p. 562.

Sec. 11. Public corporations and political subdivisions providing electricity; payment in lieu of taxes.

Every public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957.

The legislature may require each such public corporation to pay to the treasurer of any county in which may be located any incorporated city or village, within the limits of which such public corporation sells electricity at retail, a sum equivalent to five (5) per cent of the annual gross revenue of such public corporation derived from retail sales of electricity within such city or village, less an amount equivalent to the 1957 payments in lieu of taxes made by such public corporation with respect to property or operations in any such city or village. The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section shall be in lieu of all other taxes, payments in lieu of taxes, franchise payments, occupation and excise taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally.

So much of such five (5) per cent as is in excess of an amount equivalent to the amount paid by such public corporation in lieu of taxes in 1957 shall be distributed in each year to the city or village, the school districts located in such city or village, the county in which such city or village is located, and the State of Nebraska, in the proportion that their respective property tax mill levies in each such year bear to the total of such mill levies.

Source: Neb. Const. art. VIII, sec. 11 (1958); Adopted 1958, Initiative Measure No. 300, art. VIII, sec. 10.

Note: At the general election in 1958, an amendment was adopted pursuant to initiative petition providing for payment in lieu of taxes by public corporations and political subdivisions supplying electricity. This amendment stated it was to amend Article VIII by adding a new section. The figure 10 was shown at the beginning of the new section to be added. There was already an amendment to the Constitution adopted in 1956 designated as Article VIII, section 10. Therefore, the 1958 amendment has been designated as Article VIII, section 11.

Payments made by public power district were not franchise payments. City of O'Neill v. Consumers P. P. Dist., 179 Neb. 773, 140 N.W.2d 644 (1966).

Sec. 12. Cities or villages; redevelopment project; substandard and blighted property; incur indebtedness; taxes; how treated.

For the purpose of rehabilitating, acquiring, or redeveloping substandard and blighted property in a redevelopment project as determined by law, any city or

village of the state may, notwithstanding any other provision in the Constitution, and without regard to charter limitations and restrictions, incur indebtedness, whether by bond, loans, notes, advance of money, or otherwise. Notwithstanding any other provision in the Constitution or a local charter, such cities or villages may also pledge for and apply to the payment of the principal, interest, and any premium on such indebtedness all taxes levied by all taxing bodies, which taxes shall be at such rate for a period not to exceed fifteen years, on the assessed valuation of the property in the project area portion of a designated blighted and substandard area that is in excess of the assessed valuation of such property for the year prior to such rehabilitation, acquisition, or redevelopment.

When such indebtedness and the interest thereon have been paid in full, such property thereafter shall be taxed as is other property in the respective taxing jurisdictions and such taxes applied as all other taxes of the respective taxing bodies.

Source: Neb. Const. art. VIII, sec. 12 (1978); Adopted 1978, Laws 1978, LB 469, sec. 1; Amended 1984, Laws 1984, LR 227, sec. 1; Amended 1988, Laws 1987, LR 11, sec. 1.

Sec. 13. Revenue laws and legislative acts; how construed.

Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary, amendments to Article VIII of this Constitution passed in 1992 shall be effective from and after January 1, 1992, and existing revenue laws and legislative acts passed in the regular legislative session of 1992, not inconsistent with this Constitution as amended, shall be considered ratified and confirmed by such amendments without the need for legislative reenactment of such laws.

Source: Neb. Const. art. VIII, sec. 13 (1992); Adopted 1992, Laws 1992, LR 219CA, sec. 1.

ARTICLE IX

COUNTIES

Section
1. Area.
2. Division of county; decision of question.
3. County added to another; prior indebtedness; county stricken off; liabilities.
4. County and township officers.
5. Township organization.

Sec. 1. Area.

No new county shall be formed or established by the legislature which will reduce the county or counties, or either of them to a less area than four hundred square miles, nor shall any county be formed of a less area.

Source: Neb. Const. art. X, sec. 1 (1875); Transferred by Constitutional Convention, 1919-1920, art. IX, sec. 1.

Sec. 2. Division of county; decision of question.

No county shall be divided nor any part of the territory of any county be stricken therefrom, nor shall any county or part of the territory of any county be added to an adjoining county without submitting the question to the

qualified electors of each county affected thereby, nor unless approved by a majority of the qualified electors of each county voting thereon; provided, that when county boundaries divide sections, or overlap, or fail to meet, or are in doubt, the Legislature may by law provide for their adjustment, but in all cases the new boundary shall follow the nearest section line or the thread of the main channel of a boundary stream.

Source: Neb. Const. art. X, sec. 2 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 29; Transferred by Constitutional Convention, 1919-1920, art. IX, sec. 2.

L.B. 1003, Eighty-second Legislature, First Session (sections 23-2601 to 23-2612) did not violate this section. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

The power given the county board to establish a hospital district containing contiguous land in more than one county is a reasonable provision and does not violate this section. Syfie v. Tri-County Hospital Dist., 186 Neb. 478, 184 N.W.2d 398 (1971).

The boundaries of a county cannot be changed or reduced without submitting the propositions to the voters of the county. Wayne County v. Cobb, 35 Neb. 231, 52 N.W. 1102 (1892); State ex rel. Packard v. Nelson, 34 Neb. 162, 51 N.W. 648 (1892).

Sec. 3. County added to another; prior indebtedness; county stricken off; liabilities.

When a county shall be added to another, all prior indebtedness of each county shall remain a charge on the taxable property within the territory of each county as it existed prior to consolidation. When any part of a county is stricken off and attached to another county, the part stricken off shall be holden for its proportion of all then existing liabilities of the county from which it is taken, but shall not be holden for any then existing liabilities of the county to which it is attached.

Source: Neb. Const. art. X, sec. 3 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 29; Transferred by Constitutional Convention, 1919-1920, art. IX, sec. 3.

Sec. 4. County and township officers.

The Legislature shall provide by law for the election of such county and township officers as may be necessary and for the consolidation of county offices for two or more counties; *Provided*, that each of the counties affected may disapprove such consolidation by a majority vote in each of such counties.

Source: Neb. Const. art. X, sec. 4 (1875); Transferred by Constitutional Convention, 1919-1920, art. IX, sec. 4; Amended 1968, Laws 1967, c. 308, sec. 1, p. 834.

The members of the commission provided for in L.B. 1003, Eighty-second Legislature, First Session (sections 23-2601 to 23-2612), are not county officers and the act does not violate this section. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

County manager is an officer of the county within the meaning of this section. State ex rel. O'Connor v. Tusa, 130 Neb. 528, 265 N.W. 524 (1936).

Division of county into commissioner districts must give equal power in local government of the county. State ex rel. Harte v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916).

County judges are not considered as classed with ''county officers.'' Conroy v. Hallowell, 94 Neb. 794, 144 N.W. 895 (1913).

The number and character of county officers that may be created rests in the discretion of the Legislature. Dinsmore v. State, 61 Neb. 418, 85 N.W. 445 (1901).

Sec. 5. Township organization.

The Legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine; and in any county that shall have adopted a township organization the question of continu-

ing the same may be submitted to a vote of the electors of such county at a general election in the manner that shall be provided by law.

Source: Neb. Const. art. X, sec. 5 (1875); Transferred by Constitutional Convention, 1919-1920, art. IX, sec. 5.

L.B. 1003, Eighty-second Legislature, First Session (sections 23-2601 to 23-2612) did not violate this section. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

It was the intention by this section to permit adoption of township system of government in counties. Chicago, B. & Q. R. R. Co. v. Klein, 52 Neb. 258, 71 N.W. 1069 (1897).

In order to adopt township organization, a majority of the legal voters of the county voting at the election must be recorded in favor of it. State ex rel. Hocknell v. Roper, 46 Neb. 724, 61 N.W. 753 (1895).

Vote of people is only required upon general question of adopting or continuing township organization. Van Horn v. State ex rel. Abbott, 46 Neb. 62, 64 N.W. 365 (1895).

Adoption of township organization does not shorten terms of county officers. State ex rel. Crossley v. Hedlund, 16 Neb. 566, 20 N.W. 876 (1884).

ARTICLE X

PUBLIC SERVICE CORPORATIONS

Section
1. Reports under oath.
2. Property liable to sale on execution.
3. Consolidation of stock or property.
4. Railways declared public highways; maximum rates; liability not limited.
5. Capital stock; dividends.
6. Eminent domain.
7. Unjust discrimination and extortion.
8. Eminent domain for depot or other uses.

Sec. 1. Reports under oath.

Every public utility corporation or common carrier organized or doing business in this state shall report, under oath, to the Railway Commission, when required by law or the order of said Commission. The reports so made shall include such matter as may be required by law or the order of said Commission.

Source: Neb. Const. art. XI, sec. 1 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 30; Transferred by Constitutional Convention, 1919-1920, art. X, sec. 1.

Sec. 2. Property liable to sale on execution.

The rolling stock and all other movable property belonging to any railroad company or corporation in this state, shall be liable to execution and sale in the same manner as the personal property of individuals, and the legislature shall pass no law exempting any such property from execution and sale.

Source: Neb. Const. art. XI, sec. 2 (1875); Transferred by Constitutional Convention, 1919-1920, art. X, sec. 2.

Sec. 3. Consolidation of stock or property.

No public utility corporation or common carrier shall consolidate its stock, property, franchise, or earnings in whole or in part with any other public utility corporation or common carrier owning a parallel or competing property without permission of the Railway Commission; and in no case shall any consolidation take place except upon public notice of at least sixty days to all stockholders, in such manner as may be provided by law. The Legislature may

by law require all public utilities and common carriers to exchange business through physical connection, joint use, connected service, or otherwise.

Source: Neb. Const. art. XI, sec. 3 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 31; Transferred by Constitutional Convention, 1919-1920, art. X, sec. 3.

This Article permits but does not compel exchange of business through physical connections, joint use, connected service, or otherwise and public policy in the field is within the legislative domain. City of Lincoln v. Nebraska P.P. Dist., 191 Neb. 556, 216 N.W.2d 722 (1974).

Under section prior to amendment of 1920, the word ''railroad'' did not apply to street railway companies, and they were not prohibited from consolidating their lines. State ex rel. Winnett v. Omaha & C. B. St. Ry. Co., 96 Neb. 725, 148 N.W. 946 (1914); State ex rel. Tyrrell v. Lincoln Traction Co., 90 Neb. 535, 134 N.W. 278 (1912).

Prohibition against consolidation extends to leasing. State ex rel. Leese v. Atchison & Nebraska R. R. Co., 24 Neb. 143, 38 N.W. 43 (1888), 8 A.S.R. 164 (1888).

Sec. 4. Railways declared public highways; maximum rates; liability not limited.

Railways heretofore constructed, or that may hereafter be constructed, in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited.

Source: Neb. Const. art. XI, sec. 4 (1875); Transferred by Constitutional Convention, 1919-1920, art. X, sec. 4.

Railroads in this state are public highways, and title to right-of-way cannot be divested by adverse possession. Edholm v. Missouri P. R. R. Corp., 114 Neb. 845, 211 N.W. 206 (1926); McLucas v. St. Joseph & G. I. Ry. Co., 67 Neb. 603, 93 N.W. 928 (1903).

Railroad is liable for negligence notwithstanding contract limiting liability. Maucher v. Chicago, R. I. & P. Ry. Co., 100 Neb. 237, 159 N.W. 422 (1916).

This section does not prohibit Legislature from increasing common law liability of common carriers. Smith v. Chicago, St. P., M. & O. Ry. Co., 99 Neb. 719, 157 N.W. 622 (1916).

A side track connecting with main line of railroad will be presumed to be a part of the public system of the company, and a public highway. Roby v. State ex rel. Farmers Grain & Live Stock Co., 76 Neb. 450, 107 N.W. 766 (1906).

Railroads must receive cars of another road when gauge is suitable and cars offered are not defective. Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 71 N.W. 42 (1897), 66 A.S.R. 456 (1897).

Congress has legislated upon the subject of liability of carriers for loss or damage to interstate shipments, superseding all provisions of state constitutions or laws prohibiting carriers from limiting their liability by contract. C., St. P., M. & O. R. Co. v. Latta, 226 U.S. 519 (1913); C., B. & Q. R. Co. v. Miller, 226 U.S. 513 (1913).

Agreement under which constructor of unloading pit agreed to indemnify railroad which owned trackage over pit against all claims arising out of the construction, maintenance, use, and existence of pit did not contravene this Article. Linden v. Chicago, B. & Q. R.R., 483 F.2d 29 (8th Cir. 1973).

Sec. 5. Capital stock; dividends.

The capital stock of public utility corporations or common carriers shall not be increased for any purpose, except after public notice for sixty days, and in such manner as may be provided by law. No dividend shall be declared or distributed except out of net earnings after paying all operating expenses including a depreciation reserve sufficient to keep the investment intact.

Source: Neb. Const. art. XI, sec. 5 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 32; Transferred by Constitutional Convention, 1919-1920, art. X, sec. 5.

Sec. 6. Eminent domain.

The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature, of the property and franchises of incorporated companies already organized, or

hereafter to be organized, and subjecting them to the public necessity the same as of individuals.

Source: Neb. Const. art. XI, sec. 6 (1875); Transferred by Constitutional Convention, 1919-1920, art. X, sec. 6.

Lands acquired by eminent domain by railroad for right-of-way are dedicated to public use, and title thereto cannot be divested by adverse possession so long as railroad is operated. Edholm v. Missouri P. R. R. Corp., 114 Neb. 845, 211 N.W. 206 (1926).

Compensatory damages should be allowed for land taken for right-of-way for public road. Missouri Pac. R. R. Co. v. Cass County, 76 Neb. 396, 107 N.W. 773 (1906).

Sec. 7. Unjust discrimination and extortion.

The Legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises.

Source: Neb. Const. art. XI, sec. 7 (1875); Transferred by Constitutional Convention, 1919-1920, art. X, sec. 7.

The Public Service Commission has exclusive power and jurisdiction to inquire into complaints concerning telephone rates and where service is woefully inadequate, may require rebates. Myers v. Blair Tel. Co., 194 Neb. 55, 230 N.W.2d 190 (1975).

Legislature delegated power hereunder to inquire into discriminatory rates to the railway commission. Allen v. Omaha Transit Co., Inc., 187 Neb. 156, 187 N.W.2d 760 (1971).

Not all discriminations are prohibited by this section. Statute permitting free transportation to ministers and charity workers is not violative of this section. State ex rel. Sorensen v. Chicago, B. & Q. R. R. Co., 112 Neb. 248, 199 N.W. 534 (1924).

Railway Commission Act follows the mandate of this section. State v. Union Pacific R. R. Co., 87 Neb. 29, 126 N.W. 859 (1910).

Telegraph companies were placed in the same class with railroad companies and other common carriers. Western Union Tel. Co. v. State, 86 Neb. 17, 124 N.W. 937 (1910).

Anti-pass law, applied to intrastate transportation, is constitutional. State v. Martyn, 82 Neb. 225, 117 N.W. 719 (1908).

It is not undue preference to give one patron a less rate where fairly justified by differences in conditions affecting expense or difficulty of rendering service. Western Union Tel. Co. v. Call Pub. Co., 44 Neb. 326, 62 N.W. 506 (1895), affirmed by 181 U.S. 92 (1901).

Sec. 8. Eminent domain for depot or other uses.

No railroad corporation organized under the laws of any other state, or of the United States and doing business in this state shall be entitled to exercise the right of eminent domain or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state.

Source: Neb. Const. art. XI, sec. 8 (1875); Transferred by Constitutional Convention, 1919-1920, art. X, sec. 8.

Railroad corporation is required to become a body corporate of this state to exercise right of eminent domain. Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N.W.2d 582 (1953).

Foreign corporation cannot exercise right of eminent domain. Koenig v. Chicago, B. & Q. R. R. Co., 27 Neb. 699, 43 N.W. 423 (1889); State ex rel. Burlington & Missouri R.R. Co. v. Scott, 22 Neb. 628, 36 N.W. 121 (1888).

Foreign corporation may consolidate with domestic and exercise power of eminent domain. State ex rel. Leese v. Chicago, B. & Q. R. R. Co., 25 Neb. 156, 41 N.W. 125 (1888), 2 L.R.A. 564 (1888).

No foreign railway company doing business in this state can exercise right of eminent domain or have power to acquire right-of-way unless organized as a corporation under laws of this state. Trester v. Missouri P. Ry. Co., 23 Neb. 242, 36 N.W. 502 (1888).

ARTICLE XI

MUNICIPAL CORPORATIONS

Section

Sec. 1. Subscription to stock prohibited; exception.

No city, county, town, precinct, municipality, or other subdivision of the state shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad, or private corporation, or association, except that, notwithstanding any other provision of this Constitution, the Legislature may authorize the investment of public endowment funds by any city which is authorized by this Constitution to establish a charter, in the manner required of a prudent investor who shall act with care, skill, and diligence under the prevailing circumstance and in such investments as the governing body of such city, acting in a fiduciary capacity for the exclusive purpose of protecting and benefiting such investment, may determine, subject to such limitations as the Legislature may by statute provide.

Source: Neb. Const. art. XI, sec. 1 (1875); Transferred in 1907, art. XIa, sec. 1; Transferred by Constitutional Convention, 1919-1920, art. XI, sec. 1; Amended 2008, Laws 2007, LR6CA, sec. 1.

This Article and section of the Nebraska Constitution prohibits the deposit of funds by subdivisions of the State of Nebraska in mutual savings and loan associations, whether federal or state chartered, except those funds authorized under Article XV, section 17(2), of the Constitution of Nebraska. Nebraska League of S. & L. Assns. v. Mathes, 201 Neb. 122, 266 N.W.2d 720 (1978).

Sec. 2. City of 5,000 may frame charter; procedure.

Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a convention of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city at any general or special election, whose duty it shall be within four months after such election, to prepare and propose a charter for such city, which charter, when completed, with a prefatory synopsis, shall be signed by the officers and members of the convention, or a majority thereof, and delivered to the clerk of said city, who shall publish the same in full, with his official certification, in the official paper of said city, if there be one, and if there be no official paper, then in at least one newspaper published and in general circulation in said city, three times, and a week apart, and within not less than thirty days after such publication it shall be submitted to the qualified electors of said city at a general or special election, and if a majority of such qualified voters, voting thereon, shall ratify the same, it shall at the end of sixty days thereafter, become the charter of said city, and supersede any existing charter and all amendments thereof. A duplicate certificate shall be made, setting forth the charter proposed and its ratification (together with the vote for and against) and duly certified by the City Clerk, and authenticated by the corporate seal of said city and one copy thereof shall be filed with the Secretary of State and the other deposited among the archives of the city, and shall thereupon become and be the charter of said city, and all amendments of such charter, shall be authenticated in the same manner, and filed with the secretary of state and deposited in the archives of the city.

Source: Neb. Const. (1912); Adopted 1912, Laws 1911, c. 227, sec. 2, p. 681; Transferred in 1913, art. XIa, sec. 2; Transferred by Constitutional Convention, 1919-1920, art. XI, sec. 2.

1. State concern

2. Local concern
3. Miscellaneous

1. State concern

A home rule charter must be consistent with and subject to the Constitution and laws of the state. Retired City Gov. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys., 199 Neb. 507, 260 N.W.2d 472 (1977); City of Millard v. City of Omaha, 185 Neb. 617, 177 N.W.2d 576 (1970); State ex rel. City of Grand Island v. Johnson, 175 Neb. 498, 122 N.W.2d 240 (1963); Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).

The subject of vacation of streets is a matter of statewide concern, and statute controls over city charter. Dell v. City of Lincoln, 170 Neb. 176, 102 N.W.2d 62 (1960).

Home rule charter cities have authority to exercise all powers of local self-government. Mollner v. City of Omaha, 169 Neb. 44, 98 N.W.2d 33 (1959).

Where Legislature has delegated power of eminent domain to municipal corporation, home rule charter provisions must yield thereto. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N.W.2d 683 (1945).

General law of statewide concern takes precedence over conflicting provision of city home rule charter. Nagle v. City of Grand Island, 144 Neb. 67, 12 N.W.2d 540 (1943).

Statute authorizing municipal university was not violative of constitutional provision permitting cities to adopt home rule charter, as matter is of state concern, and city in accepting privilege acts as political subdivision of state. Carlberg v. Metcalfe, 120 Neb. 481, 234 N.W. 87 (1930).

Resolution of council for employment of technical advisors to prepare zoning ordinance was not subject to referendum provisions of city charter. Schroeder v. Zehrung, 108 Neb. 573, 188 N.W. 237 (1922).

2. Local concern

Home rule charter must be consistent with and subject to Constitution and laws of state. Michelson v. City of Grand Island, 154 Neb. 654, 48 N.W.2d 769 (1951).

Purpose of home rule charter provisions of Constitution is to render cities as nearly independent as possible of state legislation, subject to the general public policy of the state. State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N.W. 499 (1939).

A city may put into its home rule charter any provisions for its government that it deems proper so long as they do not run contrary to the Constitution or to any general statute. Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 276 N.W. 196 (1937).

Provisions of charter adopted by city govern as to matters of local concern, including street improvement, over legislative charter existing prior thereto. Salsbury v. City of Lincoln, 117 Neb. 465, 220 N.W. 827 (1928).

As to matters of local concern, cities are independent of state legislation and general laws yield to charter. Sandell v. City of Omaha, 115 Neb. 861, 215 N.W. 135 (1927).

Amendment to charter, and ordinance thereunder, authorizing city to sell oil and gasoline, was proper function of local government. Mutual Oil Co. v. Zehrung, 11 F.2d 887 (D. Neb. 1925).

3. Miscellaneous

Constitution recognizes that villages and cities are separate and distinct. Hueftle v. Eustis Cemetery Assn., 171 Neb. 293, 106 N.W.2d 400 (1960).

Home rule charter city, upon annexation of adjoining city, continued in force rights, obligations and duties of city annexed. Enyeart v. City of Lincoln, 136 Neb. 146, 285 N.W. 314 (1939).

City ordinance regulating sale of intoxicating liquors, passed by home rule charter city, was not inconsistent with state law. Bodkin v. State, 132 Neb. 535, 272 N.W. 547 (1937).

Charter provision for sale by city of gasoline and oil was valid. Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N.W. 172 (1926).

Charter provision authorizing city to construct, acquire and operate gas and electric plants, and other utilities, did not, by implication, authorize operation of municipal fuel yard. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922).

Sec. 3. Rejection of charter; effect; procedure to frame new charter.

But if said charter be rejected, then within six months thereafter, the mayor and council or governing authorities of said city may call a special election at which fifteen members of a new charter convention shall be elected to be called and held as above in such city, and they shall proceed as above to frame a charter which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated may be repeated until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, and a copy thereof deposited in the archives of the city, whereupon it shall become the charter of said city. Members of each of said charter conventions shall be elected at large, and they shall complete their labors within sixty days after their respective election. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city.

Source: Neb. Const. (1912); Adopted 1912, Laws 1911, c. 227, sec. 3, p. 682; Transferred in 1913, art. XIa, sec. 3; Transferred by Constitutional Convention, 1919-1920, art. XI, sec. 3.

Amendment to charter, and ordinance thereunder, authorizing sale of oil and gasoline by city, was not in violation of this article. Mutual Oil Co. v. Zehrung, 11 F.2d 887 (D. Neb. 1925).

Sec. 4. Charter; amendment; charter convention.

Such charter so ratified and adopted may be amended, or a charter convention called, by a proposal therefor made by the law-making body of such city or by the qualified electors in number not less than five per cent of the next preceding gubernatorial vote in such city, by petition filed with the council or governing authorities. The council or governing authorities shall submit the same to a vote of the qualified electors at the next general or special election not held within thirty days after such petition is filed. In submitting any such charter or charter amendments, any alternative article or section may be presented for the choice of the voters and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, as provided in Section two hereof. The City Clerk of said city shall publish with his official certification, for three times, a week apart in the official paper in said city, if there be one, and if there be no official paper, then in at least one newspaper, published and in general circulation in said city, the full text of any charter or charter amendment to be voted on at any general or special election.

No charter or charter amendment adopted under the provisions of this amendment shall be amended or repealed except by electoral vote. And no such charter or charter amendment shall diminish the tax rate for state purposes fixed by act of the Legislature, or interfere in any wise with the collection of state taxes.

Source: Neb. Const. (1912); Adopted 1912, Laws 1911, c. 227, sec. 4, p. 682; Transferred in 1913, art. XIa, sec. 4; Transferred by Constitutional Convention, 1919-1920, art. XI, sec. 4.

Provision prohibiting amendment or repeal of home rule charter except by electoral vote intended as restriction on powers of municipality and not as restriction on powers of Legislature in annexation matters. City of Millard v. City of Omaha, 185 Neb. 617, 177 N.W.2d 576 (1970).

Publication of home rule charter amendment, to be voted upon at election, was sufficient. Sandell v. City of Omaha, 115 Neb. 861, 215 N.W. 135 (1927).

Amendment to charter, and ordinance thereunder, authorizing city to sell oil and gasoline, was valid. Mutual Oil Co. v. Zehrung, 11 F.2d 887 (D. Neb. 1925).

Sec. 5. Charter of city of 100,000; home rule charter authorized.

The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the question, and when so adopted may thereafter be changed or amended as provided in Section 4 of this article, subject to the Constitution and laws of the state.

Source: Neb. Const. art. XIa, sec. 5 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 33; Transferred by Constitutional Convention, 1919-1920, art. XI, sec. 5.

1. Home rule charter
2. State concern
3. Local concern
4. Miscellaneous

1. Home rule charter

The city tax authorized by section 23-2611 (5), R.S.Supp.,1971, does not contravene the Omaha city charter adopted hereunder. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

Home rule charters of Omaha of 1922 and 1956 were adopted pursuant to this section. Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964).

Under this section, Omaha adopted as its home rule charter the provisions of Chapter 116, Laws of 1921. Belitz v. City of Omaha, 172 Neb. 36, 108 N.W.2d 421 (1961); Papke v. City of Omaha, 152 Neb. 491, 41 N.W.2d 751 (1950); Roncka v. Fogarty, 152 Neb. 467, 41 N.W.2d 745 (1950); Ash v. City of Omaha, 152 Neb. 393, 41 N.W.2d 386 (1950).

Omaha home rule charter of 1956 completely superseded home rule charter of 1922. Mollner v. City of Omaha, 169 Neb. 44, 98 N.W.2d 33 (1959).

Metropolitan city of Omaha adopted legislative act in toto as its home rule charter. Reid v. City of Omaha, 150 Neb. 286, 34 N.W.2d 375 (1948).

Home rule charter amendment changing pension and retirement benefits did not deprive policemen of vested rights. Lickert v. City of Omaha, 144 Neb. 75, 12 N.W.2d 644 (1944).

Adoption of home rule charter does not, of itself, give a city jurisdiction over a street railway save in matters of strictly municipal concern. Omaha & C. B. St. Ry. Co. v. City of Omaha, 125 Neb. 825, 252 N.W. 407 (1934).

Publication of proposed charter amendment, to be submitted at election, was sufficient. Sandell v. City of Omaha, 115 Neb. 861, 215 N.W. 135 (1927).

2. State concern

Labor relations and practices were matters of statewide concern, and take precedence over any provisions in home rule charter. Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 131 N.W.2d 609 (1964).

Statutes on eminent domain procedure control over city charter. Van Patten v. City of Omaha, 167 Neb. 741, 94 N.W.2d 664 (1959).

Parking Authority Law was a matter of statewide concern and not subject to home rule charter. Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N.W.2d 862 (1956).

A municipal corporation has only such powers as are expressly conferred upon it in matters of strictly municipal concern, and in cities which adopt a home rule charter state legislation is not excluded on subjects pertaining to state affairs. State ex rel. Hunter v. The Araho, 137 Neb. 389, 289 N.W. 545 (1940).

Omaha charter is subject to limits of Constitution and laws of state. World Realty Co. v. City of Omaha, 113 Neb. 396, 203 N.W. 574 (1925).

3. Local concern

The purpose of this section is to render a city adopting a home rule charter independent of state legislation as to all subjects which are of strictly municipal concern. State ex rel. City of Omaha v. Lynch, 181 Neb. 810, 151 N.W.2d 278 (1967).

Purpose of home rule charter provisions of Constitution is to render cities as nearly independent as possible of state legislation, subject to the general public policy of the state. State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N.W. 499 (1939).

4. Miscellaneous

Constitution recognizes that villages and cities are separate and distinct. Hueftle v. Eustis Cemetery Assn., 171 Neb. 293, 106 N.W.2d 400 (1960).

Purpose of home rule charter provisions of Constitution is to render cities as nearly independent as possible of state legislation, subject to the general public policy of the state. State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N.W. 499 (1939).

Publication of proposed charter amendment, to be submitted at election, was sufficient. Sandell v. City of Omaha, 115 Neb. 861, 215 N.W. 135 (1927).

ARTICLE XII

MISCELLANEOUS CORPORATIONS

Section

Sec. 1. Legislature to provide for organization, regulation, and supervision of corporations and associations; limitation; elections for directors or managers; voting rights of stockholders.

The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations, and for the organization, supervision and general control of mutual and co-operative companies and associations, and by such legislation shall insure the mutuality and co-operative features and functions thereof. Foreign corporations transacting or seeking to

transact business in this state shall be subject, under general law, to regulation, supervision and general control, and shall not be given greater rights or privileges than are given domestic corporations of a similar character. No corporations shall be created by special law, nor their charters be extended, changed or amended, except those corporations organized for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state. The Legislature shall provide by law that in all elections for directors or managers of incorporated companies every stockholder owning voting stock shall have the right to vote in person or proxy for the number of such shares owned by him, for as many persons as there are directors or managers to be elected or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number his shares shall equal, or to distribute them upon the same principal among as many candidates as he shall think fit, and such directors or managers shall not be elected in any other manner; *Provided*, that any mutual or cooperative company or association may, in its articles of incorporation, limit the number of shares of stock any stockholder may own, the transfer of such stock, and the right of each stockholder or member to one vote only in the meetings of such company or association. All general laws passed pursuant to this section may be altered from time to time, or repealed.

Source: Neb. Const. art. XI, sec. 1 (1875); Transferred in 1907, art. XIb, sec. 1; Amended 1920, Constitutional Convention, 1919-1920, No. 34; Transferred by Constitutional Convention, 1919-1920, art. XII, sec. 1; Amended 1972, Laws 1971, LB 762, sec. 1.

1. Organization
2. Regulation and supervision
3. Miscellaneous

1. Organization

This section applies to the granting of franchises and corporate privileges. Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N.W.2d 582 (1953).

Provision hereof that foreign corporation shall have no greater rights than domestic refers to granting of franchises and corporate privileges rather than taxation. State ex rel. Beatrice Creamery Co. v. Marsh, 119 Neb. 197, 227 N.W. 926 (1929).

Law providing for organization of sanitary drainage district did not violate provision that no corporation shall be created by special law. Whedon v. Wells, 95 Neb. 517, 145 N.W. 1007 (1914).

2. Regulation and supervision

This section permits repeal of statutes under which domestic corporations were formed. State ex rel. Neff v. Christian Brotherhood of American Burial Assn., 186 Neb. 525, 184 N.W.2d 643 (1971).

Existence of Department of Insurance may be traced to Constitution providing for regulation and supervision of corporations, companies and associations. Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N.W. 449 (1941).

Fraternal benefit corporation cannot incorporate old line insurance company and subscribe for capital stock under guise of cooperation. Folts v. Globe Life Ins. Co., 117 Neb. 723, 223 N.W. 797 (1929).

Statute authorizing amendment of articles of incorporation to change life insurance business from assessment to stock basis, held valid. Leininger v. North Amer. Nat. Life Ins. Co., 115 Neb. 801, 215 N.W. 167 (1927).

Corporations receive their charters only by general law, and are subject to reserve power of the lawmaking body of alteration and amendment. Lincoln Street Railway Co. v. City of Lincoln, 61 Neb. 109, 84 N.W. 802 (1901).

3. Miscellaneous

A provision in a lease to which the state is a party which requires the state upon termination of the lease to pay the costs of reletting the property, including the costs of alterations incurred by the owner in placing the property in condition for reletting, violates this Article and section of the Constitution of Nebraska. Ruge v. State, 201 Neb. 391, 267 N.W.2d 748 (1978).

Educational Service Units Act sustained as constitutional. Frye v. Haas, 182 Neb. 73, 152 N.W.2d 121 (1967).

Act creating the Nebraska Grid System violated this section and was held unconstitutional. Wittler v. Baumgartner, 180 Neb. 446, 144 N.W.2d 62 (1966).

Classification of cities into classes and subclasses does not violate this section. State ex rel Wheeler v. Stuht, 52 Neb. 209, 71 N.W. 941 (1897).

Act creating a corporation for canal construction was in violation of this section. State ex rel. Patterson v. Comrs. of Douglas County, 47 Neb. 428, 66 N.W. 434 (1896).

Sec. 2. Repealed 1972. Laws 1971, LB 762, sec. 1.

Sec. 3. Repealed 1972. Laws 1971, LB 762, sec. 1.

Sec. 4. Repealed 1972. Laws 1971, LB 762, sec. 1.

Sec. 5. Repealed 1972. Laws 1971, LB 762, sec. 1.

Sec. 6. Repealed 1972. Laws 1971, LB 762, sec. 1.

Sec. 7. Repealed 1938. Laws 1937, c. 18, sec. 1, p. 124.

Sec. 8. Corporation acquiring an interest in real estate used for farming or ranching or engaging in farming or ranching; restrictions; Secretary of State, Attorney General; duties; Legislature; powers.

That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and subsections as numbered, notwithstanding any other provisions of this Constitution.

Sec. 8(1) No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching.

Corporation shall mean any corporation organized under the laws of any state of the United States or any country or any partnership of which such corporation is a partner.

Farming or ranching shall mean (i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products.

Syndicate shall mean any limited partnership organized under the laws of any state of the United States or any country, other than limited partnerships in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch, and none of whom are nonresident aliens. This shall not include general partnerships.

These restrictions shall not apply to:

(A) A family farm or ranch corporation. Family farm or ranch corporation shall mean a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stockholders or partners of such entities are persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.

These restrictions shall not apply to:

(B) Non-profit corporations.

These restrictions shall not apply to:

(C) Nebraska Indian tribal corporations.

These restrictions shall not apply to:

(D) Agricultural land, which, as of the effective date of this Act, is being farmed or ranched, or which is owned or leased, or in which there is a legal or

beneficial interest in title directly or indirectly owned, acquired, or obtained by a corporation or syndicate, so long as such land or other interest in title shall be held in continuous ownership or under continuous lease by the same such corporation or syndicate, and including such additional ownership or leasehold as is reasonably necessary to meet the requirements of pollution control regulations. For the purposes of this exemption, land purchased on a contract signed as of the effective date of this amendment, shall be considered as owned on the effective date of this amendment.

These restrictions shall not apply to:

(E) A farm or ranch operated for research or experimental purposes, if any commercial sales from such farm or ranch are only incidental to the research or experimental objectives of the corporation or syndicate.

These restrictions shall not apply to:

(F) Agricultural land operated by a corporation for the purpose of raising poultry.

These restrictions shall not apply to:

(G) Land leased by alfalfa processors for the production of alfalfa.

These restrictions shall not apply to:

(H) Agricultural land operated for the purpose of growing seed, nursery plants, or sod.

These restrictions shall not apply to:

(I) Mineral rights on agricultural land.

These restrictions shall not apply to:

(J) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential use for nonfarming or nonranching purposes. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm or nonranch business operation, but pending the development of such agricultural land for nonfarm or nonranch purposes, not to exceed a period of five years, such land may not be used for farming or ranching except under lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(K) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and shall not be used for farming or ranching prior to being disposed of, except under a lease to a family farm or ranch corporation or a non-syndicate and non-corporate farm or ranch.

These restrictions shall not apply to:

(L) A bona fide encumbrance taken for purposes of security.

These restrictions shall not apply to:

(M) Custom spraying, fertilizing, or harvesting.

These restrictions shall not apply to:

(N) Livestock futures contracts, livestock purchased for slaughter, or livestock purchased and resold within two weeks.

If a family farm corporation, which has qualified under all the requirements of a family farm or ranch corporation, ceases to meet the defined criteria, it shall have fifty years, if the ownership of the majority of the stock of such corporation continues to be held by persons related to one another within the fourth degree of kindred or their spouses, and their landholdings are not increased, to either re-qualify as a family farm corporation or dissolve and return to personal ownership.

The Secretary of State shall monitor corporate and syndicate agricultural land purchases and corporate and syndicate farming and ranching operations, and notify the Attorney General of any possible violations. If the Attorney General has reason to believe that a corporation or syndicate is violating this amendment, he or she shall commence an action in district court to enjoin any pending illegal land purchase, or livestock operation, or to force divestiture of land held in violation of this amendment. The court shall order any land held in violation of this amendment to be divested within two years. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the State of Nebraska.

If the Secretary of State or Attorney General fails to perform his or her duties as directed by this amendment, Nebraska citizens and entities shall have standing in district court to seek enforcement.

The Nebraska Legislature may enact, by general law, further restrictions prohibiting certain agricultural operations that the legislature deems contrary to the intent of this section.

Source: Neb. Const. art. XII, sec. 8 (1982); Adopted 1982, Initiative Measure No. 300.

Note: Proclamation by the Governor occurred on November 29, 1982.

Pursuant to subsection (2) of section 84-205 and subsection (2) of section 23-1201, the Attorney General has the authority to discharge the duties imposed by this provision of article XII by directing a county attorney to act as the Attorney General's surrogate. If the Attorney General has information which would support an objective belief that an operation is in violation of this provision of article XII, and fails to commence an action, Nebraska citizens have standing to seek enforcement in district court. Hall v. Progress Pig, Inc., 254 Neb. 150, 575 N.W.2d 369 (1998).

A nonstock cooperative corporation formed pursuant to sections 21-1401 et seq. is not a ''non-profit corporation'' as that term is used under subdivision (1)(B) of this section because it exists and operates for the economic benefit of its members. Pig Pro Nonstock Co-op v. Moore, 253 Neb. 72, 568 N.W.2d 217 (1997).

The introductory passage to this section — ''That Article XII of the Constitution of the State of Nebraska be amended by adding a new section numbered 8 and subsections as numbered, notwithstanding any other provisions of this Constitution'' — should be added to the printed Constitution, as these words are an integral part of the amendment as adopted. Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

The plain language of this section forbids certain corporations from obtaining any kind of interest in certain real estate for certain purposes, including banks from obtaining an interest, even as a trustee, in such real estate. Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

This section does not conflict either with the due process clause or the equal protection clause of the fourteenth amendment of the U.S. Constitution, or with 12 U.S.C. section 29 (1982). Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

ARTICLE XIII

STATE, COUNTY, AND MUNICIPAL INDEBTEDNESS

Section
1. State may contract debts; limitation; exceptions.
2. Industrial and economic development; powers of counties and municipalities.
3. Credit of state; exception.

Sec. 1. State may contract debts; limitation; exceptions.

The state may, to meet casual deficits, or failures in the revenue, contract debts never to exceed in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except for the purpose of repelling

invasion, suppressing insurrection, or defending the state in war, and provision shall be made for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrepealable until such debt is paid; *Provided*, that if the Legislature determines by a three-fifths vote of the members elected thereto that (1) the need for construction of highways in this state requires such action, it may authorize the issuance of bonds for such construction, and for the payment of the interest and the retirement of such bonds it may pledge any tolls to be received from such highways or it may irrevocably pledge for the term of the bonds all or a part of any state revenue closely related to the use of such highways, such as motor vehicle fuel taxes or motor vehicle license fees and (2) the construction of water retention and impoundment structures for the purposes of water conservation and management will promote the general welfare of the state, it may authorize the issuance of revenue bonds for such construction, and for the payment of the interest and the retirement of such bonds it may pledge all or any part of any state revenue derived from the use of such structures; *and provided further*, that the Board of Regents of the University of Nebraska, the Board of Trustees of the Nebraska State Colleges, and the State Board of Education may issue revenue bonds to construct, purchase, or otherwise acquire, extend, add to, remodel, repair, furnish, and equip dormitories, residence halls, single or multiple dwelling units, or other facilities for the housing and boarding of students, single or married, and faculty or other employees, buildings and structures for athletic purposes, student unions or centers, and for the medical care and physical development and activities of students, and buildings or other facilities for parking, which bonds shall be payable solely out of revenue, fees, and other payments derived from the use of the buildings and facilities constructed or acquired, including buildings and facilities heretofore or hereafter constructed or acquired, and paid for out of the proceeds of other issues of revenue bonds, and the revenue, fees, and payments so pledged need not be appropriated by the Legislature, and any such revenue bonds heretofore issued by either of such boards are hereby authorized, ratified, and validated. Bonds for new construction shall be first approved as the Legislature shall provide.

Source: Neb. Const. art. XII, sec. 1 (1875); Transferred by Constitutional Convention, 1919-1920, art. XIII, sec. 1; Amended 1968, Laws 1967, c. 324, sec. 1, p. 861; Amended 1970, Laws 1969, c. 428, sec. 1, p. 1448; Amended 1982, Laws 1982, LB 577, sec. 1.

Section 66-825, R.S.Supp.,1979, which authorizes a plan for the development of alcohol plants and facilities in Nebraska in effect authorizes the State to guarantee payment of bonds authorized to be issued and thus is unconstitutional and void as violation of this section of the constitutional limitation on debt. State ex rel. Douglas v. Thone, 204 Neb. 836, 286 N.W.2d 249 (1979).

A lease agreement between the state and a municipal corporation with annual rental periods does not violate this Article and section of the Nebraska Constitution, when the liability of the state is conditioned upon a legislative appropriation having been made before each rental period begins. Ruge v. State, 201 Neb. 391, 267 N.W.2d 748 (1978).

Act which allowed pledging of fees and charges received by the commission beyond the biennium violated this section. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Obligations which are to be paid from revenue subject to appropriation by future Legislatures are subject to the state debt limitation of this section. State ex rel. Meyer v. Steen, 183 Neb. 297, 160 N.W.2d 164 (1968).

Law authorizing city of Omaha to build a bridge and finance it by issuing revenue bonds which are charges solely against revenue to be derived from tolls, was valid. Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N.W. 776 (1934).

Under the present Constitution the state indebtedness, except for certain extraordinary contingencies, is limited to $100,000. State ex rel. Bd. of Educ. Lands & Funds v. Stuefer, 66 Neb. 381, 92 N.W. 646 (1902).

Sec. 2. Industrial and economic development; powers of counties and municipalities.

Notwithstanding any other provision in the Constitution, the Legislature may authorize any county or incorporated city or village, including cities operating under home rule charters, to acquire, own, develop, and lease real and personal property suitable for use by manufacturing or industrial enterprises and to issue revenue bonds for the purpose of defraying the cost of acquiring and developing such property by construction, purchase, or otherwise. The Legislature may also authorize such county, city, or village to acquire, own, develop, and lease real and personal property suitable for use by enterprises as determined by law if such property is located in blighted areas as determined by law and to issue revenue bonds for the purpose of defraying the cost of acquiring and developing or financing such property by construction, purchase, or otherwise. Such bonds shall not become general obligation bonds of the governmental subdivision by which such bonds are issued. Any real or personal property acquired, owned, developed, or used by any such county, city, or village pursuant to this section shall be subject to taxation to the same extent as private property during the time it is leased to or held by private interests, notwithstanding the provisions of Article VIII, section 2, of the Constitution. The acquiring, owning, developing, and leasing of such property shall be deemed for a public purpose, but the governmental subdivision shall not have the right to acquire such property by condemnation. The principal of and interest on any bonds issued may be secured by a pledge of the lease and the revenue therefrom and by mortgage upon such property. No such governmental subdivision shall have the power to operate any such property as a business or in any manner except as the lessor thereof.

Notwithstanding any other provision in the Constitution, the Legislature may also authorize any incorporated city or village, including cities operating under home rule charters, to appropriate from local sources of revenue such funds as may be deemed necessary for an economic or industrial development project or program subject to approval by a vote of a majority of the registered voters of such city or village voting upon the question. For purposes of this provision, funds from local sources of revenue shall mean funds raised from general taxes levied by the city or village and shall not include any funds received by the city or village which are derived from state or federal sources.

Source: Neb. Const. art. XII, sec. 2 (1875); Transferred by Constitutional Convention, 1919-1920, art. XIII, sec. 2; Amended 1972, Laws 1971, LB 688, sec. 1; Amended 1982, Laws 1982, LB 634, sec. 1; Amended 1990, Laws 1990, LR 11, sec. 1.

1. Constitutionality
2. Prior law
3. Miscellaneous

1. Constitutionality

Provisions of section 18-1401 for expenditure of tax money and income from proprietary functions for purchase by a municipality or a county of property for industrial development violate the Constitution, but the provisions for expenditures for other purposes by a municipality or county itself or through private organizations are constitutional. Chase v. County of Douglas, 195 Neb. 838, 241 N.W.2d 334 (1976).

2. Prior law

The public buildings authorized by L.B. 1003, Eighty-second Legislature, First Session (sections 23-2601 to 23-2612), to be used exclusively for public purposes are not works of internal improvement within the meaning of this section. Dwyer v. Omaha-Douglas Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972).

Airport Authority Act did not violate this section. Obitz v. Airport Authority of City of Red Cloud, 181 Neb. 410, 149 N.W.2d 105 (1967).

Industrial Development Act of 1961 was sustained as constitutional under constitutional amendment notwithstanding this section. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962).

Paving by city of second class is not work of internal improvement requiring submission to electors. Wookey v. City of Alma, 118 Neb. 158, 223 N.W. 953 (1929).

State roads are not works of internal improvement requiring election before donations thereto. State v. Bone Creek Town-

ship, 109 Neb. 202, 190 N.W. 586 (1922), rehearing denied 109 Neb. 208, 193 N.W. 767 (1923).

Donations can be made only to aid in works of internal improvement, and a system of waterworks is not a work of internal improvement. Village of Grant v. Sherrill, 71 Neb. 219, 98 N.W. 681 (1904).

Bridges built by county and wholly within it are not works of internal improvement. DeClerq v. Hager, 12 Neb. 185, 10 N.W. 697 (1881).

3. Miscellaneous

A request for injunction is a proper form in which to present the question of unlawful or improper exercise of the power of eminent domain, because the attempt to deprive a private citizen of an estate in his property, if successful, makes the resulting damage irreparable and legal remedies inadequate. Monarch Chemical Works, Inc. v. City of Omaha, 203 Neb. 33, 277 N.W.2d 423 (1979).

The taking of substandard or blighted areas by a city for redevelopment and resale, in accordance with an approved redevelopment plan which is in conformity with a general plan for the municipality as a whole as provided for in these sections, is a proper public use for a municipality. Monarch Chemical Works, Inc. v. City of Omaha, 203 Neb. 33, 277 N.W.2d 423 (1979).

This section does not prohibit a city from using the power of eminent domain to acquire and develop land for manufacturing and industrial sites. Monarch Chemical Works, Inc. v. City of Omaha, 203 Neb. 33, 277 N.W.2d 423 (1979).

This section does not prohibit Legislature from authorizing the electors of a county to vote bonds for poor relief. In re House Roll 284, 31 Neb. 505, 48 N.W. 275 (1891).

Sec. 3. Credit of state; exception.

The credit of the state shall never be given or loaned in aid of any individual, association, or corporation, except that the state may guarantee or make long-term, low-interest loans to Nebraska residents seeking adult or post high school education at any public or private institution in this state. Qualifications for and the repayment of such loans shall be as prescribed by the Legislature.

Source: Neb. Const. art. XII, sec. 3 (1875); Transferred by Constitutional Convention, 1919-1920, art. XIII, sec. 3; Amended 1968, Laws 1967, c. 321, sec. 1, p. 855.

1. Laws violating prohibition on extending credit
2. Laws not violating prohibition
3. Miscellaneous

1. Laws violating prohibition on extending credit

Act providing for the reimbursement of funds to depositors of failed industrial loan and investment companies violated this provision. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

Provisions of section 18-1401 for expenditure of tax money and income from proprietary functions for purchase by a municipality or a county of property for industrial development violate the Constitution, but the provisions for expenditures for other purposes by a municipality or county itself or through private organizations are constitutional. Chase v. County of Douglas, 195 Neb. 838, 241 N.W.2d 334 (1976).

Statute offering bounty to provide for the encouragement of the manufacture of sugar and chicory violated this section. Oxnard Beet Sugar Co. v. State, 73 Neb. 66, 105 N.W. 716 (1905).

2. Laws not violating prohibition

The Nebraska Hospital-Medical Liability Act neither implies nor mandates any state obligation or extension of credit for claims under the excess liability fund. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977).

Nebraska Clean Waters Commission Act did not violate this section. State ex rel. Meyer v. Duxbury, 183 Neb. 302, 160 N.W.2d 88 (1968).

Industrial Development Act of 1961 was sustained as constitutional under constitutional amendment notwithstanding this section. State ex rel. Meyer v. County of Lancaster, 173 Neb. 195, 113 N.W.2d 63 (1962).

Statute creating pensions to firemen does not contravene this section. State ex rel. Haberlan v. Love, 89 Neb. 149, 131 N.W. 196 (1911).

3. Miscellaneous

The state's credit is inherently the power to levy taxes and involves the obligation of its general fund. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991).

Prohibition against loaning of credit applies to the state and all political subdivisions thereof. State ex rel. Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

Section was intended to prevent the state from extending its credit to private enterprises. United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956).

ARTICLE XIV
MILITIA

Section
1. Personnel; organization; discipline.

Sec. 1. Personnel; organization; discipline.

The Legislature may provide for the personnel, organization, and discipline of the militia of the state.

Source: Neb. Const. art. XIII, sec. 1 (1875); Transferred by Constitutional Convention, 1919-1920, art. XIV, sec. 1; Amended 1972, Laws 1971, LB 621, sec. 1.

ARTICLE XV
MISCELLANEOUS PROVISIONS

Section

Sec. 1. Official oath; refusal; disqualification.

Executive and judicial officers and members of the legislature, before they enter upon their official duties shall take and subscribe the following oath, or affirmation. ''I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of Nebraska, and will faithfully discharge the duties of ..... according to the best of my ability, and that at the election at which I was chosen to fill said office, I have not improperly influenced in any way the vote of any elector, and have not accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation, company or person, or any promise of office, for any official act or influence (for any vote I may give or withhold on any bill, resolution, or appropriation).'' Any such officer or member of the legislature who shall refuse to take the oath herein prescribed, shall forfeit his office, and any person who shall be convicted of having sworn falsely to, or of violating his said oath shall forfeit his office, and thereafter be disqualified from holding any office of profit or trust in this state unless he shall have been restored to civil rights.

Source: Neb. Const. art. XIV, sec. 1 (1875); Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 1.

Violation of judicial oath aggravates offense of disregarding oath as a lawyer. State ex rel. Nebraska State Bar Assn. v. Conover, 166 Neb. 132, 88 N.W.2d 135 (1958).

County judge is required to take oath of constitutional officers. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N.W.2d 583 (1951).

Exact form of oath to be taken by executive and judicial officers and members of Legislature is prescribed. State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N.W.2d 1 (1946).

A judicial officer is required to take and subscribe to the oath prescribed by this section. Duffy v. State ex rel. Edson, 60 Neb. 812, 84 N.W. 264 (1900).

Sec. 2. Official in default as collector and custodian of public money or property; disqualification; felon disqualified.

No person who is in default as collector and custodian of public money or property shall be eligible to any office of trust or profit under the constitution or laws of this state. No person convicted of a felony shall be eligible to any such office unless he shall have been restored to civil rights.

Source: Neb. Const. art. XIV, sec. 2 (1875); Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 2; Amended 1972, Laws 1972, LB 503, sec. 1.

The term ''default'' implies more than a mere civil liability, as there must exist a willful omission to account and pay over, with a corrupt intention, or such a flagrant disregard of duty as fairly to justify the inference that the conduct complained of was willful and corrupt. State ex rel. Brazda v. Marsh, 141 Neb. 817, 5 N.W.2d 206 (1942).

County treasurer is ''collector and custodian'' of public money within the meaning of this section. Section requires sufficient proof of such willful misconduct that the intent to misappropriate the trust funds in his hands as county treasurer is fairly inferable therefrom. State ex rel. Good v. Marsh, 125 Neb. 125, 249 N.W. 295 (1933).

Failure of clerk of district court to pay over money rendered him ineligible to hold office. State ex rel. Sorensen v. Farley, 123 Neb. 687, 243 N.W. 867 (1932).

Conviction of felony does not prevent former convict from suing for personal injuries. Bosteder v. Duling, 115 Neb. 557, 213 N.W. 809 (1927).

Public officer who mingles public funds with his own, and uses them as his own, is in default and ineligible to any office while the default exists. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

Sec. 3. Repealed 1986. Laws 1986, LR 318, sec. 1.

Sec. 4. Water a public necessity.

The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.

Source: Neb. Const. art. XIV, sec. 4 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 35; Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 4.

1. Natural want
2. Appropriation
3. Miscellaneous

1. Natural want

Ground waters, whether they be percolating waters or underground streams, are a natural want in this state. Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966).

This section declares the necessity of water for domestic use and for irrigation purposes to be a natural want. Hickman v. Loup River P. P. Dist., 176 Neb. 416, 126 N.W.2d 404 (1964).

Water for domestic use and for irrigation purposes is a natural want. State v. Birdwood Irrigation District, 154 Neb. 52, 46 N.W.2d 884 (1951).

2. Appropriation

Sections 46-2,107 through 46-2,119, permitting instream flow appropriations, do not offend this provision or Neb. Const. art. XV, section 5 or 6. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

Department of Water Resources initially determines right to an appropriation of water. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

Claim made and rejected that appropriation of surface and ground waters without compensation violated this section. Dischner v. Loup River P. P. Dist., 147 Neb. 949, 25 N.W.2d 813 (1947).

Rights of irrigation in Nebraska exist only as created and defined in constitutional provisions and statutes, and right of appropriation for irrigation is limited to natural streams. Drainage Dist. No. 1 of Lincoln v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

Water rights become vested as of date of appropriation and junior appropriators may use available water within the limits of their appropriation as long as the rights of senior appropriators are not injured or damaged. State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239 (1940).

By adoption of this and two succeeding sections, Nebraska recognized the principle of prior appropriation of waters. Nebraska v. Wyoming, 325 U.S. 589 (1945).

3. Miscellaneous

The statutory law and judicial decisions of the Nebraska Supreme Court show a clear intention to enforce and maintain a rigid economy in the use of public waters in order to secure the greatest benefit possible from the waters available for irrigation. The state has the right, under both the police powers and the Nebraska Constitution, to regulate the use of natural rivers and streams so that waste is eliminated. In re Water Appropriation Nos. 442A, 461, 462 & 485, 210 Neb. 161, 313 N.W.2d 271 (1981).

Riparian rights were not abolished by this section. Wassenburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

Legislative conservation and control of water by reclamation districts is a public purpose. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Constitution as well as statutes recognizes and encourages irrigation. Landowner may improve land by artificial application of water in reasonable and careful manner, without liability to adjoining owner except for negligence or willful act proximately causing damage. Spurrier v. Mitchell Irr. Dist., 119 Neb. 401, 229 N.W. 273 (1930).

Sec. 5. Use of water dedicated to people.

The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.

Source: Neb. Const. art. XIV, sec. 5 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 35; Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 5.

Sections 46-2,107 through 46-2,119, permitting instream flow appropriations, do not offend this provision or Neb. Const. art. XV, section 4 or 6. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

The state has the right, under both the police powers and the Nebraska Constitution, to regulate the use of natural rivers and streams so that waste is eliminated. In re Water Appropriation Nos. 442A, 461, 462 & 485, 210 Neb. 161, 313 N.W.2d 271 (1981).

Riparian rights were not abolished by this section. Wassenburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

The right to appropriate water for irrigation purposes is limited to waters of natural streams. Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962); Drainage Dist. No. 1 of Lincoln v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

Department of Water Resources has authority to make findings and orders for appropriation of water. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

Right to use of natural stream acquired prior to 1895 is a vested property right and may not be taken away by legislative action. City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932).

Right to appropriate public waters of state for generating electrical energy is franchise, and taxable as such. Northern Nebraska Power Co. v. Holt County, 120 Neb. 724, 235 N.W. 92 (1931).

Sec. 6. Right to divert unappropriated waters.

The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

Source: Neb. Const. art. XIV, sec. 6 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 35; Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 6.

1. Appropriation for domestic purposes
2. Appropriation for irrigation
3. Compensation
4. State's powers
5. Miscellaneous

1. Appropriation for domestic purposes

Preference is given to appropriators using water for domestic and agricultural purposes. Cozad Ditch Co. v. Central Neb. Public Power & Irr. Co., 132 Neb. 547, 272 N.W. 560 (1937).

2. Appropriation for irrigation

The right to appropriate water for irrigation purposes is limited to water of natural streams. Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962).

Rights of irrigation in Nebraska exist only as created and defined in constitutional provisions and statutes, and right of appropriation for irrigation is limited to natural streams. Drainage Dist. No. 1 of Lincoln v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

3. Compensation

Claim made and rejected that appropriation of surface and ground waters without compensation violated this section. Dischner v. Loup River P. P. Dist., 147 Neb. 949, 25 N.W.2d 813 (1947).

While those using waters for irrigation purposes are entitled to preference over those using it for power purposes, waters

previously appropriated for power purposes may be taken and appropriated by a junior appropriator in point of time for irrigation only upon due and fair compensation. Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

4. State's powers

This provision does not require that the director engage in a particular sequential consideration of the issues presented by an application. This provision is not self-executing. Central Platte NRD v. City of Fremont, 250 Neb. 252, 549 N.W.2d 112 (1996).

This provision is not self-executing, and it is, therefore, within the Legislature's province to pass statutes to delineate the public interest. In re Applications A-16027 et al., 242 Neb. 315, 495 N.W.2d 23 (1993).

Sections 46-2,107 through 46-2,119, permitting instream flow appropriations, do not offend this provision or Neb. Const. art. XV, section 4 or 5. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

The state has the right, under both the police powers and the Nebraska Constitution, to regulate the use of natural rivers and streams so that waste is eliminated. In re Water Appropriation Nos. 442A, 461, 462 & 485, 210 Neb. 161, 313 N.W.2d 271 (1981).

Allowance or denial of application for appropriation of water was within jurisdiction of Department of Water Resources. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

5. Miscellaneous

The use of the term ''divert'' in this provision is not intended to prohibit nondiversionary appropriations, but to stress that the appropriative right is independent of riparian ownership. There is nothing in the Constitution which indicates that this provision is the exclusive means of acquiring a water right. The adoption of this provision did not do away with riparian rights. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriative right. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

Riparian rights were not abolished by this section. Wassenburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

Water rights become vested as of date of appropriation and junior appropriators may use available water within limits of their appropriation as long as rights of senior appropriators are not injured or damaged. State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239 (1940).

Sec. 7. Use of water for power purposes.

The use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as by law prescribed.

Source: Neb. Const. art. XIV, sec. 7 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 36; Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 7.

Right to appropriate public waters of state for generating electrical energy is franchise, and taxable as such. Northern Nebraska Power Co. v. Holt County, 120 Neb. 724, 235 N.W. 92 (1931).

Sec. 8. Employment of women and children; minimum wage.

Laws may be enacted regulating the hours and conditions of employment of women and children, and securing to such employees a proper minimum wage.

Source: Neb. Const. art. XIV, sec. 8 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 37; Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 8.

Sec. 9. Controversies between employers and employees; industrial commission; appeals.

Laws may be enacted providing for the investigation, submission, and determination of controversies between employers and employees in any business or vocation affected with a public interest and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall be as provided by law.

Source: Neb. Const. art. XIV, sec. 9 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 38; Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 9; Amended 1990, Laws 1990, LR 8, sec. 1.

The Court of Industrial Relations, now Commission of Industrial Relations, has jurisdiction over the University of Nebraska based on this section in conjunction with sections 48-801 to 48-838, R.R.S.1943. University Police Officers Union v. University of Nebraska, 203 Neb. 4, 277 N.W.2d 529 (1979).

Whenever there is an industrial dispute between U.N.L. and its employees, this section of the Constitution of Nebraska and the provisions of sections 48-801 to 48-838, R.R.S.1943, come into play towards the resolution of the dispute. University Police Officers Union v. University of Nebraska, 203 Neb. 4, 277 N.W.2d 529 (1979).

The statutes which give the Court of Industrial Relations jurisdiction over public employees are not unconstitutional. American Fed. of S., C. & M. Emp. v. Department of Public Institutions, 195 Neb. 253, 237 N.W.2d 841 (1976).

The power of the Legislature to create a body with power to deal with labor relations of governmental entities and departments does not depend upon Article XV, section 9, of the Nebraska Constitution, but it exists by virtue of Article III, section 1. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

This section is an independent part of the Constitution. The Court of Industrial Relations is an agency within the purview of the Administrative Procedures Act with certain legislative and judicial powers. School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972).

In the absence of evidence disclosing that it is confiscatory, an act regulating fees employment agencies may charge will be presumed to have been enacted on the factual situation contemplated by this section. State ex rel. Western Reference & Bond Assn. v. Kinney, 138 Neb. 574, 293 N.W. 393 (1940).

Home rule charter city selling gasoline and oil does not violate constitutional provisions relating to control of businesses affecting public welfare. Standard Oil Co. v. City of Lincoln, 114 Neb. 243, 207 N.W. 172 (1926).

Sec. 10. Repealed 1934. Laws 1933, c. 94, sec. 1, p. 376.

Sec. 11. Repealed 1972. Laws 1971, LB 502, sec. 1.

Sec. 12. Removal of state capital.

The seat of government of the state shall not be removed or relocated without the assent of a majority of the electors of the state voting thereupon, at a general election or elections, under such rules and regulations as to the number of elections and manner of voting and places to be voted for, as may be prescribed by law. Provided the question of removal may be submitted at such other general elections as may be provided by law.

Source: Neb. Const. (1875); Transferred by Constitutional Convention, 1919-1920, art. XV, sec. 12.

Sec. 13. Labor organizations; no denial of employment; closed shop not permitted.

No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.

Source: Neb. Const. art. XV, sec. 13 (1946); Adopted 1946, Initiative Measure No. 302, sec. 1.

A public employer may not withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they were engaged in a labor dispute over a previous year's wages. Local No. 2088, Am. Fed. of State, County and Municipal Emp. v. County of Douglas, 208 Neb. 511, 304 N.W.2d 368 (1981).

A uniquely personal termination of employment would not violate this section. Nebraska Dept. of Roads Employees Assn. v. Department of Roads, 189 Neb. 754, 205 N.W.2d 110 (1973).

An employer's action or nonaction which results in cessation of an employee's employment is unlawful if the employer's motive is to discourage union membership or activity or in reprisal for such activity. Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College, 189 Neb. 37, 199 N.W.2d 747 (1972).

Union shop agreements in railroad industry violated this section. Hanson v. Union Pacific R. R. Co., 160 Neb. 669, 71 N.W.2d 526 (1955).

Right to Work Amendment sustained as constitutional. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N.W.2d 477 (1948), affirmed in 335 U.S. 525 (1949).

As to railroad employees, Congress has provided for union shop, and congressional enactment prevails over this section. Railway Employees' Department v. Hanson, 351 U.S. 225 (1956).

Public policy that employment not be denied on basis of union membership includes public as well as private employment. American Federation of State, Co., & Mun. Emp. v. Woodward, 406 F.2d 137 (8th Cir. 1969).

Sec. 14. Labor organization; definition.

The term ''labor organization'' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the

purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Source: Neb. Const. art. XV, sec. 14 (1946); Adopted 1946, Initiative Measure No. 302, sec. 2.

Sec. 15. Labor organizations; amendment self-executing; laws to facilitate operation permitted.

This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof.

Source: Neb. Const. art. XV, sec. 15 (1946); Adopted 1946, Initiative Measure No. 302, sec. 3.

A public employer may not withhold pay raises otherwise determined to be granted to public employees in a given year solely on the basis that they were engaged in a labor dispute over a previous year's wages. Local No. 2088, Am. Fed. of State, County and Municipal Emp. v. County of Douglas, 208 Neb. 511, 304 N.W.2d 368 (1981).

Sec. 16. Repealed 1972. Laws 1971, LB 688, sec. 1.

Sec. 17. Retirement and pension funds; investment.

Notwithstanding section 3 of Article XIII or any other provision in the Constitution:

(1) The Legislature may provide for the investment of any state funds, including retirement or pension funds of state employees and Nebraska school employees in such manner and in such investments as it may by statute provide; and

(2) The Legislature may authorize the investment of retirement or pension funds of cities, villages, school districts, public power districts, and other governmental or political subdivisions in such manner and in such investments as the governing body of such city, village, school district, public power district and other governmental or political subdivision may determine but subject to such limitations as the Legislature may by statute provide.

Source: Neb. Const. art. XV, sec. 17 (1966); Adopted 1966, Laws 1965, c. 302, sec. 2(2), p. 852.

Sec. 18. Governmental powers and functions; intergovernmental cooperation; Legislature may limit; merger or consolidation of counties or other local governments authorized.

(1) The state or any local government may exercise any of its powers or perform any of its functions, including financing the same, jointly or in cooperation with any other governmental entity or entities, either within or without the state, except as the Legislature shall provide otherwise by law.

(2) The Legislature may provide for the merger or consolidation of counties or other local governments. No merger or consolidation of municipalities or counties shall occur without the approval of a majority of the people voting in each municipality or county to be merged or consolidated as provided by law. If the proposal is a merger or consolidation of one or more municipalities with one or more counties, the vote shall be tabulated in each municipality in the county or counties separately from the areas of the county or counties outside the boundaries of the municipalities. If the merger or consolidation is not

approved by a majority of voters voting in the election in a municipality proposed to be merged or consolidated or the areas of the county or counties outside the boundaries of such municipality or municipalities, the proposed merger or consolidation shall be deemed rejected. Any merger or consolidation of local governments may be initiated by petition as provided by law. Annexation shall not be considered a merger or consolidation for purposes of this section. If the Legislature provides for the merger or consolidation of one or more municipalities with one or more counties, the Legislature shall provide for the reversal of the merger or consolidation. No such reversal shall occur without voter approval. The vote shall be tabulated in each municipality which is proposed to be created by the reversal separately from the areas outside the boundaries of the proposed municipalities. If the reversal is not approved by a majority of voters voting in the election in the area within the boundaries of any proposed municipality or the areas outside the proposed municipalities, the reversal shall be deemed rejected.

Source: Neb. Const. art. XV, sec. 18 (1972); Adopted 1972, Laws 1971, LB 604, sec. 1; Amended 1998, Laws 1998, LR 45CA, sec. 2.

Sec. 19. Liquor licenses; municipalities and counties; powers.

Notwithstanding any other provision of this Constitution, the governing bodies of municipalities and counties are empowered to approve, deny, suspend, cancel, or revoke retail and bottle club liquor licenses within their jurisdictions as authorized by the Legislature.

Source: Neb. Const. art. XV, sec. 19 (1992); Adopted 1992, Laws 1992, LR 9CA, sec. 1.

Sec. 20. Omitted.

Note: Article XV, sections 20 to 24, of the Constitution of Nebraska, as adopted in 1992 by Initiative 408, has been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Sec. 21. Omitted.

Note: Article XV, sections 20 to 24, of the Constitution of Nebraska, as adopted in 1992 by Initiative 408, has been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Sec. 22. Omitted.

Note: Article XV, sections 20 to 24, of the Constitution of Nebraska, as adopted in 1992 by Initiative 408, has been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Sec. 23. Omitted.

Note: Article XV, sections 20 to 24, of the Constitution of Nebraska, as adopted in 1992 by Initiative 408, has been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

Sec. 24. Omitted.

Note: Article XV, sections 20 to 24, of the Constitution of Nebraska, as adopted in 1992 by Initiative 408, has been omitted because of the decision of the Nebraska Supreme Court in Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

ARTICLE XVI
AMENDMENTS

Section

Sec. 1. How Proposed.

The Legislature may propose amendments to this Constitution. If the same be agreed to by three-fifths of the members elected to the Legislature, such proposed amendments shall be entered on the journal, with yeas and nays, and published once each week for three consecutive weeks, in at least one newspaper in each county, where a newspaper is published, immediately preceding the next election of members of the Legislature or a special election called by the vote of four-fifths of the members elected to the Legislature for the purpose of submitting such proposed amendments to the electors. At such election said amendments shall be submitted to the electors for approval or rejection upon a ballot separate from that upon which the names of candidates appear. If a majority of the electors voting on any such amendment adopt the same, it shall become a part of this Constitution, provided the votes cast in favor of such amendment shall not be less than thirty-five per cent of the total votes cast at such election. When two or more amendments are submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately.

Source: Neb. Const. art. XV, sec. 1 (1875); Amended 1920, Constitutional Convention, 1919-1920, No. 39; Transferred by Constitutional Convention, 1919-1920, art. XVI, sec. 1; Amended 1952, Laws 1951, c. 161, sec. 1, p. 638; Amended 1968, Laws 1967, c. 317, sec. 1, p. 848.

Article III, sections 2 and 4, of the Constitution of the State of Nebraska set out some of the procedural requirements that must be met before an enactment initiated by a petition becomes a part of the statutory law of Nebraska or a part of the Nebraska Constitution. The people of Nebraska have specifically reserved the right to amend their Constitution themselves in sections 2 and 4 of Article III and in Article XVI, section 1, of the Nebraska Constitution. Omaha Nat. Bank v. Spire, 223 Neb. 209, 389 N.W.2d 269 (1986).

This section provides procedure for amending Nebraska Constitution. Cunningham v. Exon, 207 Neb. 513, 300 N.W.2d 6 (1980).

Constitutional provision should not be construed so as to defeat the will of the people, plainly expressed, and substantial compliance with its requirements is sufficient. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937).

Constitutional amendment purporting to exclude schools of deaf and blind from jurisdiction of Board of Control was ineffective for failure to comply with requirements as to giving and publication of notice. State ex rel. Hall v. Cline, 118 Neb. 150, 224 N.W. 6 (1929).

By analogy to this section, publication of home rule charter amendment substantially complied with constitutional requirements. Sandell v. City of Omaha, 115 Neb. 861, 215 N.W. 135 (1927).

Canvass of vote upon adoption of constitutional amendment was properly made by State Canvassing Board. State ex rel. Oldham v. Dean, 84 Neb. 344, 121 N.W. 719 (1909).

Substantial compliance with constitutional limitations as to provisions for amendments thereto are sufficient. State ex rel. Thompson v. Winnett, 78 Neb. 379, 110 N.W. 1113 (1907).

Submission of a proposed constitutional amendment by the Legislature is not a legislative act. Weston v. Ryan, 70 Neb. 211, 97 N.W. 347 (1903).

Sec. 2. Convention.

When three-fifths of the members elected to the Legislature deem it necessary to call a convention to revise, amend, or change this constitution, they shall recommend to the electors to vote at the next election of members of the Legislature, for or against a convention, and if a majority of the electors voting on the proposition, vote for a convention, the Legislature shall, at its next session provide by law for calling the same; *Provided*, the votes cast in favor of calling a convention shall not be less than thirty-five per cent of the total votes cast at such election. The convention shall consist of not more than one hundred members, the exact number to be determined by the Legislature, and to be nominated and elected from districts in the manner to be prescribed by the Legislature. Such members shall meet within three months after their election, for the purpose aforesaid. No amendment or change of this constitu-

tion, agreed upon by such convention, shall take effect until the same has been submitted to the electors of the state, and adopted by a majority of those voting for and against the same.

Source: Neb. Const. art. XV, sec. 2 (1875); Transferred by Constitutional Convention, 1919-1920, art. XVI, sec. 2; Amended 1952, Laws 1951, c. 162, sec. 1, p. 640.

Statute providing for election of delegates to constitutional convention was valid. Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430 (1919).

ARTICLE XVII
SCHEDULE

Section
1. Terms; reference to members of the Legislature to include appointed and elected members.
2. Repealed 1972. Laws 1971, LB 504, sec. 1.
3. Repealed 1972. Laws 1971, LB 504, sec. 1.
4. General election of state.
5. Terms of office of all elected officers.
6. Transferred to Article III, section 30, Constitution of Nebraska.
7. Repealed 1972. Laws 1971, LB 504, sec. 1.
8. Repealed 1972. Laws 1971, LB 504, sec. 1.
9. Repealed 1998. Laws 1997, LR 17CA, sec. 3.
10. (Failed to carry at election.)
11. Repealed 1972. Laws 1971, LB 504, sec. 1.

Sec. 1. Terms; reference to members of the Legislature to include appointed and elected members.

Whenever they shall appear in this Constitution, the terms members of the Legislature, elected members of the Legislature, or similar terms referring to the members of the Legislature, shall include appointed and elected members of the Legislature.

Source: Neb. Const. art. XVI, sec. 1 (1920); Adopted 1920, Constitutional Convention, 1919-1920, No. 41; Transferred by Constitutional Convention, 1919-1920, art. XVII, sec. 1; Amended 1972, Laws 1971, LB 504, sec. 1.

Sec. 2. Repealed 1972. Laws 1971, LB 504, sec. 1.

Sec. 3. Repealed 1972. Laws 1971, LB 504, sec. 1.

Sec. 4. General election of state.

The general election of this state shall be held on the Tuesday succeeding the first Monday of November in the year 1914 and every two years thereafter. All state, district, county, precinct, township and other officers, by the constitution or laws made elective by the people, except school district officers, and municipal officers in cities, villages and towns, shall be elected at a general election to be held as aforesaid. An incumbent of any office shall hold over until his successor is duly elected and qualified.

Source: Neb. Const. art. XVI, sec. 13 (1875); Amended 1912, Laws 1911, c. 226, sec. 2, p. 679; Transferred by Constitutional Convention, 1919-1920, art. XVII, sec. 4; Amended 1972, Laws 1971, LB 504, sec. 1.

County officials must determine whether each petition signer was registered as a voter on or before the date on which the petition was required to be filed with the Secretary of State. State ex rel. Bellino v. Moore, 254 Neb. 385, 576 N.W.2d 793 (1998).

This section does not apply to judges selected and appointed under merit plan. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

General municipal election is not included. Allen v. Tobin, 155 Neb. 212, 51 N.W.2d 338 (1952).

This section is not applicable to election of delegates to constitutional convention. Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430 (1919).

Under this section, no valid election for county commissioners could be held in the odd-numbered years. De Larm v. Van Camp, 98 Neb. 857, 154 N.W. 717 (1915); Calling v. Gilland, 97 Neb. 788, 151 N.W. 322 (1915); Best v. Moorhead, 96 Neb. 602, 148 N.W. 551 (1914).

Being within exception of this section, Legislature may provide that police magistrates in cities of second class be chosen at either municipal or general election. State ex rel. McDermott v. Reilly, 94 Neb. 232, 142 N.W. 923 (1913), rehearing denied 94 Neb. 238, 143 N.W. 200 (1913).

Word ''district'' refers to districts created by the Legislature as well as those created by the Constitution. State ex rel. Gordon v. Moores, 70 Neb. 48, 96 N.W. 1011 (1903).

Sec. 5. Terms of office of all elected officers.

Unless otherwise provided by this Constitution or by law the terms of all elected officers shall begin on the first Thursday after the first Tuesday in January next succeeding their election.

Source: Neb. Const. art. XVI, sec. 14 (1875); Transferred by Constitutional Convention, 1919-1920, art. XVII, sec. 5; Amended 1972, Laws 1971, LB 504, sec. 1.

This section does not apply to judges selected and appointed under merit plan. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

Governor takes office on first Thursday after first Tuesday in January in odd-numbered years. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

This section has reference only to officers who have a fixed term. Baker v. Moorhead, 103 Neb. 811, 174 N.W. 430 (1919).

Office of county judge was segregated from other officers elected within a county, and shows intent to classify as judicial and not county officer. Conroy v. Hallowell, 94 Neb. 794, 144 N.W. 895 (1913).

Election law of 1905 was invalid under this section. State ex rel. Polk v. Galusha, 74 Neb. 188, 104 N.W. 197 (1905).

An election provided for and required to take place by the Constitution may be held at the required time without special legislation providing therefor. State ex rel. Gordon v. Moores, 70 Neb. 48, 96 N.W. 1011 (1903).

Sec. 6. Transferred to Article III, section 30, Constitution of Nebraska.

Sec. 7. Repealed 1972. Laws 1971, LB 504, sec. 1.

Sec. 8. Repealed 1972. Laws 1971, LB 504, sec. 1.

Sec. 9. Repealed 1998. Laws 1997, LR 17CA, sec. 3.

Sec. 10. (Failed to carry at election.)

Note: Legislative Bill 30, corresponding to Chapter 25 of the Session Laws of 1939 and consisting of three sections, proposed an amendment to the Constitution. Section 2 of the bill provided that an additional section should be inserted in Article XVII ''to be known and numbered'' as section 10. The amendment was rejected in the election of 1940. Legislative Bill 179, corresponding to Chapter 109 of the Session Laws for 1939, likewise proposed an amendment which was adopted. Section 2 of this bill provided that an additional section should be inserted in Article XVII ''to be known and numbered'' as section 11. For this reason there is no section 10 of Article XVII.

Sec. 11. Repealed 1972. Laws 1971, LB 504, sec. 1.

ARTICLE XVIII

TERM LIMITS ON CONGRESS

Section

Sec. 1. Statement of intent.

The people of the State of Nebraska want to amend the United States Constitution to establish term limits on Congress that will ensure representation in Congress by true citizen lawmakers. The President of the United States is limited by the XXII Amendment to the United States Constitution to two terms in office. Governors in forty states are limited to two terms or less. Voters have established term limits for over two thousand state legislators as well as over seventeen thousand local officials across the country. Nevertheless, Congress has ignored our desire for term limits not only by proposing excessively long terms for its own members but also by utterly refusing to pass an amendment for genuine congressional term limits. Congress has a clear conflict of interest in proposing a term limits amendment to the United States Constitution. A majority of both Republicans and Democrats in the 104th Congress voted against a constitutional amendment containing the term limits passed by a wide margin of Nebraska voters. The people, not Congress, should set term limits. We hereby establish as the official position of the citizens and State of Nebraska that our elected officials should enact by constitutional amendment congressional term limits of three terms in the United States House of Representatives and of two terms in the United States Senate.

The career politicians dominating Congress have a conflict of interest that prevents Congress from being what the founders intended, the branch of government closest to the people. The politicians have refused to heed the will of the people for term limits; they have voted to dramatically raise their own pay; they have provided lavish million-dollar pensions for themselves; and they have granted themselves numerous other privileges at the expense of the people. Most importantly, members of Congress have enriched themselves while running up huge deficits to support their spending. They have put the government nearly $5,000,000,000,000.00 (five trillion dollars) in debt, gravely threatening the future of our children and grandchildren.

The corruption and appearance of corruption brought about by political careerism is destructive to the proper functioning of the first branch of our representative government. Congress has grown increasingly distant from the people of the states. The people have the sovereign right and compelling interest in creating a citizen Congress that will more effectively protect our freedom and prosperity. This interest and right may not effectively be served in any way other than that proposed by this initiative.

We hereby state our intention on behalf of the people of Nebraska, that this initiative lead to the adoption of the following amendment to the United States Constitution:

CONGRESSIONAL TERM LIMITS AMENDMENT
TO THE UNITED STATES CONSTITUTION

Section 1. No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section 2. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve for more than one additional term.

Section 3. This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the several states.

Therefore, we the people of the State of Nebraska, have chosen to amend the Constitution of Nebraska to inform voters regarding incumbent and nonincumbent federal and state candidates' support for the congressional term limits amendment provided for in this section.

Source: Neb. Const. art. XVIII, sec. 1 (1996); Adopted 1996, Initiative Measure No. 409.

Sec. 2. Instruction to members of congressional delegation; ballot notation; when.

(1) We, the voters of Nebraska, hereby instruct each member of our congressional delegation to use all of his or her delegated powers to pass the congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution.

(2) All primary and general election ballots shall have printed the information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' adjacent to the name of any United States Senator or United States Representative who:

(a) Fails to vote in favor of the proposed congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution, when brought to a vote;

(b) Fails to second such proposed congressional term limits amendment if it lacks for a second before any proceeding of the legislative body;

(c) Fails to propose or otherwise bring to a vote of the full legislative body such proposed congressional term limits amendment if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body such proposed congressional term limits amendment;

(d) Fails to vote in favor of all votes bringing such proposed congressional term limits amendment before any committee or subcommittee of the respective house upon which he or she serves;

(e) Fails to reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body of such proposed congressional term limits amendment;

(f) Fails to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution, regardless of any other actions in support of such proposed congressional term limits amendment;

(g) Sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution; or

(h) Fails in any way to ensure that all votes on congressional term limits are recorded and made available to the public.

(3) The information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' shall not appear adjacent to the names of incumbent candidates for Congress if the congressional term limits amendment set forth in Article XVIII,

section 1, of this Constitution, is before the states for ratification or has become part of the United States Constitution.

Source: Neb. Const. art. XVIII, sec. 2 (1996); Adopted 1996, Initiative Measure No. 409.

This section violates Article V of the U.S. Constitution and is an unconstitutional infringement on the right to vote. Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999).

Sec. 3. Nonincumbent candidates; Term Limits Pledge; ballot notation; when.

(1) Nonincumbent candidates for the United States Senate, the United States House of Representatives, and the Legislature should be given an opportunity to take a ''Term Limits Pledge'' regarding term limits each time they file to run for such offices. Any such person who declines to take the ''Term Limits Pledge'' shall have the information ''DECLINED TO PLEDGE TO SUPPORT TERM LIMITS'' printed adjacent to his or her name on every primary and general election ballot.

(2) The ''Term Limits Pledge'' shall be offered to nonincumbent candidates for the United States Senate, the United States House of Representatives, and the Legislature until a constitutional amendment which limits the number of terms of United States Senators to no more than two and United States Representatives to no more than three has become part of our United States Constitution.

(3) The ''Term Limits Pledge'' that each nonincumbent candidate, set forth in subsections (1) and (2) of this section, shall be offered is as follows: I support term limits and pledge to use all my legislative powers to enact the proposed constitutional amendment to the United States Constitution set forth in Article XVIII, section 1, of this Constitution. If elected, I pledge to vote in such a way that the designation ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' will not appear adjacent to my name.

..... Signature of Candidate

Source: Neb. Const. art. XVIII, sec. 3 (1996); Adopted 1996, Initiative Measure No. 409.

This section is an unconstitutional infringement on the right to vote. Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999).

Sec. 4. Instruction to members of the Legislature; ballot notation; when.

(1) We the voters of Nebraska, hereby instruct each member of the Legislature to use all of his or her delegated powers to pass an application pursuant to Article V of the United States Constitution as set forth in subsection (2) of this section, and to ratify, if proposed, the congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution.

(2) Application: We, the people and the Legislature, due to our desire to establish term limits on Congress, hereby make application to Congress, pursuant to our power under Article V of the United States Constitution, to call a convention for proposing amendments to the United States Constitution.

(3) All primary and general election ballots shall have the information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' printed adjacent to the name of any respective member of the Legislature who:

(a) Fails to vote in favor of the application set forth in subsection (2) of this section when brought to a vote;

(b) Fails to second the application if it lacks for a second;

(c) Fails to vote in favor of all votes bringing the application before any committee or subcommittee upon which he or she serves;

(d) Fails to propose or otherwise bring to a vote of the full legislative body the application if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the application;

(e) Fails to vote against any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the application;

(f) Fails in any way to ensure that all votes on the application are recorded and made available to the public;

(g) Fails to vote against any change, addition, or modification to the application;

(h) Fails to vote in favor of the congressional term limits amendment if it is sent to the states for ratification; or

(i) Fails to vote against any term limits amendment with longer terms if such an amendment is sent to the states for ratification.

(4) The information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' shall not appear adjacent to the names of candidates for the Legislature as required by subdivisions (3)(a) through (3)(g) of this section if the State of Nebraska has made an application to Congress for a convention for proposing amendments to the United States Constitution pursuant to this initiative and such application has not been withdrawn or the congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution, has been submitted to the states for ratification.

(5) The information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' shall not appear adjacent to the names of candidates for the Legislature as required by subdivisions (3)(h) and (3)(i) of this section if the State of Nebraska has ratified the proposed congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution.

(6) The information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' shall not appear adjacent to the names of candidates for the Legislature as required by subdivisions (3)(a) through (3)(i) of this section if the proposed congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution, has become part of the United States Constitution.

Source: Neb. Const. art. XVIII, sec. 4 (1996); Adopted 1996, Initiative Measure No. 409.

This section violates Article V of the U.S. Constitution and is an unconstitutional infringement on the right to vote. Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999).

Sec. 5. Ballot notation; Secretary of State; duties; appeal.

(1) The Secretary of State shall be responsible to make an accurate determination as to whether a candidate for the United States Senate, the United States House of Representatives, or the Legislature shall have placed adjacent to his or her name on the election ballot the information ''DISREGARDED VOTERS

INSTRUCTION ON TERM LIMITS'' or ''DECLINED TO PLEDGE TO SUPPORT TERM LIMITS.''

(2) The Secretary of State shall consider timely submitted public comments prior to making the determination required in subsection (1) of this section.

(3) The Secretary of State, in accordance with subsection (1) of this section, shall determine and declare what information, if any, shall appear adjacent to the name of each incumbent member of Congress if he or she was to be a candidate in the next election. In the case of United States Representatives and United States Senators, this determination and declaration shall be made in a fashion necessary to ensure the orderly printing of primary and general election ballots with allowance made for all legal action provided in subsections (5) and (6) of this section, and shall be based upon his or her action during his or her current term of office and any action taken in any concluded term, if such action was taken after the determination and declaration was made by the Secretary of State in a previous election. In the case of incumbent members of the Legislature, this determination and declaration shall be made not later than thirty days after the end of the regular session following each general election, and shall be based upon legislative action in the previous regular session.

(4) The Secretary of State shall determine and declare what information, if any, will appear adjacent to the names of nonincumbent candidates for Congress and the Legislature, not later than five business days after the deadline for filing for the office.

(5) If the Secretary of State makes the determination that the information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' or ''DECLINED TO PLEDGE TO SUPPORT TERM LIMITS'' shall not be placed on the ballot adjacent to the name of a candidate for the United States Senate, the United States House of Representatives, or the Legislature, any elector may appeal such decision within five business days to the Nebraska Supreme Court as an original action or shall waive any right to appeal such decision; in which case the burden of proof shall be upon the Secretary of State to demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in this article and therefore should not have the information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' or ''DECLINED TO PLEDGE TO SUPPORT TERM LIMITS'' printed on the ballot adjacent to the candidate's name.

(6) If the Secretary of State determines that the information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' or ''DECLINED TO PLEDGE TO SUPPORT TERM LIMITS'' shall be placed on the ballot adjacent to a candidate's name, the candidate or any elector may appeal such decision within five business days to the Nebraska Supreme Court as an original action or shall waive any right to appeal such decision; in which case the burden of proof shall be upon the candidate or any elector to demonstrate by clear and convincing evidence that the candidate should not have the information ''DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS'' or ''DECLINED TO PLEDGE TO SUPPORT TERM LIMITS'' printed on the ballot adjacent to the candidate's name.

(7) The Nebraska Supreme Court shall hear the appeal provided for in subsection (5) of this section and issue a decision within sixty days. The Nebraska Supreme Court shall hear the appeal provided for in subsection (6) of

this section and issue a decision not later than sixty-one days before the date of the election.

Source: Neb. Const. art. XVIII, sec. 5 (1996); Adopted 1996, Initiative Measure No. 409.

This section violates Article V of the U.S. Constitution and is an unconstitutional infringement on the right to vote. Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999).

Sec. 6. Automatic repeal; when.

At such time as the congressional term limits amendment set forth in Article XVIII, section 1, of this Constitution, has become part of the United States Constitution, sections 1 through 6 of this article automatically shall be repealed.

Source: Neb. Const. art. XVIII, sec. 6 (1996); Adopted 1996, Initiative Measure No. 409.

Sec. 7. Legal challenge; jurisdiction.

Any legal challenge to this initiative shall be filed as an original action before the Nebraska Supreme Court.

Source: Neb. Const. art. XVIII, sec. 7 (1996); Adopted 1996, Initiative Measure No. 409.

Sec. 8. Severability.

If any portion, clause, or phrase of this initiative is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

Source: Neb. Const. art. XVIII, sec. 8 (1996); Adopted 1996, Initiative Measure No. 409.

CHAPTER 24
COURTS

Article.
1. Courts of Impeachment. 24-101 to 24-109.
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   (j) Appeals. 24-541 to 24-551. Transferred or Repealed.
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   (m) Recording of Instruments. 24-559. Transferred.
   (n) Unclaimed Funds. 24-560 to 24-563. Transferred.
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7. Judges, General Provisions.
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   (b) Judicial Discipline. 24-715 to 24-728.
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8. Selection and Retention of Judges.
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Cross References

Constitutional provisions:
Administration, general authority, see Article V, section 1, Constitution of Nebraska.
Commission on Judicial Qualifications, see Article V, sections 28 and 29, Constitution of Nebraska.
Courts open, no delay, see Article I, section 13, Constitution of Nebraska.
Distribution of powers, see Article II, section 1, Constitution of Nebraska.
District courts, see Article V, sections 9 to 14, Constitution of Nebraska.
English, official language, see Article I, section 27, Constitution of Nebraska.
Judges:
Discipline and removal from office, see Article III, section 17, Article IV, section 5, and Article V, sections 30 and 31, Constitution of Nebraska.
Duties, compensation, how fixed, see Article V, section 20, Constitution of Nebraska.
Hold office until successors qualified, see Article V, section 20, Constitution of Nebraska.
Jurisdiction at chambers, see Article V, section 23, Constitution of Nebraska.
Reside in district or county, see Article V, section 20, Constitution of Nebraska.
Judicial power vested in, see Article V, section 1, Constitution of Nebraska.
Juvenile courts, authorization, see Article V, section 27, Constitution of Nebraska.
Merit plan for selection of judges, terms of office, filling of vacancies, procedure, see Article V, section 21, Constitution of Nebraska.
Oath or affirmation required, see Article XV, section 1, Constitution of Nebraska.
Practice, all courts, uniform, see Article V, section 19, Constitution of Nebraska.
Process, in name of state, see Article V, section 24, Constitution of Nebraska.
Rules of practice, Supreme Court fix, see Article V, section 25, Constitution of Nebraska.
Separation of powers, see Article II, section 1, Constitution of Nebraska.
State may sue and be sued, Legislature provides manner and in what courts, see Article V, section 22, Constitution of Nebraska.
Supreme Court, see Article V, sections 2 to 8, 13, and 14, Constitution of Nebraska.
Convicts disqualified from being juror or holding office, see sections 29-112 and 29-113.
Judges:
Administer oaths, see section 24-1002.
Bonds and oaths of judges and employees, see Chapter 11.
Marriages, authorized to perform, see section 42-108.
Juvenile court, jurisdiction, see section 43-247.
Records Management Act, see section 84-1220.
Workers' Compensation Court, Nebraska, see section 48-152.

ARTICLE 1
COURTS OF IMPEACHMENT

Cross References

Constitutional provisions:
Board of Pardons, no powers in cases of impeachment, see Article IV, section 13, Constitution of Nebraska.
Conviction of Governor, effect, see Article IV, section 16, Constitution of Nebraska.
Grand jury presentment or indictment not required, see Article I, section 10, Constitution of Nebraska.
Judges, removal from office, grounds, procedure cumulative, see Article V, sections 30 and 31, Constitution of Nebraska.
Procedure, see Article III, section 17, Constitution of Nebraska.
State officers, for misdemeanor in office, see Article IV, section 5, Constitution of Nebraska.
Board of Pardons, no authority in cases of impeachment, see section 83-1,127.
Governor and Attorney General, effect of failure to compel implementation of law, see section 84-732.
Political accountability and disclosure penalties, no limit on power of Legislature to impeach public official, see section 49-14,137.
Public records, effect of violations by officials, see section 84-712.09.
Removal of county officers, see Chapter 23, article 20.
State Board of Education, manner and grounds, see section 79-326.

Section
24-106. Presiding judge; daily record of proceedings.
24-107. Written opinions to be reported.
24-108. Judgment on conviction.
24-109. Offenses occurring during preceding term.

24-101 Jurisdiction.

All impeachments of state officers shall be tried before the Supreme Court, except that the impeachment of a judge of the Supreme Court shall be tried before the Court of Appeals sitting en banc.

Source: Laws 1879, § 1, p. 82; R.S.1913, § 1128; C.S.1922, § 1057; C.S.1929, § 27-101; R.S.1943, § 24-101; Laws 1991, LB 732, § 28.

An impeachment must be tried by the Supreme Court. State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

Trial of impeachments before Supreme Court is a judicial investigation according to judicial methods. State v. Hastings, 37 Neb. 96, 55 N.W. 774 (1893).

24-102 Quorum.

A court of impeachment shall have power to proceed with a trial only when two-thirds of all the members thereof are in attendance, but any less number shall have power to adjourn to any reasonable time.

Source: Laws 1879, § 2, p. 82; R.S.1913, § 1129; C.S.1922, § 1058; C.S.1929, § 27-102.

24-103 Rules.

A court of impeachment shall make such rules and orders as in its discretion shall be best adapted to a full, fair, and impartial investigation of the charges made, and to the promotion of substantial justice.

Source: Laws 1879, § 3, p. 82; R.S.1913, § 1130; C.S.1922, § 1059; C.S.1929, § 27-103.

24-104 Clerk and reporter.

The Clerk of the Supreme Court shall act as the clerk of the Court of Impeachment, and the court may appoint a shorthand reporter, and such officers shall each receive such an allowance as the Court of Impeachment may authorize, to be by them reported for the consideration of the Legislature at its next session.

Source: Laws 1879, § 4, p. 82; R.S.1913, § 1131; C.S.1922, § 1060; C.S.1929, § 27-104.

24-105 Order of business.

Whenever the Court of Impeachment in any way interferes with the business of any other court of the state, that of the Court of Impeachment shall take precedence.

Source: Laws 1879, § 5, p. 83; R.S.1913, § 1132; C.S.1922, § 1061; C.S.1929, § 27-105.

24-106 Presiding judge; daily record of proceedings.

When the court of impeachment is composed of the judges of the Court of Appeals, the Chief Judge of the Court of Appeals shall act as the presiding judge

of the court of impeachment, and in all other cases the Chief Justice shall preside. The Clerk of the Supreme Court shall keep a full record of each day's proceedings in a book to be specially provided for that purpose, and each day's proceedings shall be signed by the presiding judge. The Clerk of the Supreme Court shall always be the custodian of the book.

Source: Laws 1879, § 6, p. 83; R.S.1913, § 1133; C.S.1922, § 1062; C.S.1929, § 27-106; R.S.1943, § 24-106; Laws 1991, LB 732, § 29.

24-107 Written opinions to be reported.

The written opinions of any court of impeachment shall be reported in the volume of the Nebraska Reports issued after the adjournments of such court.

Source: Laws 1879, § 7, p. 83; R.S.1913, § 1134; C.S.1922, § 1063; C.S.1929, § 27-107; R.S.1943, § 24-107; Laws 1995, LB 271, § 1.

24-108 Judgment on conviction.

If the accused person be found guilty, judgment of removal from office, or disqualifying such person from holding or enjoying any office of honor, profit, or trust in the state, or both, may be rendered as in other cases.

Source: Laws 1879, § 8, p. 83; R.S.1913, § 1135; C.S.1922, § 1064; C.S.1929, § 27-108.

Power of impeachment cannot be exercised after person has gone out of office. State v. Leese, 37 Neb. 92, 55 N.W. 798 (1893); State v. Hill, 37 Neb. 80, 55 N.W. 794 (1893).

24-109 Offenses occurring during preceding term.

An impeachment against any state officer shall be tried and judgment of removal from office, or disqualification to hold office, may be rendered, notwithstanding the offense for which said officer is tried occurred during a term of office immediately preceding.

Source: Laws 1879, § 9, p. 83; R.S.1913, § 1136; C.S.1922, § 1065; C.S.1929, § 27-109.

ARTICLE 2
SUPREME COURT

Cross References

Constitutional provisions:

Budget to Legislature, see Article V, section 8, Constitution of Nebraska.
Capital cases, automatic appeal, operation as stay of execution, see Article I, section 23, Constitution of Nebraska.
Chief Justice, presides at all sessions, see Article V, section 6, Constitution of Nebraska.
Copyright, state reports, see Article V, section 8, Constitution of Nebraska.
Felony cases, right of appeal, see Article I, section 23, Constitution of Nebraska.
Judicial districts, see Article V, section 5, Constitution of Nebraska.
Jurisdiction and procedure, see Article V, section 2, Constitution of Nebraska.
Justices:
- Discipline and removal from office, see Article III, section 17, Article IV, section 5, and Article V, sections 30 and 31, Constitution of Nebraska.
- Eligibility and qualifications, see Article V, section 7, Constitution of Nebraska.
- Jurisdiction at chambers, see Article V, section 23, Constitution of Nebraska.
- Merit plan for selection, see Article V, section 21, Constitution of Nebraska.
- Not act as attorneys, see Article V, section 14, Constitution of Nebraska.
- Number, see Article V, section 2, Constitution of Nebraska.
- Oath or affirmation required, see Article XV, section 1, Constitution of Nebraska.
- Salaries, Legislature may fix, see Article V, section 13, Constitution of Nebraska.
- Selection and residence, see Article V, sections 4 and 21, Constitution of Nebraska.

Tenure, see Article V, section 20, Constitution of Nebraska.
Vacancy, filling of, see Article V, section 21, Constitution of Nebraska.
Recommendations to Legislature, see Article V, section 25, Constitution of Nebraska.
Report of defects in law and constitution, see Article IV, section 23, Constitution of Nebraska.
Right to be heard in, see Article I, section 13, Constitution of Nebraska.
Rules of practice, fix for all courts, see Article V, section 25, Constitution of Nebraska.
Service by district court and appellate court judges and retired Supreme Court judges, see Article V, section 2, Constitution of Nebraska.
Staff, see Article V, section 8, Constitution of Nebraska.
Terms of the court, see Article V, section 3, Constitution of Nebraska.

Appellate jurisdiction:
Civil cases, general provisions, see sections 25-1901 to 25-1937.
Criminal cases, general provisions, see sections 29-2301 to 29-2325.

Bill of exceptions, see sections 25-1140 and 25-1140.08.

Fees, see sections 33-103, 33-103.01, 33-107.01, and 33-107.03.

Judges:
Not act as attorney, see section 7-111.
Oaths and affirmations, administer, see section 24-1002.
Resignation, see section 32-562.
Selection, provisions for, see sections 24-801 to 24-820.
State Library, board of directors, see section 51-103.

Office of Probation Administration, see section 29-2249.

Statutes, session laws, and legislative journals, sale and distribution, see sections 49-509, 49-617, and 49-707.

(a) ORGANIZATION

(b) CLERK AND REPORTER

(c) BAILIFFS

(d) LIABILITY INSURANCE

Section

(e) REQUESTS FOR CERTIFICATION OF LAW

(f) ELECTRONIC RESEARCH

(g) SUPREME COURT AUTOMATION CASH FUND

(h) WORD AND DATA PROCESSING

(i) COUNSEL FOR DISCIPLINE CASH FUND

(a) ORGANIZATION

24-201 Supreme Court; how constituted; Chief Justice.

The Supreme Court shall consist of the Chief Justice and six judges, and the Chief Justice shall preside at all sessions of the court.

Source: Laws 1879, § 10, p. 83; R.S.1913, § 1137; C.S.1922, § 1066; C.S.1929, § 27-201.

24-201.01 Supreme Court judges; salary; amount; restriction on other employment of judges.

On July 1, 2006, the salary of the Chief Justice and the judges of the Supreme Court shall be one hundred twenty-six thousand eight hundred forty-six dollars. On July 1, 2007, the salary of the Chief Justice and the judges of the Supreme Court shall be one hundred thirty-one thousand two hundred eighty-five dollars and sixty-one cents. On July 1, 2008, the salary of the Chief Justice and the judges of the Supreme Court shall be one hundred thirty-five thousand eight hundred eighty dollars and sixty cents.

The Chief Justice and the judges of the Supreme Court shall hold no other public office of profit or trust during their terms of office nor accept any public appointment or employment under the authority of the government of the United States for which they receive compensation for their services. Such salaries shall be payable in equal monthly installments.

Source: Laws 1947, c. 345, § 1, p. 1089; Laws 1951, c. 58, § 1, p. 191; Laws 1955, c. 77, § 1, p. 231; Laws 1959, c. 93, § 1, p. 406; Laws 1963, c. 534, § 1, p. 1676; Laws 1963, c. 127, § 1, p. 480; Laws 1967, c. 136, § 1, p. 421; Laws 1969, c. 173, § 1, p. 754; Laws 1969, c. 174, § 1, p. 755; Laws 1972, LB 1293, § 2; Laws 1974, LB 923, § 1; Laws 1976, LB 76, § 1; Laws 1978, LB 672, § 1; Laws 1979, LB 398, § 1; Laws 1983, LB 269, § 1; Laws 1986, LB 43, § 1; Laws 1987, LB 564, § 1; Laws 1990, LB 42,

§ 1; Laws 1995, LB 189, § 1; Laws 1997, LB 362, § 1; Laws 1999, LB 350, § 1; Laws 2001, LB 357, § 1; Laws 2005, LB 348, § 1; Laws 2007, LB377, § 1.

Legislature had constitutional right to fix salary in first instance to commence on effective date of act, notwithstanding it increased compensation during term. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N.W.2d 799 (1947).

24-201.02 Supreme Court judicial districts; described.

Based on the 2000 Census of Population by the United States Department of Commerce, Bureau of the Census, the State of Nebraska is hereby divided into six Supreme Court judicial districts. Each district shall be entitled to one Supreme Court judge. The limits and designations of the six districts shall be as follows:

District No. 1. The counties of Lancaster, Cass, and Otoe;

District No. 2. That part of Douglas County not included in Supreme Court judicial district 4;

District No. 3. The counties of Boyd, Knox, Cedar, Dixon, Dakota, Holt, Antelope, Pierce, Wayne, Thurston, Garfield, Wheeler, Boone, Madison, Stanton, Cuming, Burt, Greeley, Howard, Nance, Merrick, Platte, Colfax, Dodge, and Washington;

District No. 4. Sarpy County and that part of Douglas County beginning at the intersection of the Douglas-Sarpy County line and South 180th Street, north on South 180th Street to West Center Road, east on West Center Road to Interstate Highway 680, north on Interstate Highway 680 to Pacific Street, east on Pacific Street to Turner Boulevard, southeast then northeast on Turner Boulevard to Pacific Street, east on Pacific Street and continuing east along east-west lines extending east from Pacific Street to South 20th Street, south on South 20th Street to Pierce Street, east on Pierce Street and continuing east along an east-west line extending east from Pierce Street to South 16th Street, north on South 16th Street to the intersection of an east-west line extending west from Pacific Street, east along such line to Pacific Street, east on Pacific Street to South 11th Street, north on South 11th Street to Mason Street, east on Mason Street to South 10th Street, north on South 10th Street to the Union Pacific Railroad right-of-way, east along the Union Pacific Railroad right-of-way to the Nebraska-Iowa state line, south along the Nebraska-Iowa state line to the Douglas-Sarpy County line, and west along the Douglas-Sarpy County line to the point of beginning;

District No. 5. The counties of Phelps, Harlan, Kearney, Franklin, Hall, Adams, Webster, Nuckolls, Thayer, Clay, Hamilton, Polk, Butler, Saunders, York, Seward, Fillmore, Saline, Jefferson, Gage, Johnson, Nemaha, Pawnee, and Richardson; and

District No. 6. The counties of Valley, Sherman, Buffalo, Furnas, Gosper, Dawson, Custer, Loup, Blaine, Rock, Brown, Keya Paha, Cherry, Thomas, Logan, Lincoln, Frontier, Red Willow, Hitchcock, Hayes, McPherson, Hooker, Grant, Arthur, Keith, Perkins, Chase, Dundy, Deuel, Garden, Sheridan, Cheyenne, Morrill, Box Butte, Dawes, Sioux, Scotts Bluff, Banner, and Kimball.

Source: Laws 1971, LB 545, § 1; Laws 1981, LB 552, § 1; R.S.1943, (1987), § 5-109; Laws 1990, LB 822, § 9; Laws 1991, LB 616, § 1; Laws 2001, LB 853, § 1.

Cross References

Constitutional provisions, see Article V, section 5, Constitution of Nebraska.

24-201.03 Judges; salary increase; when effective.

Sections 24-201.01, 24-301.01, and 24-1101 shall be so interpreted as to effectuate their general purpose to provide, in the public interest, adequate compensation for the judges of the Supreme Court, Court of Appeals, district court, and separate juvenile courts and to permit a change in such salaries as soon as the same may become operative under the Constitution of Nebraska.

Source: Laws 1967, c. 136, § 3, p. 422; Laws 1991, LB 732, § 30.

24-201.04 Supreme Court judicial districts; description; basis.

The descriptions of districts in section 24-201.02 are taken from the 2000 TIGER/Line files published by the United States Department of Commerce, Bureau of the Census.

Source: Laws 1991, LB 616, § 2; Laws 2001, LB 853, § 2.

24-202 Judges; eligibility.

(1) No person shall be eligible to the office of judge of the Supreme Court unless he or she (a) is at least thirty years of age and a citizen of the United States, (b) has had five years of practice of law in the State of Nebraska which may include prior service as a judge, (c) is currently admitted to practice before the Nebraska Supreme Court, and (d) is, on the effective date of appointment, a resident and elector of the district he or she is to represent.

(2) This section and sections 24-301, 24-505.01, 43-2,118, 48-153, and 48-153.01 shall not apply to a person serving as a judge of the Supreme Court on August 24, 1979, who continues to serve as a judge of the Supreme Court after such effective date.

Source: Laws 1879, § 12, p. 84; R.S.1913, § 1138; C.S.1922, § 1067; C.S.1929, § 27-202; R.S.1943, § 24-202; Laws 1963, c. 128, § 1, p. 481; Laws 1979, LB 237, § 1.

24-203 Transferred to section 24-741.

24-204 Jurisdiction, original, appellate, and final.

The Supreme Court shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and election contests involving state officers other than members of the Legislature and shall have appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees of other courts in all matters of law, fact, or equity when the rules of law or the principles of equity appear from the files, exhibits, or records of the court to have been erroneously determined.

Source: Laws 1879, § 13, p. 84; R.S.1913, § 1140; C.S.1922, § 1069; C.S.1929, § 27-204; R.S.1943, § 24-204; Laws 1971, LB 10, § 1; Laws 1991, LB 732, § 32.

1. Jurisdiction in general
2. Original jurisdiction
3. No original jurisdiction
4. Appellate jurisdiction

5. Miscellaneous

1. Jurisdiction in general

Proceedings, without jurisdiction of party, are void. Omaha Nat. Bank v. Robinson, 73 Neb. 351, 102 N.W. 613 (1905), affirmed on rehearing, 73 Neb. 353, 104 N.W. 1070 (1905).

Jurisdiction of subject matter is power to hear cause. Barry v. State ex rel. Hampton, 57 Neb. 464, 77 N.W. 1096 (1899).

Jurisdiction in quo warranto will be exercised even though procedure to be followed has not been prescribed by the Legislature. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

Legislature cannot enlarge jurisdiction. State ex rel. King v. Hall, 47 Neb. 579, 66 N.W. 642 (1896).

Original jurisdiction is limited by Constitution, and appellate, by statute. Johnson v. Parrotte, 46 Neb. 51, 64 N.W. 363 (1895).

The validity of the removal of a public officer, and the title of the person removed, or of a new appointee to the office, may be tried by quo warranto or mandamus. In re Sawyer, 124 U.S. 200 (1888).

2. Original jurisdiction

Supreme Court had original jurisdiction of declaratory judgment action relating to the revenue of the state. Anderson v. Herrington, 169 Neb. 391, 99 N.W.2d 621 (1959).

Supreme Court has original jurisdiction in quo warranto. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

Original action in mandamus will lie in Supreme Court to compel district court to vacate void injunction. State ex rel. Reynolds v. Graves, 66 Neb. 17, 92 N.W. 144 (1902).

Supreme Court has original jurisdiction in mandamus to compel county clerk to place name on ballot. State ex rel. Whedon v. Smith, 57 Neb. 41, 77 N.W. 384 (1898).

Where state is real party, having direct interest, Supreme Court has original jurisdiction. In re Petition of Attorney General, 40 Neb. 402, 58 N.W. 945 (1894).

Habeas corpus cannot operate as writ of error. In re Betts, 36 Neb. 282, 54 N.W. 524 (1893).

Supreme Court has original jurisdiction of habeas corpus, but single judge cannot grant writ. In re White, 33 Neb. 812, 51 N.W. 287 (1892).

Supreme Court has original jurisdiction to appoint receiver of bank. State v. Commercial State Bank, 28 Neb. 677, 44 N.W. 998 (1890).

An original application for habeas corpus may be filed in the Supreme Court of Nebraska. Ex parte Leslie Williams, 317 U.S. 604 (1942).

Supreme Court is given original jurisdiction in habeas corpus matters. Graminea v. State, 206 F.Supp. 308 (D. Neb. 1962).

3. No original jurisdiction

Supreme Court has no original probate jurisdiction. Fitzgerald v. Fitzgerald & Mallory Constr. Co., 48 Neb. 386, 67 N.W. 158 (1896).

Supreme Court has no original jurisdiction to issue writ of prohibition. State ex rel. King v. Hall, 47 Neb. 579, 66 N.W. 642 (1896).

Where state is not a party, Supreme Court has no original jurisdiction of creditor's suit to appoint receiver for bank. State v. State Bank of Wahoo, 40 Neb. 192, 58 N.W. 863 (1894).

Unless some good reason is shown for not applying to district court, Supreme Court will not entertain an original application for mandamus. State ex rel. Wyckoff v. Merrell, 38 Neb. 510, 56 N.W. 1082 (1893).

Mandamus to enforce private right should be commenced in district court. State ex rel. Herpolsheimer & Co. v. Lincoln Gas Co., 38 Neb. 33, 56 N.W. 789 (1893).

Supreme Court has no original jurisdiction in equity, to vacate judgment, and grant new trial to accused. Paulson v. State, 25 Neb. 344, 41 N.W. 249 (1889).

4. Appellate jurisdiction

Appellate jurisdiction includes power to direct further proceedings to be taken in the case. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

Supreme Court has jurisdiction of error proceeding even though district court was without jurisdiction of subject matter. Armstrong v. Mayer, 60 Neb. 423, 83 N.W. 401 (1900).

Appellate jurisdiction in error proceedings is limited to final orders and judgments of district court. Marrow v. Gilbert, 52 Neb. 195, 71 N.W. 1014 (1897).

On appeal in law action, there is no trial de novo. Robertson v. Hall, 2 Neb. 17 (1873).

5. Miscellaneous

Court has power to provide by rule for exercise of jurisdiction expressly conferred. In re Petition of Attorney General, 40 Neb. 402, 58 N.W. 945 (1894).

Under Nebraska law, scope of remedy of writ of habeas corpus is limited. Shupe v. Sigler, 230 F.Supp. 601 (D. Neb. 1964).

24-204.01 Original jurisdiction; issue of constitutionality of acts of Legislature; attorney fees; costs; payment.

When an original action is instituted in the Supreme Court by or against the state, or any office, department, or officer thereof, involving the constitutionality of any act of the Legislature no matter when such act was passed, attorney fees and costs may be allowed if any of the following conditions set forth in subdivision (1), (2), or (3) of this section are found to exist:

(1)(a) The action challenges the constitutionality of an act which the Attorney General has previously ruled constitutional or unconstitutional or as to which he has made no ruling, or (b) the action supports the constitutionality of an act which the Attorney General has previously ruled unconstitutional;

(2) The action is pending or commenced while the Legislature is in session; or

(3) The action is brought by a real party in interest and raises a justiciable issue or issues. No such payment shall be made until approval thereof shall

have been given by the Legislature by resolution adopted by a majority vote of its members. The Supreme Court, upon finding that the conditions set forth in this section exist, shall allow reasonable attorney fees and costs in such amounts and for such parties as the court shall determine. Such fees and costs shall be taxed to the Attorney General and paid out of such appropriation as the Legislature shall make for that purpose.

Source: Laws 1967, c. 135, § 1, p. 420.

24-205 Supreme Court Education Fund; created; use; investment.

The Supreme Court Education Fund is created. The State Court Administrator shall administer the fund. The fund shall consist of money remitted pursuant to section 33-154. The fund shall only be used to aid in supporting the mandatory training and education program for judges and employees of the Supreme Court, Court of Appeals, district courts, separate juvenile courts, county courts, and Nebraska Probation System as enacted by rule of the Supreme Court. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source: Laws 2003, LB 760, § 1.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

24-205.01 Judicial Branch Education Advisory Committee; powers.

(1) The Supreme Court may appoint a Judicial Branch Education Advisory Committee.

(2) The Judicial Branch Education Advisory Committee may:

(a) Develop for review by the Supreme Court standards and rules and regulations addressing such issues as the criteria for mandatory education for judges, criteria for approval of qualified activities, reporting requirements, sanctions for noncompliance, exemptions, and confidentiality of records;

(b) Develop for review by the Supreme Court standards and policies for education and training of all nonjudge judicial branch employees, including criteria for approval of qualified activities, reporting requirements, sanctions for noncompliance, and exemptions;

(c) Make recommendations to the State Court Administrator regarding budget requests and pursue grant funding;

(d) Develop for review by the Supreme Court policies regarding funding for travel and other related educational expenses for all employees for both instate and out-of-state travel; and

(e) Participate in additional activities as assigned by the Supreme Court in order to promote excellence in the administration of justice through quality education.

Source: Laws 2003, LB 760, § 2.

24-206 Terms of court, special.

The judges of the Supreme Court, or a majority of them, are hereby authorized to appoint and hold a special term of said court at such time as they may

designate, for disposing of the unfinished business of any general term of said court, and may appoint one special term of said court in any one year for general or special purposes.

Source: Laws 1879, § 15, p. 84; R.S.1913, § 1142; C.S.1922, § 1071; C.S.1929, § 27-206.

24-207 Repealed. Laws 1982, LB 718, § 1.

24-208 Opinions; when filed.

The court shall cause to be reported with as much brevity as practicable each of its decisions which reverses or modifies the judgment of the district court, and also each other decision, whether made in disposing of a motion or otherwise, which determines or modifies any theretofore unsettled or new and important question of law, or that gives construction to any provision of the Constitution or of a statute not before construed, together with such other of its decisions as are deemed to be of interest or importance.

Source: Laws 1879, § 18, p. 85; R.S.1913, § 1145; Laws 1915, c. 21, § 1, p. 82; C.S.1922, § 1074; C.S.1929, § 27-208.

Opinions of appellate courts are entitled to consideration in determining the effect of their mandates. Equitable Life Assur. Soc. v. Gillan, 70 F.Supp. 640 (D. Neb. 1945).

24-209 Nebraska Reports; Nebraska Appellate Reports; Nebraska Advance Sheets; Decisions of the Nebraska Court of Appeals; disposition; price; Supreme Court Reports Cash Fund; created.

(1) One copy of the Nebraska Reports and one copy of the Nebraska Appellate Reports shall be furnished by the Supreme Court to each judge of the Supreme Court, Court of Appeals, Nebraska Workers' Compensation Court, and district, separate juvenile, and county courts, to each county law library, and to each state library, and two copies of such reports shall be furnished to the Legislative Council. The State Court Administrator shall be furnished as many additional copies as he or she deems necessary for the operation of the Court of Appeals and the Supreme Court.

(2) One advance copy of the opinions of the Nebraska Supreme Court in pamphlet form, known as the Nebraska Advance Sheets, and one advance copy of the opinions of the Nebraska Court of Appeals in pamphlet form, known as the Decisions of the Nebraska Court of Appeals, shall be furnished to each judge of the Supreme Court, Court of Appeals, Nebraska Workers' Compensation Court, and district, separate juvenile, and county courts, as many advance copies as may be requested by the members of the Legislature shall be furnished to the Clerk of the Legislature, and the State Court Administrator shall be furnished as many advance copies as he or she deems necessary for the operation of the Court of Appeals and the Supreme Court.

(3) The balance of the Nebraska Reports, Nebraska Appellate Reports, Nebraska Advance Sheets, and Decisions of the Nebraska Court of Appeals shall be sold as called for at such price as shall be prescribed by the Supreme Court. The Supreme Court shall also prescribe the price for microform copies of the reports. The money received from such sales shall be paid into the Supreme Court Reports Cash Fund which is hereby created.

(4) Upon request from any office or entity entitled to free copies of the Nebraska Reports, the Nebraska Appellate Reports, the Nebraska Advance Sheets, or the Decisions of the Nebraska Court of Appeals, the court may stop sending the publications to such office or entity until the request is withdrawn.

Source: Laws 1879, § 20, p. 86; Laws 1901, c. 24, § 2, p. 330; Laws 1907, c. 41, § 1, p. 179; R.S.1913, § 1147; Laws 1921, c. 213, § 1, p. 752; C.S.1922, § 1076; Laws 1923, c. 129, § 1, p. 322; C.S.1929, § 27-209; Laws 1937, c. 59, § 1, p. 236; C.S.Supp.,1941, § 27-209; R.S.1943, § 24-209; Laws 1947, c. 185, § 3, p. 611; Laws 1957, c. 210, § 1, p. 742; Laws 1961, c. 101, § 1, p. 332; Laws 1961, c. 243, § 1, p. 724; Laws 1963, c. 303, § 1, p. 897; Laws 1963, c. 129, § 1, p. 496; Laws 1971, LB 10, § 1; Laws 1972, LB 1284, § 13; Laws 1977, LB 9, § 1; Laws 1979, LB 377, § 1; Laws 1983, LB 271, § 1; Laws 1984, LB 13, § 5; Laws 1984, LB 848, § 1; Laws 1985, LB 498, 1; Laws 1986, LB 750, § 1; Laws 1986, LB 811, § 11; Laws 1991, LB 732, § 33; Laws 1992, LB 1059, § 2; Laws 1995, LB 271, § 2; Laws 2002, LB 876, § 4.

In absence of copyright, printer could publish and sell copies of Supreme Court Reports, even though plates belonged to state. State v. State Journal Co., 77 Neb. 752, 110 N.W. 763 (1906), affirming 75 Neb. 275, 106 N.W. 434 (1905).

Supreme Court Reports belong to office and not to judge personally. Clifford v. Hall County, 60 Neb. 506, 83 N.W. 661 (1900).

24-210 Repealed. Laws 1987, LB 571, § 1.

(b) CLERK AND REPORTER

24-211 Clerk and reporter; salaries; how fixed; duties.

(1) The Clerk of the Supreme Court shall keep his or her office at the State Capitol, be the custodian of the seal of the court, perform the duties devolving upon him or her by law, and be subject to the orders of the court. The Clerk of the Supreme Court shall receive an annual salary to be fixed by the Supreme Court.

(2) The Reporter of the Supreme Court and Court of Appeals shall keep his or her office at the State Capitol, perform the duties devolving upon him or her by law, and be subject to the orders of the court. The Reporter of the Supreme Court and Court of Appeals shall receive an annual salary to be fixed by the Supreme Court.

Source: Laws 1879, § 17, p. 85; R.S.1913, § 1144; Laws 1921, c. 103, § 1, p. 373; C.S.1922, § 1073; C.S.1929, § 27-211; R.S.1943, § 24-211; Laws 1955, c. 78, § 1, p. 233; Laws 1965, c. 109, § 1, p. 433; Laws 1991, LB 732, § 34; Laws 1995, LB 271, § 3.

Cross References

Clerk:
Amercement for neglect of duty, see section 25-1546.
Deputy, appointment, see section 24-401.
General duties, see sections 25-2204 to 25-2214.
Not to practice as an attorney, see section 7-111.
Oaths and affirmations, power to administer, see section 24-1002.
Serves as State Librarian, see section 51-102.

Under former law, since office of clerk is constitutional office, specific appropriation of payment of salary is unnecessary. Weston v. Herdman, 64 Neb. 24, 89 N.W. 384 (1902).

Salary provided is exclusive mode of compensation. In re Brown, 15 Neb. 688, 50 N.W. 273 (1884).

24-211.01 Repealed. Laws 1963, c. 341, § 1.

24-211.02 Repealed. Laws 1971, LB 33, § 1.

24-211.03 Repealed. Laws 1971, LB 33, § 1.

24-212 Nebraska Reports; Nebraska Appellate Reports; preparation and publication; copyright; disposition; annotations.

It shall be the duty of the Reporter of the Supreme Court and Court of Appeals to prepare the opinions of the courts for publication in advance pamphlet form as fast as they are delivered to him or her, and when sufficient material is accumulated to form a volume of not less than nine hundred pages, he or she shall cause the same to be printed and bound in a permanent manner. The reporter shall also determine, based on the number of current subscribers and the provisions of section 24-209, the number of copies to be printed for each publication of advance pamphlets and bound volumes. Payments for such publications shall be made from the Supreme Court Reports Cash Fund. The copyright of each volume shall be entered by the reporter for the benefit of the state, and all papers relating thereto shall be filed and recorded in the office of the Secretary of State. The titles of the volumes shall be the Nebraska Reports and the Nebraska Appellate Reports which with the number of the volume shall be printed on the back of each volume, and the reports of every case must show the name of the judge writing the opinion, the names of the judges concurring therein, and the names of the judges, if any, dissenting from the opinion. The reporter shall also edit and arrange for publication in the statutes of Nebraska, at such times as the Revisor of Statutes may request, annotations of the decisions of the Supreme Court of Nebraska, the decisions of the Court of Appeals designated for permanent publication, and the decisions of the federal courts and transmit them to the Revisor of Statutes. With the approval of the Supreme Court, the reporter may arrange for microform reproduction of the published reports.

Source: Laws 1879, § 19, p. 85; Laws 1901, c. 24, § 1, p. 329; R.S.1913, § 1146; C.S.1922, § 1075; Laws 1929, c. 84, § 1, p. 334; C.S. 1929, § 27-212; R.S.1943, § 24-212; Laws 1967, c. 328, § 1, p. 868; Laws 1979, LB 377, § 2; Laws 1984, LB 848, § 2; Laws 1994, LB 1244, § 1; Laws 1995, LB 271, § 4.

Reporter should cooperate in letting printing contract with other state agencies authorized to act. Traphagen v. Lindsay, 95 Neb. 823, 146 N.W. 1026 (1914).

It is the duty of reporter to publish at lowest reasonable cost. In re Brown, 15 Neb. 688, 50 N.W. 273 (1884).

24-213 Repealed. Laws 1947, c. 179, § 5.

24-214 Fee book; entries; duty of clerk.

The Clerk of the Supreme Court of the State of Nebraska shall keep a book, which shall be provided by the state, and which shall be known as the Fee Book of the Clerk of the Supreme Court, and shall be a part of the records of said office, and in which shall be entered every item of fees collected by him, showing in separate columns the name of the party from whom received, the time of receiving the same, the amount received and for what service the same was charged.

Source: Laws 1909, c. 39, § 1, p. 223; R.S.1913, § 1150; Laws 1921, c. 213, § 2, p. 753; C.S.1922, § 1079; C.S.1929, § 27-214.

24-215 Fees; quarterly payment into General Fund; transcripts for Supreme Court of United States; powers and duties of clerk.

The Clerk of the Supreme Court shall, on the first day in January, April, July, and October of each year, pay into the General Fund of the state treasury all fees of every nature and description received by him or her during the preceding three months; and the State Treasurer shall issue his or her receipt for such fees. If the clerk shall find it necessary to procure additional clerical help in preparing transcripts for use in the Supreme Court of the United States, he or she is authorized to pay for such additional help out of the fees collected for preparing such transcripts, taking proper receipts therefor; and he or she shall account for the balance of such fees as hereinbefore provided.

Source: Laws 1909, c. 39, § 2, p. 224; R.S.1913, § 1151; Laws 1921, c. 213, § 3, p. 753; C.S.1922, § 1080; C.S.1929, § 27-215; R.S. 1943, § 24-215; Laws 1981, LB 545, § 5.

24-216 Fees; neglect or fraud in report; penalty.

If the Clerk of the Supreme Court shall omit to comply with the provisions of sections 24-214 and 24-215, or shall fail or neglect to keep a correct account of the fees by him received, or shall fail or neglect to make a report to the Governor of the state as herein provided by law, with intent to evade the provisions of said sections, he shall be guilty of a Class V misdemeanor. If he shall intentionally make a false report under oath, he shall be guilty of perjury and shall, upon conviction thereof, be punished as provided in section 28-915.

Source: Laws 1909, c. 39, § 3, p. 224; R.S.1913, § 1152; Laws 1921, c. 213, § 4, p. 754; C.S.1922, § 1081; C.S.1929, § 27-216; R.S. 1943, § 24-216; Laws 1977, LB 40, § 99; Laws 1978, LB 748, § 3.

(c) BAILIFFS

24-217 Supreme Court; bailiffs.

The court may also appoint not to exceed two bailiffs, who shall have power to serve any process issuing out of said court in the exercise of its original jurisdiction, and shall receive for such services the same fees as sheriffs for similar services.

Source: Laws 1879, § 22, p. 87; R.S.1913, § 1149; Laws 1919, c. 13, § 1, p. 73; Laws 1921, c. 213, § 1-A, p. 753; C.S.1922, § 1078; C.S.1929, § 27-230.

Cross References

For fees of sheriff, see section 33-117.

(d) LIABILITY INSURANCE

24-218 Chief Justice; purchase liability insurance; for whom.

The Chief Justice of the Supreme Court, or the State Court Administrator acting on his or her behalf, shall have the authority to purchase and maintain insurance on behalf of any judge, officer, or employee of any court in this state against any liability asserted against him or her and incurred by him or her in any such capacity or arising out of his or her status as such, whether or not the

state would have the power to indemnify the individual against such liability under any other provision of law.

Source: Laws 1981, LB 472, § 2.

(e) REQUESTS FOR CERTIFICATION OF LAW

24-219 Supreme Court; answer questions of law; when.

The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state. Such request shall not obligate the Supreme Court to accept such request for certification and the Supreme Court may, in its absolute discretion, accept or reject such request for certification as it shall in each case determine.

Source: Laws 1982, LB 724, § 1.

Under this section, the Nebraska Supreme Court is limited to answering questions of law which have been certified to it by a federal court. Givens v. Anchor Packing, 237 Neb. 565, 466 N.W.2d 771 (1991).

Fact that district court did not certify to state Supreme Court question of whether state tolls, during plaintiff's infancy, running of ten-year statute of limitations provided for medical malpractice actions did not bar court of appeals from utilizing certification procedure, especially where certification procedure was not available to district court at time it considered statute of limitations issue. Hatfield v. Bishop Clarkson Memorial Hosp., 701 F.2d 1266 (8th Cir. 1983).

24-220 Certification request; how invoked.

Sections 24-219 to 24-225 may be invoked by a written request of any of the courts referred to in section 24-219 upon such court's own motion, or upon the motion to that court of any attorney involved.

Source: Laws 1982, LB 724, § 2.

24-221 Certification request; contents.

A certification request shall set forth (1) the questions of law to be answered and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Source: Laws 1982, LB 724, § 3.

24-222 Certification request; requirements; acceptance.

The certification request shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed with the certification order if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions. The Supreme Court shall determine whether to accept the certification request within sixty days following receipt by the court of the request. If the court fails to act on the request within sixty days of receipt, the request shall be deemed rejected.

Source: Laws 1982, LB 724, § 4.

24-223 Certification request; fees and costs.

Fees and costs shall be the same as in civil appeals docketed with the Supreme Court.

Source: Laws 1982, LB 724, § 5.

Cross References

Docket fees, see sections 33-103, 33-103.01, 33-107.01, and 33-107.03.

24-224 Certification request; Supreme Court; duties.

If a certification request made pursuant to section 24-222 is accepted by the Supreme Court, it shall promptly notify the requesting court in writing of such fact and the proceedings shall thereafter be as provided by the Supreme Court. The Supreme Court shall provide an expedited briefing and hearing process so that resolution of the accepted question may be promptly determined and justice not delayed.

Source: Laws 1982, LB 724, § 6.

24-225 Certification request; Supreme Court opinion; delivery.

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

Source: Laws 1982, LB 724, § 7.

(f) ELECTRONIC RESEARCH

24-226 Use of electronic research capabilities; authorized; payment.

The Supreme Court may authorize, for judges of the district court and judges of the county court, the use of electronic research capabilities available on the state computer network. All costs and expenses related to such use shall be paid by the Supreme Court.

Source: Laws 1992, LB 1059, § 1.

(g) SUPREME COURT AUTOMATION CASH FUND

24-227 Repealed. Laws 1997, LB 216, § 3.

24-227.01 Supreme Court Automation Cash Fund; created; use; investment.

The Supreme Court Automation Cash Fund is created. The State Court Administrator shall administer the fund. The fund shall only be used to support automation expenses of the Supreme Court, Court of Appeals, district courts, separate juvenile courts, county courts, and Nebraska Probation System from the computer automation budget program. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source: Laws 2002, Second Spec. Sess., LB 13, § 1.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.

Nebraska State Funds Investment Act, see section 72-1260.

(h) WORD AND DATA PROCESSING

24-228 Assumption of district court expenses; when.

The Supreme Court shall assume as expenses the cost of word processing and data processing hardware and software involved in the operation of the district courts if those costs are for services provided on equipment owned by the State of Nebraska and the services have been approved by the State Court Administrator.

Source: Laws 1993, LB 832, § 3; Laws 1997, LB 216, § 1.

(i) COUNSEL FOR DISCIPLINE CASH FUND

24-229 Counsel for Discipline Cash Fund; created; use; investment.

The Counsel for Discipline Cash Fund is created. The fund shall be established within the Nebraska Supreme Court and administered by the State Court Administrator. The fund shall consist of a portion of the annual membership dues assessed by the Nebraska State Bar Association and remitted to the Nebraska Supreme Court for credit to the fund. The fund shall only be used to pay the costs associated with the operation of the Office of the Counsel for Discipline. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source: Laws 2007, LB322, § 1.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

ARTICLE 3
DISTRICT COURT

Cross References

Constitutional provisions:
- Appeals concerning claims upon treasury, see Article VIII, section 9, Constitution of Nebraska.
- Districts and changes in boundaries, see Article V, sections 10 and 11, Constitution of Nebraska.
- Judges:
  - Appointment to act as associate judges of Supreme Court, see Article V, section 2, Constitution of Nebraska.
  - Chambers, jurisdiction at, see Article V, section 23, Constitution of Nebraska.
  - Discipline and removal from office, see Article III, section 17, Article IV, section 5, and Article V, sections 30 and 31, Constitution of Nebraska.
  - Hold court for each other, see Article V, section 12, Constitution of Nebraska.
  - Jurisdiction, see Article V, section 9, Constitution of Nebraska.
  - Merit plan for selection, see Article V, section 21, Constitution of Nebraska.
  - Not act as attorneys, see Article V, section 14, Constitution of Nebraska.
  - Number, see Article V, sections 10 and 11, Constitution of Nebraska.
  - Oath or affirmation required, see Article XV, section 1, Constitution of Nebraska.
  - Retired, temporary duty on Supreme Court, see Article V, section 12, Constitution of Nebraska.
  - Salary, Legislature may fix, see Article V, section 13, Constitution of Nebraska.
  - Tenure, see Article V, sections 20 and 21, Constitution of Nebraska.
  - Vacancies, appointment to fill, see Article V, section 21, Constitution of Nebraska.
- Jurisdiction, see Article V, section 9, Constitution of Nebraska.

Appeals, when right conferred but procedure not prescribed, see section 25-1937.
Appellate jurisdiction, general provisions, see sections 25-1901 to 25-1937, 25-2728 to 25-2738, and 84-917.
Civil procedure, see Chapter 25.
Criminal procedure, see Chapter 29.
Fees, see sections 33-106 to 33-106.03 and 33-107.01 to 33-107.03.
Judges:
- Association, see sections 29-2247 and 29-2248.

Cannot act as attorney, see section 7-111.
Disqualification, see section 24-739.
Oaths and affirmations, power to administer, see section 24-1002.
Resignation, see section 32-562.
Selection, see sections 24-801 to 24-820.
Vacancies, how filled, see section 24-810.
Judicial districts, see section 24-301.02.
Nebraska District Court Judges Association, see sections 29-2247 and 29-2248.
Witness fees, unclaimed, disposition, see sections 33-140 to 33-140.03.

(a) ORGANIZATION

Section
24-301. District judge; eligibility.
24-301.01. District judge; judge of separate juvenile court; salary.
24-301.02. District court judicial districts; described; number of judges.
24-301.03. Repealed. Laws 1959, c. 266, § 1.
24-301.04. Repealed. Laws 1959, c. 266, § 1.
24-301.05. Repealed. Laws 1961, c. 286, § 1.
24-301.06. Repealed. Laws 1990, LB 822, § 40.
24-301.07. Repealed. Laws 1971, LB 33, § 1.
24-302. Jurisdiction.
24-302.01. Transferred to section 25-2706.
24-303. Terms of court; when fixed; where held; assignment of judges by Supreme Court; telephonic or videoconference hearing; authorized.
24-304. Terms of court, special.
24-305. Absence of judge; adjournment from day to day.
24-306. Absence of judge; adjournment until next regular term.
24-307. Absence of judge; adjournment by written order.
24-308. Failure of term; pending proceedings continued.
24-309. Failure of term; persons recognized; sureties; liability.
24-310. Final adjournment; effect.
24-311. Transferred to section 24-1001.
24-312. District judges; interchange; appointment of county judge to act; when; effect; reassignment of cases.
24-313. Inferior tribunal; powers over.
24-314. Transferred to section 24-1002.
24-315. Transferred to section 24-739.
24-316. Repealed. Laws 1959, c. 108, § 2.
24-317. Transferred to section 24-734.
24-318. Offenses at trial; order to investigate; order to prosecute; duty of county attorney.

(b) ACTIONS IN WHICH THE STATE OR A STATE AGENCY IS A PARTY

24-319. Transferred to section 25-21,201.
24-320. Transferred to section 25-21,202.
24-321. Transferred to section 25-21,203.
24-322. Transferred to section 25-21,204.
24-323. Transferred to section 25-21,205.
24-324. Transferred to section 25-21,206.
24-325. Transferred to section 25-21,207.
24-326. Transferred to section 25-21,208.
24-327. Transferred to section 25-21,209.
24-328. Transferred to section 25-21,210.
24-329. Transferred to section 25-21,211.
24-330. Transferred to section 25-21,212.
24-331. Transferred to section 25-21,213.
24-332. Transferred to section 25-21,214.
24-333. Transferred to section 25-21,215.
24-334. Transferred to section 25-21,216.
24-335. Transferred to section 25-21,217.
24-336. Transferred to section 25-21,218.

Section

(c) CLERK

(d) COURT REPORTERS

(e) UNCALLED-FOR FUNDS; DISPOSITION

(f) BAILIFF

(g) APPELLATE DIVISION

(a) ORGANIZATION

24-301 District judge; eligibility.

No person shall be eligible to the office of district judge in any district unless he or she:

(1) Is at least thirty years of age;

(2) Is a citizen of the United States;

(3) Has been engaged in the practice of law in the State of Nebraska for at least five years, which may include prior service as a judge;

(4) Is currently admitted to practice before the Nebraska Supreme Court; and

(5) Is, on the effective date of appointment, a resident of the district to be served, and remains a resident of such district during the period of service.

This section and sections 24-202, 24-505.01, 43-2,118, 48-153, and 48-153.01 shall not apply to a person serving as a district judge on August 24, 1979, who continues to serve as a district judge after such effective date.

Source: Laws 1879, § 23, p. 87; R.S.1913, § 1160; C.S.1922, § 1083; C.S.1929, § 27-301; R.S.1943, § 24-301; Laws 1979, LB 237, § 2.

24-301.01 District judge; judge of separate juvenile court; salary.

As soon as the same may be legally paid under the Constitution of Nebraska, each judge of the district court and each judge of a separate juvenile court shall be paid a salary of thirty-nine thousand five hundred dollars per annum. On January 8, 1981, the salary shall be increased to an amount equal to six percent over the base salary. For the purposes of this section base salary shall mean the amount derived by increasing thirty-nine thousand five hundred dollars by six percent. On January 6, 1983, and thereafter the salary paid shall be an amount equal to ninety-two and one-half percent of the salary set for the Chief Justice and judges of the Supreme Court. Such salary shall be payable in equal installments.

Source: Laws 1945, c. 58, § 1, p. 251; Laws 1947, c. 345, § 3, p. 1090; Laws 1951, c. 58, § 2, p. 191; Laws 1955, c. 77, § 2, p. 232; Laws 1959, c. 93, § 2, p. 406; Laws 1963, c. 127, § 2, p. 480; Laws 1965, c. 110, § 1, p. 434; Laws 1965, c. 116, § 1, p. 446; Laws 1967, c. 136, § 2, p. 422; Laws 1969, c. 174, § 2, p. 755; Laws 1972, LB 1293, § 2; Laws 1974, LB 923, § 2; Laws 1976, LB 76, § 2; Laws 1978, LB 672, § 2; Laws 1979, LB 398, § 2; Laws 1981, LB 111, § 1.

Cross References

Section, interpretation, see section 24-201.03.
Supreme Court judges, salary, see section 24-201.01.

Salary increase for district judges under this section became effective upon appointment of new district judges. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

Salary of district judge could not be decreased during term by deductions for retirement fund. Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956).

Legislature of 1945 had once before fixed salary of district judges. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N.W.2d 799 (1947).

24-301.02 District court judicial districts; described; number of judges.

The State of Nebraska shall be divided into the following twelve district court judicial districts:

District No. 1 shall contain the counties of Clay, Nuckolls, Saline, Jefferson, Gage, Thayer, Johnson, Pawnee, Nemaha, Fillmore, and Richardson;

District No. 2 shall contain the counties of Sarpy, Cass, and Otoe;

District No. 3 shall contain the county of Lancaster;

District No. 4 shall contain the county of Douglas;

District No. 5 shall contain the counties of Merrick, Platte, Colfax, Boone, Nance, Hamilton, Polk, York, Butler, Seward, and Saunders;

District No. 6 shall contain the counties of Dixon, Dakota, Cedar, Burt, Thurston, Dodge, and Washington;

District No. 7 shall contain the counties of Knox, Cuming, Antelope, Pierce, Wayne, Madison, and Stanton;

District No. 8 shall contain the counties of Cherry, Keya Paha, Brown, Rock, Blaine, Loup, Custer, Boyd, Holt, Garfield, Wheeler, Valley, Greeley, Sherman, and Howard;

District No. 9 shall contain the counties of Buffalo and Hall;

District No. 10 shall contain the counties of Adams, Phelps, Kearney, Harlan, Franklin, and Webster;

District No. 11 shall contain the counties of Hooker, Thomas, Arthur, McPherson, Logan, Keith, Perkins, Lincoln, Dawson, Chase, Hayes, Frontier, Gosper, Dundy, Hitchcock, Red Willow, and Furnas; and

District No. 12 shall contain the counties of Sioux, Dawes, Box Butte, Sheridan, Scotts Bluff, Morrill, Garden, Banner, Kimball, Cheyenne, Grant, and Deuel.

In the fourth district there shall be sixteen judges of the district court. In the third district there shall be seven judges of the district court. In the second, fifth, ninth, eleventh, and twelfth districts there shall be four judges of the district court. In the first and sixth districts there shall be three judges of the district court. In the seventh, eighth, and tenth districts there shall be two judges of the district court.

Source: Laws 1911, c. 5, § 1, p. 70; Laws 1913, c. 203, § 1, p. 623; R.S.1913, § 217; Laws 1915, c. 12, § 1, p. 64; Laws 1917, c. 3, § 1, p. 55; Laws 1919, c. 114, § 1, p. 278; Laws 1921, c. 146, § 1, p. 620; C.S.1922, § 199; Laws 1923, c. 119, § 1, p. 283; C.S.1929, § 5-103; R.S.1943, § 5-105; Laws 1961, c. 11, § 1, p. 99; Laws 1963, c. 24, § 1, p. 125; Laws 1965, c. 24, § 1, p. 189; Laws 1965, c. 23, § 1, p. 186; Laws 1969, c. 27, § 1, p. 229; Laws 1972, LB 1301, § 1; Laws 1975, LB 1, § 1; Laws 1980, LB 618, § 1; Laws 1983, LB 121, § 1; Laws 1985, LB 287, § 1; Laws 1986, LB 516, § 1; R.S.1943, (1987), § 5-105; Laws 1990, LB 822, § 10; Laws 1991, LB 181, § 1; Laws 1992, LB 1059, § 3; Laws 1993, LB 306, § 1; Laws 1995, LB 19, § 1; Laws 1995, LB 189, § 2; Laws 1998, LB 404, § 1; Laws 2001, LB 92, § 1; Laws 2004, LB 1207, § 1; Laws 2007, LB377, § 2.

Cross References

Constitutional provisions, see Article V, sections 10 and 11, Constitution of Nebraska.

Rights of newly appointed judges under merit plan of judicial selection governed by applicable laws in effect at time of appointment and qualification. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

Omission of county in amendatory act providing for judicial districts did not exclude county from the operation of the laws or judicial authority of the state. State ex rel. Reed v. Grimes, 98 Neb. 762, 154 N.W 544 (1915).

24-301.03 Repealed. Laws 1959, c. 266, § 1.

24-301.04 Repealed. Laws 1959, c. 266, § 1.

24-301.05 Repealed. Laws 1961, c. 286, § 1.

24-301.06 Repealed. Laws 1990, LB 822, § 40.

24-301.07 Repealed. Laws 1971, LB 33, § 1.

24-302 Jurisdiction.

The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided.

Source: Laws 1879, § 24, p. 87; R.S.1913, § 1161; C.S.1922, § 1084; C.S.1929, § 27-302.

1. General powers
2. Jurisdiction
3. Miscellaneous

1. General Powers

As a court of general jurisdiction, district court has power to examine into and determine the sufficiency of supersedeas and appeal bonds and the sureties thereon up to the time when appeal to the Supreme Court is complete. Fisher v. Keeler, 142 Neb. 79, 5 N.W.2d 143 (1942).

Court has power to punish for contempt. Back v. State, 75 Neb. 603, 106 N.W. 787 (1906).

District court has power to send original process to any part of state unless restricted. Eager v. Eager, 74 Neb. 827, 105 N.W. 636 (1905), reversed on rehearing, 74 Neb. 830, 107 N.W. 254 (1906).

Court has power in equity to supply omissions in legal procedure. Wardell v. Wardell, 71 Neb. 774, 99 N.W. 674 (1904).

District court may, in its discretion, sit as an examining magistrate. State v. Dennison, 60 Neb. 192, 82 N.W. 628 (1900).

Court has power to enter nunc pro tunc order to correct record. Gund v. Horrigan, 53 Neb. 794, 74 N.W. 257 (1898); Hyde v. Michelson, 52 Neb. 680, 72 N.W. 1035 (1897); Hamer v. McKinley-Lanning Loan & Trust Co., 51 Neb. 496, 71 N.W. 51 (1897); Van Etten v. Test, 49 Neb. 725, 68 N.W. 1023 (1896); Wachsmuth v. Orient Ins. Co., 49 Neb. 590, 68 N.W. 935 (1896).

Court has power to make necessary rules. Andres v. Kridler, 49 Neb. 535, 68 N.W. 938 (1896).

Court has power to enter deficiency judgment upon foreclosure of mortgage. Flentham v. Steward, 45 Neb. 640, 63 N.W. 924 (1895).

The validity of the removal of a public officer and the title of the person removed, or of a new appointee to the office, may be tried by quo warranto or mandamus. In re Sawyer, 124 U.S. 200 (1888).

2. Jurisdiction

Section 48-161 provides the Workers' Compensation Court with jurisdiction to determine insurance disputes in workers' compensation claims, including the existence of coverage and the extent of an insurer's liability. According to the terms of section 48-161, that jurisdiction is not exclusive, however, and the district court may also exercise its inherent jurisdiction for these purposes. Schweitzer v. American Nat. Red Cross, 256 Neb. 350, 591 N.W.2d 524 (1999).

Unless upon change of venue, an accused cannot be tried lawfully in any county other than the county where the offense was committed. State v. Furstenau, 167 Neb. 439, 93 N.W.2d 384 (1958).

District courts have general and original jurisdiction in criminal cases except when otherwise provided. Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955).

Legislature cannot take from courts the broad general jurisdiction conferred on them by the Constitution of Nebraska. State ex re. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Courts have no discretion to refuse to entertain jurisdiction of cause of action brought by nonresident because of such nonresidence. Herrmann v. Franklin Ice Cream Co., 114 Neb. 468, 208 N.W. 141 (1926).

Court has general equity jurisdiction. Rhoades v. Rhoades, 78 Neb. 495, 111 N.W. 122 (1907).

Court has jurisdiction to assign dower. Swobe v. Marsh, 73 Neb. 331, 102 N.W. 619 (1905).

If the court has no jurisdiction, judgment is void. Aldrich v. Steen, 71 Neb. 33, 98 N.W. 445 (1904), affirmed on rehearing, 71 Neb. 57, 100 N.W. 311 (1904).

District court does not have original jurisdiction of will contest, or to construe same where there is no trust. Andersen v. Andersen, 69 Neb. 565, 96 N.W. 276 (1903).

Parties cannot confer jurisdiction over subject matter. Crawford Co. v. Hathaway, 61 Neb. 317, 85 N.W. 303 (1901).

Court has jurisdiction of action for alimony independent of divorce action. Earle v. Earle, 27 Neb. 277, 43 N.W. 118 (1889).

Court has jurisdiction to set aside deed fraudulently secured. Barker v. Barker, 27 Neb. 135, 42 N.W. 889 (1889).

Court has general jurisdiction to compel executor to account for trust funds. Blake v. Chambers, 4 Neb. 90 (1875).

3. Miscellaneous

Void judgment may be collaterally attacked. Radil v. Sawyer, 85 Neb. 235, 122 N.W. 980 (1909).

Regularity of proceedings will be presumed. Back v. State, 75 Neb. 603, 106 N.W. 787 (1906); Wright v. State, 45 Neb. 44, 63 N.W. 147 (1895).

24-302.01 Transferred to section 25-2706.

24-303 Terms of court; when fixed; where held; assignment of judges by Supreme Court; telephonic or videoconference hearing; authorized.

(1) The judges of the district court shall, the last two months in each year, fix the time of holding terms of court in the counties composing their respective districts during the ensuing year, and cause the same to be published throughout the district, if the same can be done without expense. All jury terms of the district court shall be held at the county seat in the courthouse, or other place provided by the county board, but nothing herein contained shall preclude the district court, or a judge thereof, from rendering a judgment or other final

order or from directing the entry thereof in any cause, in any county other than where such cause is pending, where the trial or hearing upon which such judgment or other final order is rendered took place in the county in which such cause is pending. Terms of court may be held at the same time in different counties in the same judicial district, by the judge of the district court thereof, if there be more than one, and upon request of the judge or judges of such court, any term in such district may be held by a judge of the district court of any other district of the state. The Supreme Court may order the assignment of judges of the district court to other districts whenever it shall appear that their services are needed to relieve a congested calendar or to adjust judicial case loads, or on account of the disqualification, absence, disability, or death of a judge, or for other adequate cause. When necessary, a term of the district court sitting in any county may be continued into and held during the time fixed for holding such court in any other county within the district, or may be adjourned and held beyond such time.

(2) All nonevidentiary hearings, and any evidentiary hearings approved by the district court and by stipulation of all parties that have filed an appearance, may be heard by the court telephonically or by videoconferencing or similar equipment at any location within the judicial district as ordered by the court and in a manner that ensures the preservation of an accurate record. Such hearings shall not include trials before a jury. Hearings conducted in this manner shall be consistent with the public's access to the courts.

Source: Laws 1879, § 42, p. 91; Laws 1885, c. 45, § 1, p. 242; R.S.1913, § 1162; C.S.1922, § 1085; C.S.1929, § 27-303; Laws 1935, c. 58, § 1, p. 213; C.S.Supp.,1941, § 27-303; R.S.1943, § 24-303; Laws 1955, c. 79, § 1, p. 235; Laws 1961, c. 102, § 1, p. 333; Laws 2008, LB1014, § 1.
Operative date January 1, 2009.

1. Terms of court
2. Court held in district by another judge
3. Miscellaneous

1. Terms of court

Unless otherwise provided by order of the district court, a term of court begins on January 1 of the given year and ends on December 31 of that same year. Therefor, the action of the trial court in vacating its former judgment and granting a new trial was done during the term of the court and pursuant to its own authority. In re Estate of Weinberger, 207 Neb. 711, 300 N.W.2d 818 (1981).

Judges of district court are required to fix time of holding terms of court in counties within their districts. Krieger v. Schroeder, 165 Neb. 657, 87 N.W.2d 367 (1957).

Statute does not require that terms of court be fixed finally and absolutely on first day of January. Wilcox v. State, 119 Neb. 422, 229 N.W. 269 (1930).

Terms of court fixed by district judge have the same validity as if definitely fixed by statute. Glebe v. State, 106 Neb. 251, 183 N.W. 295 (1921).

Judge may, for sufficient reason, adjourn term without day. Russell v. State, 77 Neb. 519, 110 N.W. 380 (1906).

First day of term is when the judge is present and ready to transact business. Parrott v. Wolcott, 75 Neb. 530, 106 N.W. 607 (1906).

Terms of court may be held in different counties of same district at same time. Tippy v. State, 35 Neb. 368, 53 N.W. 208 (1892).

2. Court held in district by another judge

Request need not be in writing to enable a district judge of one district to hold court in any other district. Iron Bear v. Jones, 149 Neb. 651, 32 N.W.2d 125 (1948).

Request by one district judge to another to try case need not be in writing. Maher v. State, 144 Neb. 463, 13 N.W.2d 641 (1944).

District judges may hold court for each other. Rhodes v. Van Steenberg, 225 F.Supp. 113 (D. Neb. 1963).

3. Miscellaneous

Without a written stipulation of the parties, a district judge can hear application to modify an award of child support in county where the proceeding is pending, only. Hanson v. Hanson, 195 Neb. 836, 241 N.W.2d 131 (1976).

Purpose of 1935 amendment was to remove any statutory impediment to exercise of powers in chambers. Mueller v. Keeley, 163 Neb. 613, 80 N.W.2d 707 (1957).

Criminal trials must be held in courtroom provided by county board. It is not proper to adjourn court from courtroom to theatre. Roberts v. State, 100 Neb. 199, 158 N.W. 930 (1916).

A judgment rendered at place not authorized is void. Shold v. Van Treeck, 82 Neb. 99, 117 N.W. 113 (1908).

24-304 Terms of court, special.

A special term may be ordered and held by the district judge in any county in his district, for the transaction of any business, if he deem it necessary. In ordering a special term he shall direct whether a grand or petit jury, or both, shall be summoned.

Source: Laws 1879, § 25, p. 87; R.S.1913, § 1163; C.S.1922, § 1086; C.S.1929, § 27-304.

A session of court held at other times than those fixed by law is a special term. Glebe v. State, 106 Neb. 251, 183 N.W. 295 (1921).

Judge may call a special term if he deems it necessary. Russell v. State, 77 Neb. 519, 110 N.W. 380 (1906).

Power was conferred of calling special terms for the purpose, among others, of expediting trials in criminal cases of persons incarcerated and unable to give bail. Welsh v. State, 60 Neb. 101, 82 N.W. 368 (1900).

Judge is authorized to appoint and hold a special term in any county of his district. Nelson v. Alling, 58 Neb. 606, 79 N.W. 162 (1899); Nelson v. Farmland Security Co., 58 Neb. 604, 79 N.W. 161 (1899).

Judge may direct summoning of jury as in regular terms. Judge acts under statute, not Constitution. McElvoy v. State, 9 Neb. 157, 2 N.W. 378 (1879).

Record should show calling of special term. Burley v. State, 1 Neb. 385 (1871).

24-305 Absence of judge; adjournment from day to day.

If the judge does not appear on the day appointed for holding the court, the clerk shall make an entry thereof in his record and adjourn the court until the next day, and so on until the fourth day, unless the judge appears.

Source: Laws 1879, § 29, p. 88; R.S.1913, § 1164; C.S.1922, § 1087; C.S.1929, § 27-305.

24-306 Absence of judge; adjournment until next regular term.

If the judge does not appear by 5 p.m. in the afternoon of the fourth day, the court shall stand adjourned until the next regular term.

Source: Laws 1879, § 30, p. 88; R.S.1913, § 1165; C.S.1922, § 1088; C.S.1929, § 27-306.

In adjourning term, clerk acts in a ministerial capacity. Parrott v. Wolcott, 75 Neb. 530, 106 N.W. 607 (1906).

24-307 Absence of judge; adjournment by written order.

If the judge be sick, or for any other sufficient cause is unable to attend court at the regularly appointed time, he may, by a written order, direct an adjournment to a particular day therein specified, and the clerk shall, on the first day of the term, or as soon thereafter as he received the order, adjourn the court as therein directed.

Source: Laws 1879, § 31, p. 88; R.S.1913, § 1166; C.S.1922, § 1089; C.S.1929, § 27-307.

Sufficient reason is presumed. Winder v. Winder, 86 Neb. 495, 125 N.W. 1095 (1910).

Term may be adjourned for sufficient reason. Russell v. State, 77 Neb. 519, 110 N.W. 380 (1906).

Judge may by written order in vacation adjourn regular term to specified date. Parrott v. Wolcott, 75 Neb. 530, 106 N.W. 607 (1906).

Adjournment of court to a holiday is null. Polin v. State, 14 Neb. 540, 16 N.W. 898 (1883).

Reason for adjournment is not reviewable. Smith v. State, 4 Neb. 277 (1876).

24-308 Failure of term; pending proceedings continued.

No recognizance, or other instrument or proceeding, shall be rendered invalid by reason of there being a failure of the term, but all proceedings pending in court shall be continued to the next regular or special term, unless an adjournment be made as authorized in section 24-307.

Source: Laws 1879, § 32, p. 88; R.S.1913, § 1167; C.S.1922, § 1090; C.S.1929, § 27-308.

Recognizance continues in force. Bartling v. State, 67 Neb. 637, 93 N.W. 1047 (1903), affirming 67 Neb. 643, 97 N.W. 443 (1903).

24-309 Failure of term; persons recognized; sureties; liability.

In case of such continuances or adjournments, persons recognized or bound to appear at the regular term, which has failed as aforesaid, shall be held bound in like manner, to appear at the time so fixed, and their sureties, if any, shall be liable, in case of their nonappearance, in the same manner as though the term had been held at the regular time, and they had failed to make their appearance thereat.

Source: Laws 1879, § 33, p. 89; R.S.1913, § 1168; C.S.1922, § 1091; C.S.1929, § 27-309.

Surety is not discharged by failure to hold term at which principal was recognized to appear. Bartling v. State, 67 Neb. 637, 93 N.W. 1047 (1903), affirming 67 Neb. 643, 97 N.W. 443 (1903).

24-310 Final adjournment; effect.

Upon any final adjournment of the court, all business not otherwise disposed of shall stand continued generally.

Source: Laws 1879, § 34, p. 89; R.S.1913, § 1169; C.S.1922, § 1092; C.S.1929, § 27-310.

Under section 24-310, R.R.S.1943, a trial court retains the authority to rule on a motion to vacate if the motion was made during the original term, even if none of the grounds listed in section 25-2001, R.R.S.1943, are met. Moackler v. Finley, 207 Neb. 353, 299 N.W.2d 166 (1980).

24-311 Transferred to section 24-1001.

24-312 District judges; interchange; appointment of county judge to act; when; effect; reassignment of cases.

(1) The district judges may interchange and hold each other's court. Whenever it shall appear by affidavit, to the satisfaction of any district judge in the state, that the judge of any other district is unable to act, on account of sickness, interest, or absence from the district or from any other cause, the judge to whom application may be made shall have power to make any order or do any act relative to any suit, judicial matter, or proceeding or to any special matter arising within the district where such vacancy or disability exists which the judge of such district court could make or do. The order or act shall have the same effect as if made or done by the judge of such district.

(2) A district judge may appoint by order a consenting county judge residing in the district to act as a district judge in specific instances on any matter over which the district court has determined that it has jurisdiction over the parties and subject matter, except appeals from the county court. The appointed county judge shall have power to make any order or do any act relative to any suit, judicial matter, or proceeding or to any special matter which the district judge of such district could make or do if (a) all parties have consented to the appointment or (b) no party has objected to the appointment within ten days after service of the order of appointment upon him or her, except that in any domestic relations matter as defined in section 25-2740 or Class IV felony case, consent shall not be required and a party shall not have the right to object to the appointment of a county judge to act as a district judge. Any order or act by the county judge after appointment shall have the same effect as if made or

done by the district judge of such district. A copy of the order of appointment shall be filed in each action in which a county judge acts as a district judge.

(3) In an effort to more efficiently administer the caseload, the presiding judges of the district court and county court in each judicial district may assign between the courts cases involving domestic relations matters as defined in section 25-2740 and Class IV felony cases. The presiding judges shall annually review the caseload of the two benches and determine whether to reassign cases involving domestic relations matters as defined in section 25-2740 and Class IV felony cases. The consent of the parties shall not be required for such cases, and such cases shall remain filed in the court where they were originally filed. The annual plan on the case assignments shall be sent to the Supreme Court, and if the presiding judges cannot agree on a plan, the matter shall be forwarded to the Supreme Court for resolution.

Source: Laws 1879, § 26, p. 87; R.S.1913, § 1171; C.S.1922, § 1094; C.S.1929, § 27-312; R.S.1943, § 24-312; Laws 1986, LB 516, § 2; Laws 1996, LB 1296, § 1; Laws 2008, LB1014, § 2. Operative date January 1, 2009.

A specific disqualification for prejudice is not enumerated herein. State v. Smith, 77 Neb. 824, 110 N.W. 557 (1906).

Inability or request of regular judge is presumed. Cox & Cornell v. Peoria Mfg. Co., 42 Neb. 660, 60 N.W. 933 (1894).

Judges may hold court for each other. Drake v. State, 14 Neb. 535, 17 N.W. 117 (1883).

If judge is not unable to act, injunction by judge of another district is void. Ellis v. Karl, 7 Neb. 381 (1878).

24-313 Inferior tribunal; powers over.

The district court may by rule compel an inferior court or board to allow an appeal or to make or amend records according to law either by correcting an evident mistake or supplying an evident omission. This section shall not apply to cases in which a review by a juvenile review panel may be requested under sections 43-287.01 to 43-287.06 or if the Administrative Procedure Act otherwise provides.

Source: Laws 1879, § 28, p. 88; R.S.1913, § 1172; C.S.1922, § 1095; C.S.1929, § 27-313; R.S.1943, § 24-313; Laws 1988, LB 352, § 23; Laws 1989, LB 182, § 7.

Cross References

Administrative Procedure Act, see section 84-920.

District court may by order compel an inferior court or tribunal to amend record to correct an evident mistake. Liljehorn v. Fyfe, 178 Neb. 532, 134 N.W.2d 230 (1965).

District court may, by order, direct transcript to be returned to county judge for proper certification. Goetz Brewing Co. v. Waln, 92 Neb. 614, 139 N.W. 230 (1912), Ann. Cas. 1914A 336 (1912).

District court may not compel excise board to reconvene and hear evidence excluded. In re Thompsen, 84 Neb. 67, 120 N.W. 952 (1909).

Question of power to require supplemental transcript on criminal appeal raised but not decided. Thomsen v. State, 82 Neb. 634, 118 N.W. 330 (1908).

District court may compel excise board to furnish certified transcript in appeal, in liquor license contest. State ex rel. Thomas v. Board of Fire & Police Comrs. of Omaha, 76 Neb. 741, 108 N.W. 122 (1906).

District court may, by rule, compel county judge to write true history of case. New Home Sewing-Machine Co. v. Thornburg, 56 Neb. 636, 77 N.W. 86 (1898).

24-314 Transferred to section 24-1002.

24-315 Transferred to section 24-739.

24-316 Repealed. Laws 1959, c. 108, § 2.

24-317 Transferred to section 24-734.

24-318 Offenses at trial; order to investigate; order to prosecute; duty of county attorney.

Every judge of the district court, when it appears that any offense has been committed in connection with the trial of any cause, shall direct the county attorney to make a complete investigation, and to report to the judge fully and expeditiously the result of that investigation. If convinced that the interests of justice require, the judge shall direct that such report be made in writing and filed with the clerk of the district court and by him made a part of the records of the court. If the judge is satisfied that further action should be taken, he shall direct the county attorney to prosecute the party or parties who appear to have committed the offense, and it shall be the duty of the county attorney thereupon to proceed promptly with such prosecution. The county attorney in such proceedings may file an information verified on information and belief; *Provided*, where the judge is himself satisfied from what has occurred in the trial that a prosecution should be instituted, it shall be his duty to promptly order it without waiting for an investigation by the county attorney.

Source: Laws 1915, c. 246, § 1, p. 566; C.S.1922, § 1115; C.S.1929, § 27-318.

(b) ACTIONS IN WHICH THE STATE OR A STATE AGENCY IS A PARTY

24-319 Transferred to section 25-21,201.

24-320 Transferred to section 25-21,202.

24-321 Transferred to section 25-21,203.

24-322 Transferred to section 25-21,204.

24-323 Transferred to section 25-21,205.

24-324 Transferred to section 25-21,206.

24-325 Transferred to section 25-21,207.

24-326 Transferred to section 25-21,208.

24-327 Transferred to section 25-21,209.

24-328 Transferred to section 25-21,210.

24-329 Transferred to section 25-21,211.

24-330 Transferred to section 25-21,212.

24-331 Transferred to section 25-21,213.

24-332 Transferred to section 25-21,214.

24-333 Transferred to section 25-21,215.

24-334 Transferred to section 25-21,216.

24-335 Transferred to section 25-21,217.

24-336 Transferred to section 25-21,218.

(c) CLERK

24-337 Clerk of district court; duty to record proceedings; when made up and signed.

The clerk of each district court shall keep a record of the proceedings of the court, under the direction of the judge. The proceedings, including those of the last day of the session, shall be made up and signed by the judge before the final order of adjournment is made.

Source: Laws 1879, § 27, p. 88; R.S.1913, § 1193; C.S.1922, § 1116; C.S.1929, § 27-334.

Cross References

Amercement for neglect of duty, see section 25-1546.
Clerks and assistants, see section 23-1111.
Duties, general provisions, see sections 25-2204 to 25-2214.01.
Duty to report divorces and annulments monthly, see section 71-615.
Election and term, see section 32-524.
Mileage, see sections 23-1112 and 23-1112.01.
Not to practice as an attorney, see section 7-111.
Oaths and affirmations, power to administer, see section 24-1002.
Salary, see section 23-1114.
Vacancy:
How filled, see section 32-567.
Possession and control of office by deputy, see section 32-563.

Journal entry is not impeachable by notes in judge's docket. Barker v. State, 54 Neb. 53, 74 N.W. 427 (1898); Gage v. Bloomington Town Co., 37 Neb. 699, 56 N.W. 491 (1893).

Where correction is made at succeeding term, notice is necessary. Brownlee v. Davidson, 28 Neb. 785, 45 N.W. 51 (1890).

In case of discharge of jury, reasons should be entered on record. Conklin v. State, 25 Neb. 784, 41 N.W. 788 (1889).

Supreme Court does not have jurisdiction to direct the ministerial officers of the district court in the discharge of their duties. State ex rel. Wilkins v. LeFevre, 25 Neb. 223, 41 N.W. 184 (1888).

Failure of judge to sign record does not render decree void. Fouts v. Mann, 15 Neb. 172, 18 N.W. 64 (1883).

Power to correct record to conform with facts is not affected by appeal. Wise v. Frey, 9 Neb. 217, 2 N.W. 375 (1879).

Approved journal entry is conclusive evidence of what judgment was. Findley v. Bowers, 9 Neb. 72, 2 N.W. 349 (1879).

Nunc pro tunc order may be based on own notes or other evidence. Garrison v. State, 6 Neb. 274 (1877); Morrill v. McNeill, 1 Neb. Unof. 651, 91 N.W. 601 (1901).

Entry of notes by clerk is improper. Nuckolls v. Irwin, 2 Neb. 60 (1873).

Journal is authentic evidence of judgments. Morrill v. McNeill, 1 Neb. Unof. 651, 91 N.W. 601 (1901).

24-337.01 Transferred to section 24-1006.

24-337.02 Transferred to section 24-1005.

24-337.03 Transferred to section 25-2214.01.

(d) COURT REPORTERS

24-338 Repealed. Laws 1974, LB 647, § 5.

24-339 Repealed. Laws 1974, LB 647, § 5.

24-339.01 Repealed. Laws 1974, LB 647, § 5.

24-339.02 Repealed. Laws 1953, c. 65, § 3.

24-339.03 Repealed. Laws 1959, c. 266, § 1.

24-339.04 Repealed. Laws 1961, c. 286, § 1.

24-339.05 Repealed. Laws 1974, LB 647, § 5.

24-339.06 Repealed. Laws 1971, LB 33, § 1.

24-340 Repealed. Laws 1974, LB 647, § 5.

24-341 Repealed. Laws 1974, LB 647, § 5.

24-342 Transferred to section 25-1140.09.

24-342.01 Transferred to section 24-1004.

24-342.02 Transferred to section 24-1003.

24-343 Repealed. Laws 1974, LB 647, § 5.

24-344 Repealed. Laws 1974, LB 647, § 5.

(e) UNCALLED-FOR FUNDS; DISPOSITION

24-345 Funds uncalled for; payment to State Treasurer; clerk's liability discharged.

All money, other than witness fees, fines, penalties, forfeitures and license money, that comes into the possession of the clerk of the district court for any county in the State of Nebraska by virtue of his or her office and remains in the custody of the clerk of the district court, uncalled for by the party or parties entitled to the money for a period of three years following the close of litigation in relation to the money, shall be remitted by the clerk of the district court to the State Treasurer on the first Tuesday in January, April, July, or October, respectively, following the expiration of the three-year period, for deposit in a separate trust fund pursuant to section 69-1317. Such payment shall release the bond of the clerk of the district court making such payment from all liability for the money so paid in compliance with this section.

Source: Laws 1933, c. 33, § 1, p. 214; C.S.Supp.,1941, § 27-342; R.S. 1943, § 24-345; Laws 1980, LB 572, § 1; Laws 1992, Third Spec. Sess., LB 26, § 1.

Cross References

Filing of claim to property delivered to state, see section 69-1318.

24-346 Repealed. Laws 1980, LB 572, § 4.

24-347 Repealed. Laws 1980, LB 572, § 4.

24-348 Funds uncalled for; receipt; record.

The State Treasurer shall give the clerk of the district court a receipt for each sum paid by the clerk to the State Treasurer under the provisions of sections 24-345 to 24-349, which receipt shall specify, among other things, the amount paid, and the title and appearance docket and number of the given case or proceeding. The clerk of the district court shall keep a record in his or her office, in connection with the given case or proceeding, of the date and amount of any money paid by him or her to the State Treasurer under the provisions of said sections.

Source: Laws 1933, c. 33, § 4, p. 216; C.S.Supp.,1941, § 27-345; R.S. 1943, § 24-348; Laws 1980, LB 572, § 2.

24-349 Sections, how construed.

Nothing in sections 24-345 to 24-349 shall be taken to modify or amend any existing statute relating to witness fees, fines, penalties, forfeitures or license money.

Source: Laws 1933, c. 33, § 5, p. 216; C.S.Supp.,1941, § 27-346.

(f) BAILIFF

24-350 Bailiff; term; compensation.

The judge of the district court may, if the business of the court requires, appoint a bailiff or bailiffs. In counties having more than sixty thousand inhabitants, bailiffs shall be appointed and shall hold office for a term of one year unless sooner removed by the appointing judge. In counties having not more than sixty thousand inhabitants, the appointment shall continue only so long as is necessary. Bailiffs shall receive for their services either (a) an annual salary in an amount to be fixed by the county board, payable in monthly installments from the county general fund, or (b) a per diem in an amount to be fixed by the county board, payable monthly from the county general fund.

Source: R.S.1866, c. 19, § 32, p. 171; Laws 1895, c. 36, § 1, p. 165; Laws 1909, c. 59, § 1, p. 289; R.S.1913, § 2431; Laws 1919, c. 12, § 1, p. 72; C.S.1922, § 2371; Laws 1927, c. 119, § 1, p. 332; C.S.1929, § 33-110; Laws 1943, c. 90, § 17, p. 304; R.S.1943, § 33-107; Laws 1945, c. 73, § 1, p. 275; Laws 1959, c. 141, § 1, p. 548; Laws 1961, c. 158, § 1, p. 481; Laws 1969, c. 269, § 1, p. 1033; Laws 1975, LB 277, § 1; R.S.1943, (1988), § 33-107; Laws 1989, LB 4, § 4.

Cross References

For other provisions for salaries of county officers and employees, see sections 23-1114 to 23-1114.09.

This section, as it existed in 1911, did not authorize the appointment of special bailiffs to take charge of witnesses for the state in pending criminal prosecutions. Shaw v. Holt County, 88 Neb. 348, 129 N.W. 552 (1911).

(g) APPELLATE DIVISION

24-351 Repealed. Laws 1991, LB 732, § 160.

24-352 Repealed. Laws 1991, LB 732, § 160.

24-353 Repealed. Laws 1991, LB 732, § 160.

24-354 Repealed. Laws 1991, LB 732, § 160.

ARTICLE 4
DEPUTY CLERKS

Section
24-401. Clerk of Supreme Court; clerks of district and county courts; deputies.
24-402. Clerk; liability for acts of deputy.
24-403. District and county court clerks; deputies; acknowledgments; validity.

24-401 Clerk of Supreme Court; clerks of district and county courts; deputies.

The Clerk of the Supreme Court and of the several district and county courts in this state shall have power to appoint deputies. Each of such deputies shall

be sworn to faithfully perform the duties of his or her office before entering upon such duties.

Source: Laws 1879, § 43, p. 91; Laws 1905, c. 58, § 1, p. 304; Laws 1913, c. 173, § 1, p. 534; R.S.1913, § 1194; Laws 1917, c. 23, § 1, p. 88; Laws 1919, c. 77, § 1, p. 198; Laws 1921, c. 101, § 1, p. 370; C.S.1922, § 1117; C.S.1929, § 27-401; R.S.1943, § 24-401; Laws 1943, c. 90, § 13, p. 302; Laws 2008, LB775, § 1.
Effective date July 18, 2008.

Cross References

Deputy district court clerk:
Mileage, see sections 23-1112 and 23-1112.01.
Power to take acknowledgments, see section 24-403.
Salary, see section 23-1114.

Appointment of chief deputy was not made. McCollough v. County of Douglas, 150 Neb. 389, 34 N.W.2d 654 (1948).

Acts of deputy de facto are binding and can only be challenged by state. Haskell v. Dutton, 65 Neb. 274, 91 N.W. 395 (1902).

Clerk has authority to appoint assistants. State ex rel. Douglas County v. Frank, 61 Neb. 679, 85 N.W. 956 (1901); State ex rel. Douglas County v. Frank, 60 Neb. 327, 83 N.W. 74 (1900).

24-402 Clerk; liability for acts of deputy.

Every clerk appointing a deputy under the provisions of section 24-401 shall be liable for all the official acts of said deputy clerk.

Source: Laws 1879, § 44, p. 92; R.S.1913, § 1195; C.S.1922, § 1118; C.S.1929, § 27-402.

24-403 District and county court clerks; deputies; acknowledgments; validity.

Deputy clerks of the district and county courts in this state are authorized to take acknowledgments of deeds and other instruments in writing in the name of their principals, and the acknowledgments shall be as legal and as valid as if taken by their principals.

Source: Laws 1870, § 1, p. 17; R.S.1913, § 5743; C.S.1922, § 5072; C.S.1929, § 84-809; R.S.1943, § 84-809; R.S.1943, § 84-809; R.S.1943, (1987), § 84-809; Laws 1990, LB 821, § 37.

ARTICLE 5

COUNTY COURT

Cross References

Judges:
Not to act as an attorney, see section 7-111.
Oaths and affirmations, see section 24-1002.
Resignation, see section 32-562.
Selection, see sections 24-801 to 24-820.
Vacancies, how filled, see sections 24-810 and 32-563.
Juvenile court, when county court constitutes, see section 43-245.

(a) ORGANIZATION

Section
24-501. Legislative intent.
24-502. Court of record; divisions.
24-503. County judge districts; created; number of judges; membership.
24-504. Repealed. Laws 1977, LB 5, § 2.
24-505. Repealed. Laws 1979, LB 237, § 8.

Section
24-541.01. Transferred to section 25-2728.
24-541.02. Transferred to section 25-2729.
24-541.03. Transferred to section 25-2730.
24-541.04. Transferred to section 25-2731.
24-541.05. Transferred to section 25-2732.
24-541.06. Transferred to section 25-2733.
24-541.07. Transferred to section 25-2734.
24-541.08. Transferred to section 25-2735.
24-541.09. Transferred to section 25-2736.
24-541.10. Transferred to section 25-2737.
24-542. Repealed. Laws 1981, LB 42, § 27.
24-543. Repealed. Laws 1981, LB 42, § 27.
24-544. Repealed. Laws 1981, LB 42, § 27.
24-545. Repealed. Laws 1981, LB 42, § 27.
24-546. Repealed. Laws 1981, LB 42, § 27.
24-547. Repealed. Laws 1981, LB 42, § 27.
24-548. Repealed. Laws 1981, LB 42, § 27.
24-549. Repealed. Laws 1981, LB 42, § 27.
24-550. Repealed. Laws 1981, LB 42, § 27.
24-551. Transferred to section 25-2738.

(k) PROBATE PROCEDURE

24-552. Transferred to section 24-740.
24-553. Transferred to section 25-2709.

(l) PROBATE RECORDS

24-554. Transferred to section 25-2723.
24-555. Transferred to section 25-2724.
24-556. Transferred to section 25-2725.
24-557. Transferred to section 25-2726.
24-558. Transferred to section 25-2727.

(m) RECORDING OF INSTRUMENTS

24-559. Transferred to section 25-2708.

(n) UNCLAIMED FUNDS

24-560. Transferred to section 25-2714.
24-561. Transferred to section 25-2715.
24-562. Transferred to section 25-2716.
24-563. Transferred to section 25-2717.

(o) BONDS

24-564. Repealed. Laws 1977, LB 167, § 3.
24-565. Repealed. Laws 1977, LB 167, § 3.
24-566. Repealed. Laws 1977, LB 167, § 3.

(p) RECORD

24-567. Transferred to section 25-2722.

(q) FORCIBLE ENTRY AND DETAINER

24-568. Transferred to section 25-21,219.
24-569. Transferred to section 25-21,220.
24-570. Transferred to section 25-21,232.
24-571. Transferred to section 25-21,221.
24-572. Transferred to section 25-21,222.
24-573. Transferred to section 25-21,223.
24-574. Transferred to section 25-21,224.
24-575. Transferred to section 25-21,225.
24-576. Transferred to section 25-21,226.
24-577. Transferred to section 25-21,227.
24-578. Transferred to section 25-21,228.
24-579. Transferred to section 25-21,229.

Section
24-580. Transferred to section 25-21,230.
24-581. Transferred to section 25-21,231.
24-582. Transferred to section 25-21,233.
24-583. Transferred to section 25-21,234.
24-584. Transferred to section 25-21,235.

(r) MISCELLANEOUS

24-585. Transferred to section 25-2702.
24-585.01. Transferred to section 25-2719.
24-586. Repealed. Laws 1998, LB 218, § 29.
24-587. Repealed. Laws 1998, LB 218, § 29.
24-588. Repealed. Laws 1998, LB 218, § 29.
24-589. Repealed. Laws 1998, LB 218, § 29.
24-590. Repealed. Laws 1998, LB 218, § 29.
24-591. Repealed. Laws 1990, LB 822, § 40.
24-592. Repealed. Laws 1985, LB 15, § 1.
24-593. Municipal court employees; transfer to county court; salary and benefits.
24-594. Exercise of jurisdiction; ratified.

(s) CONSTABLES AND SHERIFFS

24-595. Transferred to section 25-2232.
24-596. Transferred to section 25-2233.
24-597. Transferred to section 25-2234.
24-598. Transferred to section 25-2235.
24-599. Transferred to section 25-2236.
24-5,100. Transferred to section 23-1701.02.
24-5,101. Transferred to section 25-2231.
24-5,102. Transferred to section 25-2237.
24-5,103. Transferred to section 25-2238.
24-5,104. Transferred to section 25-2239.
24-5,105. Transferred to section 25-2230.
24-5,106. Transferred to section 25-2229.

(a) ORGANIZATION

24-501 Legislative intent.

It is the intent of the Legislature to provide a unified system of county courts for the state by combining the functions of county courts, justice of the peace courts, and police magistrate courts and to provide jurisdiction and procedure for the county courts that will effectively, efficiently, and economically meet the needs of the people of the State of Nebraska and of all other persons who may have business before the county courts.

Source: Laws 1972, LB 1032, § 1; Laws 1984, LB 13, § 6; Laws 1990, LB 822, § 11.

24-502 Court of record; divisions.

There shall be a county court in and for each county in this state. The county court shall be a court of record and shall be located at the county seat. Divisions of the court may be established in any other city or village within the county as provided in section 24-512.

Source: Laws 1972, LB 1032, § 2; Laws 1990, LB 822, § 12.

24-503 County judge districts; created; number of judges; membership.

For the purpose of serving the county courts in each county, twelve county judge districts are hereby created:

District No. 1 shall contain the counties of Saline, Jefferson, Gage, Thayer, Johnson, Pawnee, Nemaha, and Richardson;

District No. 2 shall contain the counties of Sarpy, Cass, and Otoe;

District No. 3 shall contain the county of Lancaster;

District No. 4 shall contain the county of Douglas;

District No. 5 shall contain the counties of Merrick, Platte, Colfax, Boone, Nance, Hamilton, Polk, York, Butler, Seward, and Saunders;

District No. 6 shall contain the counties of Dixon, Dakota, Cedar, Burt, Thurston, Dodge, and Washington;

District No. 7 shall contain the counties of Knox, Cuming, Antelope, Pierce, Wayne, Madison, and Stanton;

District No. 8 shall contain the counties of Cherry, Keya Paha, Brown, Rock, Blaine, Loup, Custer, Boyd, Holt, Garfield, Wheeler, Valley, Greeley, Sherman, and Howard;

District No. 9 shall contain the counties of Buffalo and Hall;

District No. 10 shall contain the counties of Fillmore, Adams, Clay, Phelps, Kearney, Harlan, Franklin, Webster, and Nuckolls;

District No. 11 shall contain the counties of Hooker, Thomas, Arthur, McPherson, Logan, Keith, Perkins, Lincoln, Dawson, Chase, Hayes, Frontier, Gosper, Dundy, Hitchcock, Red Willow, and Furnas; and

District No. 12 shall contain the counties of Sioux, Dawes, Box Butte, Sheridan, Scotts Bluff, Morrill, Garden, Banner, Kimball, Cheyenne, Grant, and Deuel.

District 4 shall have twelve county judges. Districts 3 and 5 shall have six county judges. Districts 11 and 12 shall have five county judges. Districts 2, 6, and 9 shall have four county judges. Districts 1, 7, 8, and 10 shall have three county judges.

Judge of the county court shall include any person appointed to the office of county judge or municipal judge prior to July 1, 1985, pursuant to Article V, section 21, of the Constitution of Nebraska.

Any person serving as a municipal judge in district 3 or 4 immediately prior to July 1, 1985, shall be a judge of the county court and shall be empowered to hear only those cases as provided in section 24-517 which the presiding judge of the county court for such district, with the concurrence of the Supreme Court, shall direct.

Source: Laws 1972, LB 1032, § 3; Laws 1974, LB 785, § 1; Laws 1980, LB 618, § 2; Laws 1984, LB 13, § 7; Laws 1985, LB 287, § 2; Laws 1986, LB 516, § 3; Laws 1987, LB 509, § 1; Laws 1990, LB 822, § 13; Laws 1991, LB 181, § 2; Laws 1992, LB 1059, § 4; Laws 1993, LB 306, § 2; Laws 1998, LB 404, § 2; Laws 2007, LB377, § 3.

24-504 Repealed. Laws 1977, LB 5, § 2.

24-505 Repealed. Laws 1979, LB 237, § 8.

24-505.01 County judge; eligibility.

No person shall be eligible for the office of county judge unless he or she:

(1) Is at least thirty years of age;

(2) Is a citizen of the United States;

(3) Has been engaged in the practice of law in the State of Nebraska for at least five years, which may include prior service as a judge;

(4) Is currently admitted to practice before the Nebraska Supreme Court; and

(5) Is, on the effective date of appointment, a resident of the county court district to be served, and remains a resident of such district during the period of service.

This section and sections 24-202, 24-301, 43-2,118, 48-153, and 48-153.01 shall not apply to a person serving as a county judge on August 24, 1979, who continues to serve as a county judge after such effective date.

Source: Laws 1979, LB 237, § 7.

24-506 Presiding judge; selection; departments.

In districts with more than one judge of the county court, the judges shall annually select one of their number as presiding judge and may establish such departments within the court as they deem necessary for determining particular classes of cases.

Source: Laws 1972, LB 1032, § 6; Laws 1984, LB 13, § 8.

Cross References

Small Claims Department, see section 25-2801.

24-507 Clerk magistrates; appointment; serve as clerk of court.

(1) There shall be appointed a clerk magistrate to serve each county. Clerk magistrates shall be appointed by the county judge, or judges if the district has more than one county judge, and shall serve at the pleasure of the county judge or judges, subject to personnel rules adopted by the Supreme Court.

(2) The clerk magistrate shall be the clerk of the county court and if appointed as clerk magistrate for more than one county shall be the clerk of the county court for each county.

Source: Laws 1972, LB 1032, § 7; Laws 1986, LB 529, § 2.%

24-508 Clerk magistrate; duties; qualifications; education requirements.

(1) Clerk magistrates may be assigned by the presiding county judge to perform the duties of a clerk magistrate in any other county within the district.

(2) A person shall be eligible for appointment as a clerk magistrate if he or she is a graduate of a high school or holds a certificate of equivalency issued by the State Board of Education.

(3) A clerk magistrate shall comply with the Supreme Court judicial branch education requirements as required by the Supreme Court.

Source: Laws 1972, LB 1032, § 8; Laws 1974, LB 735, § 1; Laws 1986, LB 529, § 3; Laws 2008, LB1014, § 3.
Operative date July 18, 2008.

24-509 Judge; clerk magistrate; oath; filing.

Each county judge and clerk magistrate before assuming the duties of office shall take the oath prescribed by law for district judges. Oaths of county judges shall be filed with the Secretary of State. Oaths of clerk magistrates shall be filed in the office of the county clerk.

Source: Laws 1972, LB 1032, § 9; Laws 1973, LB 226, § 2; Laws 1986, LB 529, § 4.

Cross References

Oath or affirmation, judicial officers, see Article XV, section 1, Constitution of Nebraska.

24-510 Repealed. Laws 1986, LB 529, § 58.

24-511 Clerk; powers; duties.

The clerk shall have the same power in the county court, unless otherwise specifically provided by law, as the clerk of the district court. The clerk shall keep and be the custodian of the records of the court. The clerk shall receive and account for all fees and money received by the court and shall deposit all money received pursuant to sections 77-2326.01 to 77-2326.09. Provisions for dockets and records of the county courts shall be established by rule of the Supreme Court.

Source: Laws 1972, LB 1032, § 11; Laws 1973, LB 226, § 3; Laws 1975, LB 286, § 1; Laws 1986, LB 525, § 1; Laws 1986, LB 529, § 5; Laws 1990, LB 822, § 14.

Cross References

Amercement for neglect of duty, see section 25-1546.
Duties, general provisions, see sections 25-2204 to 25-2214.
Not to practice as an attorney, see section 7-111.
Oaths or affirmations, power to administer, see section 24-1002.
Power to take acknowledgments, see section 24-403.

24-512 Divisions; jurisdiction.

Divisions of the county court may be established at locations other than the county seat when such establishment is determined by the county judges to be beneficial in the administration of justice. The county judges may take such action on their own motion, or on request of the governing body of a city or village. All matters over which the county court has jurisdiction shall be filed with the clerk at the county seat, unless the county judges, in their order establishing a division at another location, specifically provide for the filing of cases in such division. Matters relating to decedents' estates, guardianship and conservatorship shall be filed only with the clerk at the county seat.

Source: Laws 1972, LB 1032, § 12.

24-513 County judge; salary; class; expenses.

On January 6, 1983, and thereafter each county judge shall receive an annual salary in an amount equal to eighty-five percent of the salary set for the Chief Justice and judges of the Supreme Court. As soon as the same may be legally paid under the Constitution of Nebraska after January 1, 2000, each county judge shall receive an annual salary in an amount equal to eighty-eight percent of the salary set for the Chief Justice and judges of the Supreme Court. As soon as the same may be legally paid under the Constitution of Nebraska after January 1, 2001, each county judge shall receive an annual salary in an amount equal to eighty-nine percent of the salary set for the Chief Justice and judges of

the Supreme Court. As soon as the same may be legally paid under the Constitution of Nebraska after January 1, 2002, each county judge shall receive an annual salary in an amount equal to ninety percent of the salary set for the Chief Justice and judges of the Supreme Court.

Judges of the county court shall be considered to be of the same class and when one member of the class, as a judge of the county court, is entitled to a raise in salary, all members of the class shall be entitled to such raise in salary. All county judges shall be compensated for necessary travel expenses in the same manner as provided in sections 81-1174 to 81-1177. Salaries of clerk magistrates and other employees of the court shall be set by rule by the Supreme Court.

Source: Laws 1972, LB 1032, § 13; Laws 1973, LB 40, § 2; Laws 1975, LB 141, § 1; Laws 1976, LB 76, § 3; Laws 1978, LB 672, § 3; Laws 1979, LB 398, § 3; Laws 1981, LB 111, § 2; Laws 1981, LB 204, § 35; Laws 1986, LB 529, § 6; Laws 1999, LB 839, § 1.

24-513.01 Repealed. Laws 1986, LB 529, § 58.

24-514 Salaries; expenses; operational costs; payment; property purchased by county; how treated.

The State of Nebraska shall pay, with funds appropriated to the Supreme Court, all salaries, benefits, and expenses related to the education and travel of judges and employees of the county courts. The state shall also pay, with funds appropriated to the Supreme Court, the following operational costs of the county courts:

(1) Computer hardware and software used for data processing;

(2) Computer hardware and software used for word processing if the costs are incurred on equipment owned by the state;

(3) Communication line costs arising from data and word processing pursuant to subdivisions (1) and (2) of this section; and

(4) Multi-track recorders, microphones, and playback units used to create verbatim records of county court proceedings.

The county shall pay any county court expense not provided for in this section. All property purchased by the county as a county court expense before September 9, 1993, or on or after September 9, 1993, shall remain the property of the county.

Source: Laws 1972, LB 1032, § 14; Laws 1973, LB 226, § 4; Laws 1990, LB 822, § 15; Laws 1993, LB 593, § 1; Laws 2007, LB213, § 1.

24-515 Courtroom and office facilities; costs; standards; property transfers from municipal courts; standards.

Each county shall be responsible for all costs involved in establishing, furnishing, and maintaining appropriate courtroom and office facilities for the county court at the county seat. On July 1, 1985, the courtroom and office facilities of a municipal court shall be transferred, by sale, lease, or other arrangement, from cities of the metropolitan or primary class to the county responsible pursuant to this section for the establishing, furnishing, and maintaining of courtroom and office facilities for the county court at the county seat. Payments by a city and county on the bonded indebtedness on any facility

constructed for joint use by a city and county shall continue in the same manner and in the same proportionate shares as payments made prior to July 1, 1985, subject to any sale, lease, or other arrangement pursuant to this section. All other property, equipment, books, and records of the municipal courts shall be transferred on July 1, 1985, to the county court. When a division of the county court is established at a location other than the county seat, the city or village in which such division is located shall be responsible for all costs involved in establishing, furnishing, and maintaining appropriate courtroom and office facilities for such division.

The Supreme Court shall prescribe minimum standards for all courtroom and office facilities. The Supreme Court may establish standards by class of county, based on population, caseload, and other pertinent factors.

Source: Laws 1972, LB 1032, § 15; Laws 1984, LB 13, § 10; Laws 1992, LB 1059, § 5; Laws 1993, LB 593, § 2.

24-516 Judge; interchange; vacancy, disqualification, absence, or temporary incapacity; Chief Justice; temporary appointment; appointment of district judge to act; when; effect.

(1) The county judges may interchange and hold each other's court. Whenever requested by a county judge of another county judge district or it appears by affidavit, to the satisfaction of any county judge in the state, that the judge of any other county judge district is unable to act, on account of sickness, interest, or absence from the county judge district or from any other cause, the judge to whom application is made shall have power to make any order or do any act relative to any suit, judicial matter, or proceeding or to any special matter arising within the county judge district where such vacancy or disability exists which the judge of such county court could make or do. The order or act shall have the same effect as if made or done by the judge of such county judge district.

(2) In addition to subsection (1) of this section, in the event of a vacancy in the office of county judge or the disqualification, absence, or the temporary incapacity of a county judge, the Chief Justice of the Supreme Court may designate a county judge from another county judge district to temporarily perform the duties of the office. The Chief Justice also may assign a county judge to temporarily perform duties in another county judge district when in his or her opinion such assignment would be beneficial to the administration of justice.

(3) A county judge may appoint by order a consenting district judge residing in the county judge district to act as county judge in specific instances on any matter over which the county court has determined that it has jurisdiction over the parties and subject matter. The appointed district judge shall have power to make any order or do any act relative to any suit, judicial matter, or proceeding or to any special matter which the county judge of such county judge district could make or do. Any such order or act shall have the same effect as if made or done by the county judge of such county judge district. A district judge shall not hear any appeals of matters in which he or she acted as a county judge. A copy of the order of appointment shall be filed in each action in which a district judge acts as a county judge.

Source: Laws 1972, LB 1032, § 16; Laws 1973, LB 226, § 5; Laws 1977, LB 5, § 1; Laws 1986, LB 516, § 4; Laws 2007, LB214, § 2.

24-517 Jurisdiction.

Each county court shall have the following jurisdiction:

(1) Exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof, except as provided in subsection (c) of section 30-2464 and section 30-2486;

(2) Exclusive original jurisdiction in all matters relating to the guardianship of a person, except if a separate juvenile court already has jurisdiction over a child in need of a guardian, concurrent original jurisdiction with the separate juvenile court in such guardianship;

(3) Exclusive original jurisdiction of all matters relating to conservatorship of any person, including (a) original jurisdiction to consent to and authorize a voluntary selection, partition, and setoff of a ward's interest in real estate owned in common with others and to exercise any right of the ward in connection therewith which the ward could exercise if competent and (b) original jurisdiction to license the sale of such real estate for cash or on such terms of credit as shall seem best calculated to produce the highest price subject only to the requirements set forth in section 30-3201;

(4) Concurrent jurisdiction with the district court to involuntarily partition a ward's interest in real estate owned in common with others;

(5) Concurrent original jurisdiction with the district court in all civil actions of any type when the amount in controversy is forty-five thousand dollars or less through June 30, 2005, and as set by the Supreme Court pursuant to subdivision (b) of this subdivision on and after July 1, 2005.

(a) When the pleadings or discovery proceedings in a civil action indicate that the amount in controversy is greater than the jurisdictional amount of subdivision (5) of this section, the county court shall, upon the request of any party, certify the proceedings to the district court as provided in section 25-2706. An award of the county court which is greater than the jurisdictional amount of subdivision (5) of this section is not void or unenforceable because it is greater than such amount, however, if an award of the county court is greater than the jurisdictional amount, the county court shall tax as additional costs the difference between the filing fee in district court and the filing fee in county court.

(b) The Supreme Court shall adjust the jurisdictional amount for the county court every fifth year commencing July 1, 2005. The adjusted jurisdictional amount shall be equal to the then current jurisdictional amount adjusted by the average percentage change in the unadjusted Consumer Price Index for All Urban Consumers published by the Federal Bureau of Labor Statistics for the five-year period preceding the adjustment date. The jurisdictional amount shall be rounded to the nearest one-thousand-dollar amount;

(6) Concurrent original jurisdiction with the district court in any criminal matter classified as a misdemeanor or for any infraction. The district court shall have exclusive original jurisdiction in any criminal matter classified as a misdemeanor that arises from the same incident as a charged felony;

(7) Concurrent original jurisdiction with the district court in domestic relations matters as defined in section 25-2740 and with the district court and separate juvenile court in paternity or custody determinations as provided in section 25-2740;

(8) Concurrent original jurisdiction with the district court in matters arising under the Nebraska Uniform Trust Code;

(9) Exclusive original jurisdiction in any action based on violation of a city or village ordinance;

(10) Exclusive original jurisdiction in juvenile matters in counties which have not established separate juvenile courts;

(11) Exclusive original jurisdiction in matters of adoption, except if a separate juvenile court already has jurisdiction over the child to be adopted, concurrent original jurisdiction with the separate juvenile court; and

(12) All other jurisdiction heretofore provided and not specifically repealed by Laws 1972, Legislative Bill 1032, and such other jurisdiction as hereafter provided by law.

Source: Laws 1972, LB 1032, § 17; Laws 1973, LB 226, § 6; Laws 1977, LB 96, § 1; Laws 1979, LB 373, § 1; Laws 1983, LB 137, § 1; Laws 1984, LB 13, § 12; Laws 1986, LB 529, § 7; Laws 1986, LB 1229, § 1; Laws 1991, LB 422, § 1; Laws 1996, LB 1296, § 2; Laws 1997, LB 229, § 1; Laws 1998, LB 1041, § 1; Laws 2001, LB 269, § 1; Laws 2003, LB 130, § 114; Laws 2005, LB 361, § 29; Laws 2008, LB280, § 1; Laws 2008, LB1014, § 4.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB280, section 1, with LB1014, section 4, to reflect all amendments.

Note: Changes made by LB280 became effective July 18, 2008. Changes made by LB1014 became operative January 1, 2009.

Cross References

Nebraska Uniform Trust Code, see section 30-3801.

The certification of a civil proceeding, in which the amount in controversy exceeds the statutory limit, is now mandatory only upon the request of a party. Hunt v. Trackwell, 262 Neb. 688, 635 N.W.2d 106 (2001).

Pursuant to subsection (1) of this section, the county court has exclusive original jurisdiction of all proceedings regarding a decedent's estate. Mischke v. Mischke, 253 Neb. 439, 571 N.W.2d 248 (1997).

This section does not divest a county court of its subject matter jurisdiction to modify its own void judgments. State v. LeGrand, 249 Neb. 1, 541 N.W.2d 380 (1995).

Subsection (4) of this section does not vest equity jurisdiction in the county courts. Iodence v. Potmesil, 239 Neb. 387, 476 N.W.2d 554 (1991).

When a claim presented in the manner described in section 30-2486 and within the time limit described in section 30-2485 is disallowed by the personal representative, the dissatisfied claimant may, within 60 days of the mailing of notice of the disallowance, commence a proceeding against the personal representative in the district court insofar as the claim relates to matters within the district court's chancery or common-law jurisdiction. Holdrege Co-op Assn. v. Wilson, 236 Neb. 541, 463 N.W.2d 312 (1990).

This section clearly grants county courts jurisdiction over actions involving speeding violations. State v. Jones, 209 Neb. 296, 307 N.W.2d 126 (1981).

County courts have exclusive original jurisdiction of all matters related to decedents' estates, including the probate of wills and the construction thereof, and all other jurisdiction heretofore provided and not specifically repealed by Laws 1972, L.B. 1032, and such other jurisdiction as thereafter provided by law. County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction. In re Estate of Layton, 207 Neb. 646, 300 N.W.2d 802 (1981).

One suing a parent under the family purpose doctrine for damages caused by a member of the family, who was killed in an accident, need not first file a claim in the estate of the decedent. Marcus v. Everett, 195 Neb. 518, 239 N.W.2d 487 (1976).

Notwithstanding this section, the district court retains jurisdiction in injunction actions brought to enforce zoning ordinances. Village of Springfield v. Hevelone, 195 Neb. 37, 236 N.W.2d 811 (1975).

24-517.01 Repealed. Laws 1983, LB 272, § 2.

24-517.02 Repealed. Laws 1990, LB 822, § 40.

24-518 Repealed. Laws 1986, LB 529, § 58.

24-519 Clerk magistrate; duties.

Clerk magistrates shall have authority to perform the following duties:

(1) To conduct any proceeding which is based on a misdemeanor, traffic infraction, violation of a city or village ordinance, or traffic violation or infraction under the laws of this state, except the trial of defendants who plead not guilty or for whom a not guilty plea has been entered. Any penalty imposed

under this subdivision shall be made pursuant to a schedule established by the Supreme Court. Such schedule shall not provide for imprisonment;

(2) To conduct any proceeding for the issuance of warrants for arrest or for searches and seizures when no county or district judge is available in the county;

(3) To hear and determine any nonfelony proceeding for preliminary examination to determine probable cause or the release on bail of persons charged with bailable offenses;

(4) To determine temporary custody of a juvenile pursuant to sections 43-251, 43-253, 43-254, and 43-258. An order of a clerk magistrate shall be reviewed by the county judge upon the written request of any party to the action within ten days of the order. Such order may be affirmed, modified, or set aside by the county judge. The clerk magistrate may also appoint a guardian ad litem as provided in section 43-272.01;

(5) To hear and determine noncontested proceedings relating to decedents' estates, inheritance tax matters, and guardianship or conservatorship, except that matters relating to the construction of wills and trusts, the determination of title to real estate, and an authorization of the sale or mortgaging of real estate shall not be heard by a clerk magistrate; and

(6) To enter orders for hearings and trials, including orders for garnishment and hearings on distribution of garnished funds.

Source: Laws 1972, LB 1032, § 19; Laws 1976, LB 585, § 1; Laws 1985, LB 373, § 1; Laws 1986, LB 529, § 8; Laws 1987, LB 601, § 1; Laws 1992, LB 1184, § 7.

A clerk magistrate has no authority to make a determination as to whether probable cause exists to continue to detain a defendant. State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997).

''Construction'' includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision of a will. In re Estate of Walker, 224 Neb. 812, 402 N.W.2d 251 (1987).

Prosecution of a traffic infraction is a misdemeanor criminal proceeding authorizing a nonlawyer associate judge of the county court to preside in any such proceeding. Miller v. Peterson, 208 Neb. 658, 305 N.W.2d 364 (1981).

24-520 Clerk magistrates; assignment; written orders.

All assignments of matters to clerk magistrates shall be by written order signed by the presiding county judge and filed with the clerk. No order or judgment shall be void or subject to collateral attack solely because it was rendered pursuant to improper assignment to a clerk magistrate.

Source: Laws 1972, LB 1032, § 20; Laws 1986, LB 529, § 9.

(b) NEBRASKA COUNTY COURT JUDGES ASSOCIATION

24-521 Nebraska County Court Judges Association; created; duties.

The Nebraska County Court Judges Association is hereby created which shall consist of all the active judges of the county courts of this state and their successors in office. The association shall:

(1) Meet at least once during each calendar year;

(2) Select from its membership officers thereof; and

(3) Adopt such bylaws and rules as may be necessary or proper for the conduct of its meetings, the exercise of its powers, and the performance of its duties and delegate to one or more of its members such powers as the association deems necessary to carry out its responsibilities.

Source: Laws 1999, LB 315, § 1.

24-522 Transferred to section 25-2802.

24-523 Transferred to section 25-2803.

24-524 Transferred to section 25-2804.

24-525 Transferred to section 25-2805.

24-526 Transferred to section 25-2806.

24-527 Transferred to section 25-2807.

(c) PROCEDURE

24-528 Transferred to section 25-2701.

24-529 Repealed. Laws 1984, LB 13, § 90.

(d) FEES AND COSTS

24-530 Transferred to section 25-2710.

24-531 Transferred to section 25-2711.

24-532 Transferred to section 25-2712.

24-532.01 Transferred to section 25-2713.

(e) CITIES AND VILLAGES

24-533 Transferred to section 25-2703.

(f) PROCESS

24-534 Transferred to section 23-1701.04.

24-535 Transferred to section 25-2704.

(g) TRIAL

24-536 Transferred to section 25-2705.

(h) JUDGMENTS

24-537 Transferred to section 25-2720.

24-538 Transferred to section 25-2718.

24-539 Transferred to section 25-2721.

(i) GARNISHMENT

24-540 Transferred to section 25-2707.

(j) APPEALS

24-541 Repealed. Laws 1981, LB 42, § 27.

24-541.01 Transferred to section 25-2728.

24-541.02 Transferred to section 25-2729.

24-541.03 Transferred to section 25-2730.

24-541.04 Transferred to section 25-2731.

24-541.05 Transferred to section 25-2732.

24-541.06 Transferred to section 25-2733.

24-541.07 Transferred to section 25-2734.

24-541.08 Transferred to section 25-2735.

24-541.09 Transferred to section 25-2736.

24-541.10 Transferred to section 25-2737.

24-542 Repealed. Laws 1981, LB 42, § 27.

24-543 Repealed. Laws 1981, LB 42, § 27.

24-544 Repealed. Laws 1981, LB 42, § 27.

24-545 Repealed. Laws 1981, LB 42, § 27.

24-546 Repealed. Laws 1981, LB 42, § 27.

24-547 Repealed. Laws 1981, LB 42, § 27.

24-548 Repealed. Laws 1981, LB 42, § 27.

24-549 Repealed. Laws 1981, LB 42, § 27.

24-550 Repealed. Laws 1981, LB 42, § 27.

24-551 Transferred to section 25-2738.

(k) PROBATE PROCEDURE

24-552 Transferred to section 24-740.

24-553 Transferred to section 25-2709.

(l) PROBATE RECORDS

24-554 Transferred to section 25-2723.

24-555 Transferred to section 25-2724.

24-556 Transferred to section 25-2725.

24-557 Transferred to section 25-2726.

24-558 Transferred to section 25-2727.

(m) RECORDING OF INSTRUMENTS

24-559 Transferred to section 25-2708.

(n) UNCLAIMED FUNDS

24-560 Transferred to section 25-2714.

24-561 Transferred to section 25-2715.

24-562 Transferred to section 25-2716.

24-563 Transferred to section 25-2717.

(o) BONDS

24-564 Repealed. Laws 1977, LB 167, § 3.

24-565 Repealed. Laws 1977, LB 167, § 3.

24-566 Repealed. Laws 1977, LB 167, § 3.

(p) RECORD

24-567 Transferred to section 25-2722.

(q) FORCIBLE ENTRY AND DETAINER

24-568 Transferred to section 25-21,219.

24-569 Transferred to section 25-21,220.

24-570 Transferred to section 25-21,232.

24-571 Transferred to section 25-21,221.

24-572 Transferred to section 25-21,222.

24-573 Transferred to section 25-21,223.

24-574 Transferred to section 25-21,224.

24-575 Transferred to section 25-21,225.

24-576 Transferred to section 25-21,226.

24-577 Transferred to section 25-21,227.

24-578 Transferred to section 25-21,228.

24-579 Transferred to section 25-21,229.

24-580 Transferred to section 25-21,230.

24-581 Transferred to section 25-21,231.

24-582 Transferred to section 25-21,233.

24-583 Transferred to section 25-21,234.

24-584 Transferred to section 25-21,235.

(r) MISCELLANEOUS

24-585 Transferred to section 25-2702.

24-585.01 Transferred to section 25-2719.

24-586 Repealed. Laws 1998, LB 218, § 29.

24-587 Repealed. Laws 1998, LB 218, § 29.

24-588 Repealed. Laws 1998, LB 218, § 29.

24-589 Repealed. Laws 1998, LB 218, § 29.

24-590 Repealed. Laws 1998, LB 218, § 29.

24-591 Repealed. Laws 1990, LB 822, § 40.

24-592 Repealed. Laws 1985, LB 15, § 1.

24-593 Municipal court employees; transfer to county court; salary and benefits.

(1) Any employee of a municipal court of a city of the primary or metropolitan class, except municipal judges, municipal probation officers, violations bureau staff, constables, and sheriffs, shall, on July 1, 1985, be transferred to the county court of the county where such city is located. The salary and classification of any transferred employee shall be subject to sections 24-513 and 24-514, except that no employee shall incur a loss of income as a result of the transfer and any classification.

(2) The primary- or metropolitan-class city shall transfer all accrued sick leave of such employees transferred pursuant to subsection (1) of this section up to the maximum number of accumulated hours for sick leave allowed by the state and the city shall reimburse the state in an amount equal to twenty-five percent of the value of such accrued sick leave hours based on the straight-time rate of pay for the employee. For any accrued sick leave hours of an employee which are in excess of the amount that can be transferred, the city shall reimburse the employee for twenty-five percent of the value of the sick leave hours based on the straight-time rate of pay for the employee.

(3) The transferred employee may transfer the maximum amount of accrued annual leave earned as an employee of the city allowed by the state. The city shall reimburse the state in an amount equal to one hundred percent of the value of the hours of accrued annual leave transferred. The city shall reimburse the transferred employee in an amount equal to one hundred percent of the hours of any accrued annual leave in excess of the amount which may be transferred based on the employee's straight-time rate of pay at the time of transfer.

(4) Any municipal court employee transferred to the county court shall not lose any accrual rate value for his or her sick leave and vacation leave as a result of such transfer. The employee may use each year's service with the city as credit in qualifying for accrual rates for the state's sick leave and vacation leave programs.

(5) When accrued sick leave and vacation leave for a transferred employee are at a greater rate value than allowed by the state's sick leave and vacation leave plan, the city shall pay to the state on July 1, 1985, an amount equal to the difference between the value of such benefits allowed by the city and by the state, based on, at the time of transfer, twenty-five percent of the employee's straight-time rate of pay for the sick leave and one hundred percent of the employee's straight-time rate of pay for vacation leave. The state may receive reimbursement based on such difference in rate values not later than July l, 1990.

(6) The transferred employee shall not receive any additional accrual rate value for state benefits until the employee meets the qualifications for the increased accrual rates pursuant to the state's requirements.

(7) The transferred employee shall participate in and be covered by the Nebraska State Insurance Program, sections 84-1601 to 84-1615, on July 1, 1985. The waiting period for medical insurance coverage of transferred employees is specifically waived.

Source: Laws 1984, LB 13, § 9.

24-594 Exercise of jurisdiction; ratified.

The exercise of any jurisdiction, prior to, on, or after July 1, 1985, authorized by law and any action taken pursuant to such exercise are hereby ratified and shall not be subject to attack for the sole reason that they were not authorized at the time.

Source: Laws 1984, LB 13, § 11.

(s) CONSTABLES AND SHERIFFS

24-595 Transferred to section 25-2232.

24-596 Transferred to section 25-2233.

24-597 Transferred to section 25-2234.

24-598 Transferred to section 25-2235.

24-599 Transferred to section 25-2236.

24-5,100 Transferred to section 23-1701.02.

24-5,101 Transferred to section 25-2231.

24-5,102 Transferred to section 25-2237.

24-5,103 Transferred to section 25-2238.

24-5,104 Transferred to section 25-2239.

24-5,105 Transferred to section 25-2230.

24-5,106 Transferred to section 25-2229.

ARTICLE 6
FIDUCIARIES

Section
24-601. Transferred to section 30-3201.
24-601.01. Transferred to section 30-3207.
24-601.02. Transferred to section 30-3202.
24-601.03. Transferred to section 30-3203.
24-601.04. Transferred to section 30-3209.
24-601.05. Transferred to section 30-3208.
24-602. Transferred to section 30-3204.
24-603. Transferred to section 30-3210.
24-604. Transferred to section 30-3211.
24-604.01. Transferred to section 81-120.
24-605. Transferred to section 30-3212.
24-606. Repealed. Laws 1974, LB 354, § 316.
24-607. Repealed. Laws 1974, LB 354, § 316.
24-608. Repealed. Laws 1974, LB 354, § 316.
24-609. Repealed. Laws 1974, LB 354, § 316.
24-610. Repealed. Laws 1974, LB 354, § 316.
24-611. Repealed. Laws 1974, LB 354, § 316.
24-612. Repealed. Laws 1974, LB 354, § 316.
24-613. Repealed. Laws 1974, LB 354, § 316.
24-614. Repealed. Laws 1974, LB 354, § 316.
24-615. Repealed. Laws 1974, LB 354, § 316.
24-616. Repealed. Laws 1974, LB 354, § 316.
24-617. Repealed. Laws 1974, LB 354, § 316.
24-618. Repealed. Laws 1974, LB 354, § 316.
24-619. Transferred to section 48-2001.
24-620. Transferred to section 48-2002.
24-621. Transferred to section 30-3302.
24-622. Transferred to section 30-3303.
24-623. Transferred to section 30-3304.
24-624. Transferred to section 30-3305.
24-625. Transferred to section 30-3306.
24-626. Transferred to section 30-3307.
24-627. Transferred to section 30-3308.
24-628. Transferred to section 30-3309.
24-629. Transferred to section 30-3310.
24-630. Transferred to section 30-3311.
24-631. Transferred to section 30-3301.
24-632. Transferred to section 30-3213.
24-633. Transferred to section 30-3214.
24-634. Transferred to section 30-3215.
24-635. Transferred to section 30-3216.
24-636. Transferred to section 30-3217.
24-637. Transferred to section 30-3218.
24-638. Transferred to section 30-3205.
24-639. Transferred to section 30-3206.

24-601 Transferred to section 30-3201.

24-601.01 Transferred to section 30-3207.

24-601.02 Transferred to section 30-3202.

24-601.03 Transferred to section 30-3203.

24-601.04 Transferred to section 30-3209.

24-601.05 Transferred to section 30-3208.

24-602 Transferred to section 30-3204.

24-603 Transferred to section 30-3210.

24-604 Transferred to section 30-3211.

24-604.01 Transferred to section 81-120.

24-605 Transferred to section 30-3212.

24-606 Repealed. Laws 1974, LB 354, § 316.

24-607 Repealed. Laws 1974, LB 354, § 316.

24-608 Repealed. Laws 1974, LB 354, § 316.

24-609 Repealed. Laws 1974, LB 354, § 316.

24-610 Repealed. Laws 1974, LB 354, § 316.

24-611 Repealed. Laws 1974, LB 354, § 316.

24-612 Repealed. Laws 1974, LB 354, § 316.

24-613 Repealed. Laws 1974, LB 354, § 316.

24-614 Repealed. Laws 1974, LB 354, § 316.

24-615 Repealed. Laws 1974, LB 354, § 316.

24-616 Repealed. Laws 1974, LB 354, § 316.

24-617 Repealed. Laws 1974, LB 354, § 316.

24-618 Repealed. Laws 1974, LB 354, § 316.

24-619 Transferred to section 48-2001.

24-620 Transferred to section 48-2002.

24-621 Transferred to section 30-3302.

24-622 Transferred to section 30-3303.

24-623 Transferred to section 30-3304.

24-624 Transferred to section 30-3305.

24-625 Transferred to section 30-3306.

24-626 Transferred to section 30-3307.

24-627 Transferred to section 30-3308.

24-628 Transferred to section 30-3309.

24-629 Transferred to section 30-3310.

24-630 Transferred to section 30-3311.

24-631 Transferred to section 30-3301.

24-632 Transferred to section 30-3213.

24-633 Transferred to section 30-3214.

24-634 Transferred to section 30-3215.

24-635 Transferred to section 30-3216.

24-636 Transferred to section 30-3217.

24-637 Transferred to section 30-3218.

24-638 Transferred to section 30-3205.

24-639 Transferred to section 30-3206.

ARTICLE 7

JUDGES, GENERAL PROVISIONS

(a) JUDGES RETIREMENT

Section

Section

(g) CANDIDACY FOR OFFICE

24-741. Judges; when ineligible as candidates for other offices.

(a) JUDGES RETIREMENT

24-701 Terms, defined.

For purposes of the Judges Retirement Act, unless the context otherwise requires:

(1) Fund means the Nebraska Retirement Fund for Judges;

(2) Judge means and includes (a) all duly elected or appointed Chief Justices or judges of the Supreme Court and judges of the district courts of Nebraska who serve in such capacity on and after January 3, 1957, (b)(i) all duly appointed judges of the Nebraska Workmen's Compensation Court who served in such capacity on and after September 20, 1957, and prior to July 17, 1986, and (ii) judges of the Nebraska Workers' Compensation Court who serve in such capacity on and after July 17, 1986, (c) judges of separate juvenile courts, (d) judges of the county courts of the respective counties who serve in such capacity on and after January 5, 1961, except acting judges of the county court appointed pursuant to section 24-507, (e) judges of the county court and clerk magistrates who were associate county judges and members of the fund at the time of their appointment as clerk magistrates, (f) judges of municipal courts established by Chapter 26, article 1, who served in such capacity on and after October 23, 1967, and prior to July 1, 1985, and (g) judges of the Court of Appeals;

(3) Prior service means all the periods of time any person has served as a (a) judge of the Supreme Court or judge of the district court prior to January 3, 1957, (b) judge of the county court prior to January 5, 1961, (c) judge of the Nebraska Workmen's Compensation Court prior to September 20, 1957, (d) judge of the separate juvenile court, or (e) judge of the municipal court prior to October 23, 1967;

(4)(a) Current service means the period of service (i) any judge of the Supreme Court or judge of the district court serves in such capacity from and after January 3, 1957, (ii)(A) any judge of the Nebraska Workmen's Compensation Court served in such capacity from and after September 20, 1957, and prior to July 17, 1986, and (B) any judge of the Nebraska Workers' Compensation Court serves in such capacity on and after July 17, 1986, (iii) any county judge serves in such capacity from and after January 5, 1961, (iv) any judge of a separate juvenile court serves in such capacity, (v) any judge of the municipal court served in such capacity subsequent to October 23, 1967, and prior to July 1, 1985, (vi) any judge of the county court or associate county judge serves in such capacity subsequent to January 4, 1973, (vii) any clerk magistrate, who was an associate county judge and a member of the fund at the time of appointment as a clerk magistrate, serves in such capacity from and after July 1, 1986, and (viii) any judge of the Court of Appeals serves in such capacity on or after September 6, 1991.

(b) Current service shall not be deemed to be interrupted by (i) temporary or seasonal suspension of service that does not terminate the employee's employment, (ii) leave of absence authorized by the employer for a period not exceeding twelve months, (iii) leave of absence because of disability, or (iv) military service, when properly authorized by the board. Current service does

not include any period of disability for which disability retirement benefits are received under section 24-709;

(5) Military service means active service of (a) any judge of the Supreme Court or judge of the district court in any of the armed forces of the United States during a war or national emergency prior or subsequent to September 18, 1955, if such service commenced while such judge was holding the office of judge, (b) any judge of the Nebraska Workmen's Compensation Court or the Nebraska Workers' Compensation Court in any of the armed forces of the United States during a war or national emergency prior or subsequent to September 20, 1957, if such service commenced while such judge was holding the office of judge, (c) any judge of the municipal court in any of the armed forces of the United States during a war or national emergency prior or subsequent to October 23, 1967, and prior to July 1, 1985, if such service commenced while such judge was holding the office of judge, (d) any judge of the county court or associate county judge in any of the armed forces of the United States during a war or national emergency prior or subsequent to January 4, 1973, if such service commenced while such judge was holding the office of judge, (e) any clerk magistrate, who was an associate county judge and a member of the fund at the time of appointment as a clerk magistrate, in any of the armed forces of the United States during a war or national emergency on or after July 1, 1986, if such service commenced while such clerk magistrate was holding the office of clerk magistrate, and (f) any judge of the Court of Appeals in any of the armed forces of the United States during a war or national emergency on or after September 6, 1991, if such service commenced while such judge was holding the office of judge. The board shall have the power to determine when a national emergency exists or has existed for the purpose of applying this definition and provision;

(6) Creditable service means the total number of years served as a judge, including prior service, military service, and current service, computed to the nearest one-twelfth year. For current service prior to the time that the member has contributed the required percentage of salary until the maximum benefit as limited by section 24-710 has been earned, creditable service does not include current service for which member contributions are not made or are withdrawn and not repaid;

(7)(a) Compensation means the statutory salary of a judge or the salary being received by such judge pursuant to law. Compensation does not include compensation for unused sick leave or unused vacation leave converted to cash payments, insurance premiums converted into cash payments, reimbursement for expenses incurred, fringe benefits, or bonuses for services not actually rendered, including, but not limited to, early retirement inducements, cash awards, and severance pay, except for retroactive salary payments paid pursuant to court order, arbitration, or litigation and grievance settlements. Compensation includes overtime pay, member retirement contributions, and amounts contributed by the member to plans under sections 125 and 457 of the Internal Revenue Code as defined in section 49-801.01 or any other section of the code which defers or excludes such amounts from income.

(b) Compensation in excess of the limitations set forth in section 401(a)(17) of the Internal Revenue Code as defined in section 49-801.01 shall be disregarded. For an employee who was a member of the retirement system before the first plan year beginning after December 31, 1995, the limitation on compensation

shall not be less than the amount which was allowed to be taken into account under the retirement system as in effect on July 1, 1993;

(8) Beneficiary means a person so designated by a judge in the last designation of beneficiary on file with the board or, if no designated person survives or if no designation is on file, the estate of such judge;

(9) Normal form annuity means a series of equal monthly payments payable at the end of each calendar month during the life of a retired judge as provided in sections 24-707 and 24-710, except as provided in section 42-1107. The first payment shall include all amounts accrued since the effective date of the award of the annuity. The last payment shall be at the end of the calendar month in which such judge dies. If at the time of death the amount of annuity payments such judge has received is less than contributions to the fund made by such judge, plus regular interest, the difference shall be paid to the beneficiary or estate;

(10) Board means the Public Employees Retirement Board;

(11) Member means a judge eligible to participate in the retirement system established under the Judges Retirement Act;

(12) Original member means a judge who first served as a judge prior to December 25, 1969, who does not elect to become a future member pursuant to subsection (8) of section 24-703 or section 24-710.01, and who was retired on or before December 31, 1992;

(13) Future member means a judge who first served as a judge on or after December 25, 1969, or means a judge who first served as a judge prior to December 25, 1969, who elects to become a future member on or before June 30, 1970, as provided in subsection (8) of section 24-703 or section 24-710.01;

(14) Final average compensation means the average monthly compensation for the three twelve-month periods of service as a judge in which compensation was the greatest or, in the event of a judge serving less than three twelve-month periods, the average monthly compensation for such judge's period of service;

(15) Regular interest means interest fixed at a rate equal to the daily treasury yield curve for one-year treasury securities, as published by the Secretary of the Treasury of the United States, that applies on July 1 of each year, which may be credited monthly, quarterly, semiannually, or annually as the board may direct;

(16) Normal retirement date means the first day of the month following attainment of age sixty-five;

(17) Actuarial equivalence means the equality in value of the aggregate amounts expected to be received under different forms of payment. The determinations are to be based on the 1994 Group Annuity Mortality Table reflecting sex-distinct factors blended using seventy-five percent of the male table and twenty-five percent of the female table. An interest rate of eight percent per annum shall be reflected in making these determinations;

(18) Current benefit means (a) until July 1, 2000, the initial benefit increased by all adjustments made pursuant to section 24-710.08 and (b) on or after July 1, 2000, the initial benefit increased by all adjustments made pursuant to the Judges Retirement Act;

(19) Initial benefit means the retirement benefit calculated at the time of retirement;

(20) Plan year means the twelve-month period beginning on July 1 and ending on June 30 of the following year;

(21) Retirement system or system means the Nebraska Judges Retirement System as provided in the Judges Retirement Act;

(22) Surviving spouse means (a) the spouse married to the member on the date of the member's death or (b) the spouse or former spouse of the member if survivorship rights are provided under a qualified domestic relations order filed with the board pursuant to the Spousal Pension Rights Act. The spouse or former spouse shall supersede the spouse married to the member on the date of the member's death as provided under a qualified domestic relations order. If the benefits payable to the spouse or former spouse under the qualified domestic relations order are less than the value of benefits entitled to the surviving spouse, the spouse married to the member on the date of the member's death shall be the surviving spouse for the balance of the benefits; and

(23) Termination of employment occurs on the date on which the State Court Administrator's office determines that the judge's employer-employee relationship with the State of Nebraska is dissolved. The State Court Administrator's office shall notify the board of the date on which such a termination has occurred. Termination of employment does not include ceasing employment as a judge if the judge returns to regular employment as a judge or is employed on a regular basis by another agency of the State of Nebraska and there are less than one hundred twenty days between the date when the judge's employer-employee relationship ceased and the date when the employer-employee relationship recommences.

Source: Laws 1955, c. 83, § 1, p. 244; Laws 1957, c. 77, § 1, p. 315; Laws 1957, c. 79, § 1, p. 318; Laws 1959, c. 95, § 1, p. 409; Laws 1959, c. 189, § 13, p. 687; Laws 1965, c. 115, § 1, p. 440; Laws 1969, c. 178, § 1, p. 759; Laws 1971, LB 987, § 4; Laws 1972, LB 1032, § 120; Laws 1973, LB 226, § 10; Laws 1974, LB 905, § 3; Laws 1983, LB 223, § 1; Laws 1984, LB 13, § 32; Laws 1984, LB 750, § 1; Laws 1986, LB 351, § 1; Laws 1986, LB 92, § 1; Laws 1986, LB 811, § 12; Laws 1986, LB 529, § 17; Laws 1986, LB 311, § 9; Laws 1989, LB 506, § 2; Laws 1991, LB 549, § 15; Laws 1991, LB 732, § 36; Laws 1992, LB 682, § 1; Laws 1994, LB 833, § 12; Laws 1996, LB 700, § 1; Laws 1996, LB 847, § 11; Laws 1996, LB 1076, § 8; Laws 1996, LB 1273, § 19; Laws 1997, LB 624, § 9; Laws 1999, LB 674, § 1; Laws 2000, LB 1192, § 4; Laws 2001, LB 408, § 6; Laws 2003, LB 451, § 14.

Cross References

Spousal Pension Rights Act, see section 42-1101.

Judges Retirement Act did not become operative until after terms of all incumbent judges had expired. Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956).

24-701.01 Act, how cited.

Sections 24-701 to 24-714 shall be known and may be cited as the Judges Retirement Act.

Source: Laws 1996, LB 847, § 12; Laws 1997, LB 624, § 10; Laws 1998, LB 532, § 1; Laws 1998, LB 1191, § 36; Laws 2001, LB 408, § 7; Laws 2002, LB 407, § 11; Laws 2004, LB 1097, § 10.

24-701.02 Changes to act; operative; when.

Any changes made to the Judges Retirement Act affecting retirement benefits shall be so interpreted as to effectuate their general purpose to provide, in the public interest, adequate retirement benefits for judges and to permit a change in such retirement benefits as soon as the same may become operative under the Constitution of Nebraska.

Source: Laws 2004, LB 1097, § 9.

24-702 Nebraska Retirement Fund for Judges; Nebraska Judges Retirement Act Expense Fund; created; use.

(1) There is hereby created in the state treasury a fund to be known as the Nebraska Retirement Fund for Judges which shall be administered by the board and to which shall be credited all money appropriated or transferred by law thereto. The fund is hereby appropriated and made available to the board for the uses and purposes prescribed by the provisions of the Judges Retirement Act.

(2) The employer contribution to the fund shall consist of the amounts remitted pursuant to subsection (3) of section 24-703.

(3) The Nebraska Judges Retirement Act Expense Fund is created. The fund shall be credited with money from the retirement system assets and income sufficient to pay the pro rata share of administrative expenses incurred as directed by the board for the proper administration of the Judges Retirement Act and necessary in connection with the administration and operation of the retirement system.

Source: Laws 1955, c. 83, § 2, p. 245; Laws 1994, LB 833, § 13; Laws 2001, LB 408, § 8; Laws 2002, LB 407, § 12; Laws 2005, LB 364, § 6.

24-703 Judges; contributions; payment; funding of system; late fees.

(1) Each original member shall contribute monthly four percent of his or her monthly compensation to the fund until the maximum benefit as limited in subsection (1) of section 24-710 has been earned. It shall be the duty of the Director of Administrative Services in accordance with subsection (10) of this section to make a deduction of four percent on the monthly payroll of each original member who is a judge of the Supreme Court, a judge of the Court of Appeals, a judge of the district court, a judge of a separate juvenile court, a judge of the county court, a clerk magistrate of the county court who was an associate county judge and a member of the fund at the time of his or her appointment as a clerk magistrate, or a judge of the Nebraska Workers' Compensation Court showing the amount to be deducted and its credit to the fund. The Director of Administrative Services and the State Treasurer shall credit the four percent as shown on the payroll and the amounts received from the various counties to the fund and remit the same to the director in charge of the judges retirement system who shall keep an accurate record of the contributions of each judge.

(2)(a) Beginning on July 1, 2004, each future member who has not elected to make contributions and receive benefits as provided in section 24-703.03 shall contribute monthly six percent of his or her monthly compensation to the fund until the maximum benefit as limited in subsection (2) of section 24-710 has

been earned. After the maximum benefit as limited in subsection (2) of section 24-710 has been earned, such future member shall make no further contributions to the fund, except that any time the maximum benefit is changed, a future member who has previously earned the maximum benefit as it existed prior to the change shall contribute monthly six percent of his or her monthly compensation to the fund until the maximum benefit as changed and as limited in subsection (2) of section 24-710 has been earned.

(b) Beginning on July 1, 2004, a judge who first serves as a judge on or after such date or a future member who elects to make contributions and receive benefits as provided in section 24-703.03 shall contribute monthly eight percent of his or her monthly compensation to the fund until the maximum benefit as limited by subsection (2) of section 24-710 has been earned. After the maximum benefit as limited in subsection (2) of section 24-710 has been earned, such judge or future member shall contribute monthly four percent of his or her monthly compensation to the fund for the remainder of his or her active service.

(c) It shall be the duty of the Director of Administrative Services to make a deduction on the monthly payroll of each such future member who is a judge of the Supreme Court, a judge of the Court of Appeals, a judge of the district court, a judge of a separate juvenile court, a judge of the county court, a clerk magistrate of the county court who was an associate county judge and a member of the fund at the time of his or her appointment as a clerk magistrate, or a judge of the Nebraska Workers' Compensation Court showing the amount to be deducted and its credit to the fund. This shall be done each month. The Director of Administrative Services and the State Treasurer shall credit the amount as shown on the payroll and the amounts received from the various counties to the fund and remit the same to the director in charge of the judges retirement system who shall keep an accurate record of the contributions of each judge.

(3) A Nebraska Retirement Fund for Judges fee of five dollars shall be taxed as costs in each (a) civil cause of action, criminal cause of action, traffic misdemeanor or infraction, and city or village ordinance violation filed in the district courts, the county courts, and the separate juvenile courts, (b) filing in the district court of an order, award, or judgment of the Nebraska Workers' Compensation Court or any judge thereof pursuant to section 48-188, (c) appeal or other proceeding filed in the Court of Appeals, and (d) original action, appeal, or other proceeding filed in the Supreme Court. In county courts a sum shall be charged which is equal to ten percent of each fee provided by sections 33-125, 33-126.02, 33-126.03, and 33-126.06, rounded to the nearest even dollar. No judges retirement fee shall be charged for filing a report pursuant to sections 33-126.02 and 33-126.06. When collected by the clerk of the district or county court, such fees shall be paid and information submitted to the director in charge of the judges retirement system on forms prescribed by the board by the clerk within ten days after the close of each calendar quarter. The board may charge a late administrative processing fee not to exceed twenty-five dollars if the information is not timely received or the money is delinquent. In addition, the board may charge a late fee of thirty-eight thousandths of one percent of the amount required to be submitted pursuant to this section for each day such amount has not been received. Such director shall promptly thereafter remit the same to the State Treasurer for credit to the fund. No

Nebraska Retirement Fund for Judges fee which is uncollectible for any reason shall be waived by a county judge as provided in section 29-2709.

(4) All expenditures from the fund shall be authorized by voucher in the manner prescribed in section 24-713. The fund shall be used for the payment of all annuities and other benefits and for the expenses of administration.

(5) The fund shall consist of the total fund as of December 25, 1969, the contributions of members as provided in this section, all supplementary court fees as provided in subsection (3) of this section, and any required contributions of the state.

(6) Not later than January 1 of each year, the State Treasurer shall transfer to the fund the amount certified by the board as being necessary to pay the cost of any benefits accrued during the fiscal year ending the previous June 30 in excess of member contributions for that fiscal year and court fees as provided in subsection (3) of this section and fees pursuant to sections 25-2804, 33-103, 33-103.01, 33-106, 33-106.02, 33-123, 33-125, 33-126.02, 33-126.03, and 33-126.06 and directed to be remitted to the fund, if any, for that fiscal year plus any required contributions of the state as provided in subsection (9) of this section.

(7) Benefits under the retirement system to members or to their beneficiaries shall be paid from the fund.

(8) Any member who is making contributions to the fund on December 25, 1969, may, on or before June 30, 1970, elect to become a future member by delivering written notice of such election to the board.

(9) Not later than January 1 of each year, the State Treasurer shall transfer to the fund an amount, determined on the basis of an actuarial valuation as of the previous June 30 and certified by the board, to fully fund the unfunded accrued liabilities of the retirement system as of June 30, 1988, by level payments up to January 1, 2000. Such valuation shall be on the basis of actuarial assumptions recommended by the actuary, approved by the board, and kept on file with the board. For the fiscal year beginning July 1, 2002, and each fiscal year thereafter, the actuary for the board shall perform an actuarial valuation of the system using the entry age actuarial cost method. Under this method, the actuarially required funding rate is equal to the normal cost rate, plus the contribution rate necessary to amortize the unfunded actuarial accrued liability on a level payment basis. The normal cost under this method shall be determined for each individual member on a level percentage of salary basis. The normal cost amount is then summed for all members. The initial unfunded actual accrued liability as of July 1, 2002, if any, shall be amortized over a twenty-five-year period. Prior to July 1, 2006, changes in the funded actuarial accrued liability due to changes in benefits, actuarial assumptions, the asset valuation method, or actuarial gains or losses shall be measured and amortized over a twenty-five-year period beginning on the valuation date of such change. Beginning July 1, 2006, any existing unfunded liabilities shall be reinitialized and amortized over a thirty-year period, and during each subsequent actuarial valuation, changes in the funded actuarial accrued liability due to changes in benefits, actuarial assumptions, the asset valuation method, or actuarial gains or losses shall be measured and amortized over a thirty-year period beginning on the valuation date of such change. If the unfunded actuarial accrued liability under the entry age actuarial cost method is zero or less than zero on an actuarial valuation date, then all prior unfunded actuarial accrued liabilities shall be considered

fully funded and the unfunded actuarial accrued liability shall be reinitialized and amortized over a thirty-year period as of the actuarial valuation date. If the actuarially required contribution rate exceeds the rate of all contributions required pursuant to the Judges Retirement Act, there shall be a supplemental appropriation sufficient to pay for the differences between the actuarially required contribution rate and the rate of all contributions required pursuant to the Judges Retirement Act.

(10) The state or county shall pick up the member contributions required by this section for all compensation paid on or after January 1, 1985, and the contributions so picked up shall be treated as employer contributions in determining federal tax treatment under the Internal Revenue Code as defined in section 49-801.01, except that the state or county shall continue to withhold federal income taxes based upon these contributions until the Internal Revenue Service or the federal courts rule that, pursuant to section 414(h) of the code, these contributions shall not be included as gross income of the member until such time as they are distributed or made available. The state or county shall pay these member contributions from the same source of funds which is used in paying earnings to the member. The state or county shall pick up these contributions by a compensation deduction through a reduction in the compensation of the member. Member contributions picked up shall be treated for all purposes of the Judges Retirement Act in the same manner and to the extent as member contributions made prior to the date picked up.

Source: Laws 1955, c. 83, § 3, p. 246; Laws 1957, c. 79, § 2, p. 321; Laws 1959, c. 95, § 2, p. 411; Laws 1959, c. 189, § 14, p. 689; Laws 1963, c. 137, § 1, p. 513; Laws 1965, c. 115, § 2, p. 442; Laws 1965, c. 116, § 2, p. 446; Laws 1967, c. 140, § 1, p. 428; Laws 1969, c. 178, § 2, p. 957; Laws 1971, LB 987, § 5; Laws 1972, LB 1032, § 121; Laws 1972, LB 1471, § 1; Laws 1973, LB 226, § 11; Laws 1974, LB 228, § 1; Laws 1977, LB 344, § 2; Laws 1977, LB 467, § 1; Laws 1981, LB 459, § 3; Laws 1984, LB 13, § 33; Laws 1984, LB 218, § 2; Laws 1986, LB 92, § 2; Laws 1986, LB 529, § 18; Laws 1989, LB 233, § 1; Laws 1989, LB 506, § 3; Laws 1991, LB 549, § 16; Laws 1991, LB 732, § 37; Laws 1992, LB 682, § 2; Laws 1992, LB 672, § 31; Laws 1994, LB 833, § 14; Laws 1995, LB 574, § 34; Laws 2001, LB 408, § 9; Laws 2002, LB 407, § 13; Laws 2003, LB 320, § 1; Laws 2003, LB 760, § 4; Laws 2004, LB 1097, § 11; Laws 2005, LB 348, § 2; Laws 2005, LB 364, § 7; Laws 2006, LB 1019, § 5.

Statutory provisions requiring counties to pay cost of maintaining a county court, prosecuting criminal law violations, and conducting state and national elections do not contravene the constitutional provision which prohibits property tax by state. State ex rel. Meyer v. County of Banner, 196 Neb. 565, 244 N.W.2d 179 (1976).

The independent act considered herein is not unconstitutional for failure to mention in the incidental provision for payment or exemption from payment of costs, nor for failure to refer to and repeal certain other statutes. State ex rel. Douglas v. Gradwohl, 194 Neb. 745, 235 N.W.2d 854 (1975).

24-703.01 Repealed. Laws 1998, LB 1191, § 85.

24-703.02 Repealed. Laws 1998, LB 1191, § 85.

24-703.03 Elections authorized.

Any future member who has not previously retired prior to July 1, 2004, may elect to make contributions as provided in subdivision (2)(b) of section 24-703 and receive benefits as described in sections 24-707.01 and 24-708. Such

election shall be made by written notice delivered to the board not later than ninety days after July 1, 2004.

Source: Laws 2004, LB 1097, § 8.

24-704 Administration of system; Public Employees Retirement Board, Auditor of Public Accounts, and Nebraska Investment Council; duties; employer education program.

(1) The general administration of the retirement system for judges provided for in the Judges Retirement Act, except the investment of funds, is hereby vested in the board. The Auditor of Public Accounts shall make an annual audit of the retirement system and file an annual report of its condition with the Clerk of the Legislature. Each member of the Legislature shall receive a copy of the annual report by making a request for such report to the Auditor of Public Accounts. The board shall adopt and promulgate rules and regulations as may be necessary to carry out the Judges Retirement Act.

(2)(a) The board shall employ a director and such assistants and employees as may be necessary to efficiently discharge the duties imposed by the act. The director shall keep a record of all acts and proceedings taken by the board.

(b) The director shall keep a complete record of all members with respect to name, current address, age, contributions, length of service, compensation, and any other facts as may be necessary in the administration of the act. The information in the records shall be provided by the State Court Administrator in an accurate and verifiable form, as specified by the director. The director shall, from time to time, carry out testing procedures pursuant to section 84-1512 to verify the accuracy of such information. For the purpose of obtaining such facts and information, the director shall have access to the records of the various state departments and agencies and the holder of the records shall comply with a request by the director for access by providing such facts and information to the director in a timely manner. A certified copy of a birth certificate or delayed birth certificate shall be prima facie evidence of the age of the person named in the certificate.

(c) The director shall develop and implement an employer education program using principles generally accepted by public employee retirement systems so that all employers have the knowledge and information necessary to prepare and file reports as the board requires.

(3) Information necessary to determine membership in the retirement system shall be provided by the State Court Administrator.

(4) Any funds of the retirement system available for investment shall be invested by the Nebraska Investment Council pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. Payment for investment services by the council shall be charged directly against the gross investment returns of the funds. Charges so incurred shall not be a part of the board's annual budget request. The amounts of payment for such services, as of December 31 of each year, shall be reported not later than March 31 of the following year to the council, the board, and the Nebraska Retirement Systems Committee. The state investment officer shall sell any such securities upon request from the director so as to provide money for the payment of benefits or annuities.

Source: Laws 1955, c. 83, § 4, p. 246; Laws 1971, LB 987, § 6; Laws 1979, LB 322, § 6; Laws 1986, LB 311, § 10; Laws 1991, LB

549, § 17; Laws 1994, LB 833, § 15; Laws 1994, LB 1066, § 18; Laws 1995, LB 369, § 4; Laws 1996, LB 847, § 13; Laws 2000, LB 1192, § 5; Laws 2005, LB 503, § 4.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

24-704.01 Board; power to adjust contributions and benefits.

(1) If the board determines that the retirement system has previously received contributions or distributed benefits which for any reason are not in accordance with the Judges Retirement Act, the board shall refund contributions, require additional contributions, adjust benefits, or require repayment of benefits paid. In the event of an overpayment of a benefit, the board may, in addition to other remedies, offset future benefit payments by the amount of the prior overpayment, together with regular interest thereon. In the event of an underpayment of a benefit, the board shall immediately make payment equal to the deficit amount plus regular interest.

(2) The board shall adopt and promulgate rules and regulations implementing this section, which shall include, but not be limited to, the following: (a) The procedures for refunding contributions, adjusting future contributions or benefit payments, and requiring additional contributions or repayment of benefits; (b) the process for a member, member's beneficiary, employee, or employer to dispute an adjustment of contributions or benefits; and (c) notice provided to all affected persons. All notices shall be sent prior to an adjustment and shall describe the process for disputing an adjustment of contributions or benefits.

Source: Laws 1996, LB 1076, § 10; Laws 2004, LB 1097, § 12.

24-705 Technical and administrative employees; actuary; report; expenses.

The board shall have the power to secure and employ the services of such technical and administrative employees as are necessary to carry out the provisions of the Judges Retirement Act. Pursuant to subdivision (2)(e) of section 84-1503, the board shall have an annual report prepared by a member of the American Academy of Actuaries showing a complete valuation of the present and prospective assets and liabilities of the fund created by the act. Such valuation shall be on the basis of actuarial assumptions recommended by the actuary, approved by the board, and kept on file with the board. The report shall further include a prospectus of the amount of the appropriation that will be required from the Legislature for the succeeding year. This report shall be furnished to the Clerk of the Legislature at each regular session. Each member of the Legislature shall receive a copy of such report by making a request for it to the director. The employees of the board shall be paid at such rates as the board shall approve. All administrative expenses shall be paid from the retirement fund.

Source: Laws 1955, c. 83, § 5, p. 247; Laws 1971, LB 987, § 7; Laws 1979, LB 322, § 7; Laws 1981, LB 462, § 3; Laws 1994, LB 833, § 18; Laws 1995, LB 502, § 1; Laws 1998, LB 1191, § 37.

24-706 Termination of employment; return of contributions, when; rejoining system.

(1) Upon termination of employment, any member whose service is terminated prior to age sixty-five for any cause other than death or disability may, upon request to the board:

(a) Have returned to him or her the total amount of contributions which he or she has made to the fund, plus regular interest, and the return of such contributions to such judge shall preclude such judge from any benefits under the Judges Retirement Act unless and until such judge again serves in such capacity and repays his or her withdrawals pursuant to section 24-706.01. If the member chooses not to repay such withdrawals with interest, the member shall enter the retirement system as a new member with no prior rights; or

(b) Leave his or her contributions in the fund and receive a retirement annuity as provided in sections 24-708 and 24-710.

(2) Any member whose service is terminated at or subsequent to age sixty-five shall be considered as beginning normal retirement and annuity payments shall begin as provided in section 24-710.

Source: Laws 1955, c. 83, § 6, p. 247; Laws 1959, c. 95, § 3, p. 412; Laws 1969, c. 178, § 3, p. 765; Laws 1974, LB 905, § 4; Laws 1975, LB 42, § 1; Laws 1986, LB 92, § 3; Laws 1989, LB 506, § 4; Laws 1994, LB 833, § 19; Laws 1996, LB 1076, § 9; Laws 1997, LB 624, § 11; Laws 1999, LB 703, § 5; Laws 2000, LB 1192, § 6; Laws 2001, LB 408, § 10.

24-706.01 Termination of employment prior to eligibility to retire; rejoining system; effect.

A member who terminates employment prior to becoming eligible to retire and again serves as a judge may elect to repay part or all of the amount he or she had withdrawn as a refund pursuant to section 24-706 plus the interest that would have accrued on such amount. Payment shall commence prior to termination of employment, shall not be extended more than five years after the date the member elects to repay his or her refund, and shall be completed prior to termination of employment. Prior service and rights shall be restored in proportion to the amounts repaid, and the prior service and rights of the member shall be fully restored only if he or she repays all accumulated withdrawals plus interest which would have accrued on that amount.

Source: Laws 2001, LB 408, § 11.

24-707 Death of judge; benefits spouse entitled to receive; contributions paid to beneficiary; when.

(1) In the event of the death of a judge prior to retirement, if such judge shall have had five or more years of creditable service, the surviving spouse of such judge shall at his or her option, exercised within twelve months after the date of death, be immediately entitled to receive an annuity which shall be equal to the amount that would have accrued to the member had he or she elected to have the retirement annuity paid as a one-hundred-percent joint and survivor annuity payable as long as either the member or the member's spouse should survive and had the member retired (a) on the date of death if his or her age at death is sixty-five years or more or (b) at age sixty-five years if his or her age at death is less than sixty-five years. If such option is not exercised by such surviving spouse within twelve months after the judge's death, if there is no surviving spouse, or if the judge has not served for five years, then the beneficiary, or the

estate if the judge has not filed a statement with the board naming a beneficiary, shall be paid a lump sum equal to all contributions to the fund made by such judge plus regular interest.

(2) In the event of the death of a judge subsequent to retirement, if such judge has not filed a statement of intent with the board to elect to receive any other form of annuity which may be provided for by section 24-710 or elected to make contributions and receive benefits as provided in section 24-703.03, the amount of annuities such judge has received under the provisions of the Judges Retirement Act shall be computed and, if such amount shall be less than the contributions to the fund made by such judge, plus regular interest, the difference shall be paid to the beneficiary or estate.

(3) Benefits to which the surviving spouse, beneficiary, or estate of a judge shall be entitled shall commence immediately upon the death of such judge.

Source: Laws 1955, c. 83, § 7, p. 248; Laws 1973, LB 478, § 1; Laws 1974, LB 905, § 5; Laws 1975, LB 298, § 1; Laws 1977, LB 344, § 4; Laws 1983, LB 223, § 2; Laws 1986, LB 92, 4; Laws 1989, LB 506, § 5; Laws 1994, LB 833, § 20; Laws 1996, LB 1273, § 20; Laws 1997, LB 624, § 12; Laws 2000, LB 1192, § 7; Laws 2003, LB 451, § 15; Laws 2004, LB 1097, § 13; Laws 2007, LB508, § 1.

24-707.01 Surviving spouse; benefits; applicable, when.

(1) This section only applies to a judge who first served as a judge on or after July 1, 2004, and to a future member who elects to make contributions and receive benefits as provided in section 24-703.03.

(2) In the event of the death of a judge subsequent to retirement, his or her surviving spouse, if any, shall be entitled to receive, if the surviving spouse was born not more than five years subsequent to the birth of the deceased judge, a monthly benefit payable for life equal to fifty percent of the monthly benefit the retired judge was entitled to receive under the normal form of payment. Such benefit to the surviving spouse shall be provided without actuarial reduction or other assessment to the retired judge in determining his or her benefits. The entire cost of such a benefit shall be assumed by the fund. This benefit value may be applied on an actuarially equivalent basis to any joint and survivor benefit elected by a retiring judge with the surviving spouse as named beneficiary.

(3) In the event that the spouse of a retiring judge was born more than five years subsequent to the birth of the judge, such benefit to the judge described under subsection (2) of this section shall be reduced by the actuarial cost of providing a benefit to the surviving spouse equal to fifty percent of the benefit the retired judge was entitled to receive. The reduction to the retired judge's benefit shall be limited to that portion of the actuarial cost that exceeds the actuarial cost if the spouse was born five years subsequent to the judge. In the event of the death of a retired judge as described by this subsection, his or her surviving spouse shall receive a monthly benefit payable for life equal to fifty percent of the monthly benefit received by the deceased judge.

(4) This section shall not prevent a retiring judge from contracting to provide a larger percentage of benefit for a surviving spouse under other applicable statutes.

Source: Laws 2004, LB 1097, § 7.

24-708 Retirement of judge; when; deferment of payment; board; duties.

(1) Except as provided in section 24-721, a judge may retire upon reaching the age of sixty-five years and upon making application to the board. Upon retiring each such judge shall receive retirement annuities as provided in section 24-710.

(2) Except as provided in section 24-721, a judge may retire upon reaching the age of fifty-five years and elect to receive a reduced monthly retirement income in lieu of a deferred vested annuity. The judge may request that the reduced monthly retirement income commence at any date, beginning on the first day of the month following the actual retirement date and ending on the normal retirement date. The amount of the reduced monthly retirement income shall be calculated based on the length of creditable service and average compensation at the actual retirement date. When a judge has elected to receive a reduced monthly retirement income to commence at the age of sixty-four years, the monthly payments shall be reduced by three percent. When a judge has elected to receive a reduced monthly retirement income to commence at the age of sixty-three years, the monthly payments shall be reduced by six percent. When a judge has elected to receive a reduced monthly retirement income to commence at the age of sixty-two years, the monthly payments shall be reduced by nine percent. When a judge has elected to receive a reduced monthly retirement income to commence prior to the age of sixty-two years, the monthly payments shall be further reduced to an amount that is actuarially equivalent to the amount payable at the age of sixty-two years.

(3) Payment of any benefit provided under the Judges Retirement Act may not be deferred later than April 1 of the year following the year in which the judge has both attained at least age seventy and one-half years and terminated his or her employment as a judge.

(4) The effective date of retirement payments shall be the first day of the month following (a) the date a member qualifies for retirement as provided in this section or (b) the date upon which a member's request for retirement is received on an application form provided by the retirement system, whichever is later. An application may be filed no more than ninety days in advance of qualifying for retirement.

(5) The board shall make reasonable efforts to locate the member or the member's beneficiary and distribute benefits by the required beginning date as specified by section 401(a)(9) of the Internal Revenue Code and the regulations issued thereunder. If the board is unable to make such a distribution, the benefit shall be distributed pursuant to the Uniform Disposition of Unclaimed Property Act and no amounts may be applied to increase the benefits any member would otherwise receive under the Judges Retirement Act.

Source: Laws 1955, c. 83, § 8, p. 248; Laws 1957, c. 78, § 2, p. 317; Laws 1957, c. 79, § 3, p. 322; Laws 1965, c. 115, § 3, p. 444; Laws 1972, LB 1032, § 123; Laws 1973, LB 353, § 1; Laws 1984, LB 750, § 2; Laws 1986, LB 311, § 11; Laws 1987, LB 296, § 2; Laws 1989, LB 506, § 6; Laws 1994, LB 833, § 21; Laws 1997, LB 624, § 13; Laws 2003, LB 320, § 2; Laws 2003, LB 451, § 16; Laws 2004, LB 1097, § 14; Laws 2008, LB1147, § 5.
Operative date July 18, 2008.

Cross References

Uniform Disposition of Unclaimed Property Act, see section 69-1329.

24-708.01 Retired member; reemployment; how treated.

For a member who retired under section 24-708 and becomes employed full-time or part-time as a judge in the state after his or her retirement date, the retired member shall continue receiving retirement benefits, shall be treated as a new judge for all purposes of the Judges Retirement Act, and shall receive service credit only for service commencing from the date of reemployment. Retired judges who are assigned to temporary duty as provided in sections 24-729 to 24-733 shall not become contributing active members in the retirement system and shall not receive any service credits.

Source: Laws 1997, LB 624, § 14.

24-709 Judge; physically or mentally disabled; retirement; Commission on Judicial Qualifications; application; examination; benefits.

Any judge, except a clerk magistrate, who has become physically or mentally disabled, which disability seriously interferes with the performance of his or her duties and which disability is determined to be permanent or reasonably likely to become permanent, may, upon being found so disabled by the Commission on Judicial Qualifications, retire or be retired, and upon such retirement he or she shall be entitled to receive the retirement annuity as provided in section 24-710. Any judge, or the guardian of any judge, so permanently disabled desiring to so retire, shall file an application for such retirement with the commission, which application shall be in such form and contain such information as such commission shall require. Such commission may require such judge to be examined by a physician appointed by the commission and may require such other evidence and proof of disability as it deems necessary to reach a determination as to whether such judge is so permanently disabled. If the commission determines that any such judge is so permanently disabled, it shall promptly notify the judge and the Public Employees Retirement Board and thereupon such judge shall be placed on retirement by the board and receive the retirement annuity each month as is provided in section 24-710.

Source: Laws 1955, c. 83, § 9, p. 248; Laws 1971, LB 987, § 8; Laws 1983, LB 223, § 3; Laws 1986, LB 529, § 19.

24-709.01 Judicial retirement proceedings before Commission on Judicial Qualifications; confidential.

All documents filed with and proceedings before the Commission on Judicial Qualifications pursuant to sections 24-709 and 24-712 shall be confidential.

Source: Laws 1981, LB 475, § 12; Laws 2000, LB 1192, § 8.

24-709.02 Certain clerk magistrates; disabled; retirement; Public Employees Retirement Board; application; examination; benefits.

(1) Clerk magistrates who were associate county judges and members of the fund at the time of their appointment as clerk magistrates shall have questions of disability decided by the Public Employees Retirement Board. Any such clerk magistrate may be retired as a result of disability either upon his or her own application or upon the application of an employer or any person acting in his or her behalf. Upon such retirement he or she shall be entitled to receive the

retirement annuity as provided in section 24-710. Before any such clerk magistrate may be retired, a medical examination shall be made at the expense of the Nebraska Retirement Fund for Judges, which examination shall be conducted by a disinterested physician legally authorized to practice medicine under the laws of the state in which he or she practices, such physician to be selected by the board, and the physician shall certify to the board that the clerk magistrate is physically or mentally incapable of further performing his or her duties and should be retired. The application for disability retirement shall be made within one year of termination of employment.

(2) The board may require any such disability beneficiary who has not attained the age of sixty-five to undergo a medical examination at the expense of the board once each year. Should any disability beneficiary refuse to undergo such an examination, his or her disability retirement benefit may be discontinued by the board.

Source: Laws 1983, LB 223, § 5; Laws 1986, LB 529, § 20; Laws 1997, LB 623, § 9.

24-710 Judges; retirement annuity; amount; how computed; cost-of-living adjustment.

(1) The retirement annuity of a judge who is an original member, who has not made the election provided for in subsection (8) of section 24-703 or section 24-710.01, and who retires under section 24-708 or 24-709 shall be computed as follows: Each such judge shall be entitled to receive an annuity, each monthly payment of which shall be in an amount equal to three and one-third percent of his or her final average compensation as such judge, multiplied by the number of his or her years of creditable service. The amount stated in this section shall be supplemental to any benefits received by such judge under the Nebraska and federal old age and survivors' insurance acts at the date of retirement, but the monthly combined benefits received thereunder and by the Judges Retirement Act shall not exceed sixty-five percent of the final average compensation such judge was receiving when he or she last served as such judge. The amount of retirement annuity of a judge who retires under section 24-708 or 24-709 shall not be less than twenty-five dollars per month if he or she has four years or more of service credit.

(2) The retirement annuity of a judge who is a future member and who retires after July 1, 1986, under section 24-708 or 24-709 shall be computed as follows: Each such judge shall be entitled to receive an annuity, each monthly payment of which shall be in an amount equal to three and one-half percent of his or her final average compensation as such judge, multiplied by the number of his or her years of creditable service, except that the monthly benefits received under this subsection shall not exceed seventy percent of the final average compensation such judge was receiving when he or she last served as such judge.

(3) Except as provided in section 42-1107, any member may, when filing an application as provided by the retirement system, elect to receive, in lieu of the normal form annuity benefits to which the member or his or her beneficiary may otherwise be entitled under the Judges Retirement Act, any form of annuity which the board may by rules and regulations provide, the value of which, determined by accepted actuarial methods and on the basis of actuarial assumptions recommended by the actuary, approved by the board, and kept on file in the office of the director, is equal to the value of the benefit replaced. The

board shall (a) adopt and promulgate appropriate rules and regulations establishing joint and survivorship annuities, with and without reduction on the death of the first annuitant, and such other forms of annuities as may in its judgment be appropriate and establishing benefits as provided in sections 24-707 and 24-707.01, (b) prescribe appropriate forms for making the election by the members, and (c) provide for the necessary actuarial services to make the required valuations.

(4) A one-time cost-of-living adjustment shall be made for each retired judge and each surviving beneficiary who is receiving a retirement annuity as provided for in this section. The annuity shall be adjusted by the increase in the cost of living or wage levels between the effective date of retirement and June 30, 1992, except that such increases shall not exceed three percent per year of retirement and the total increase shall not exceed two hundred fifty dollars per month.

Source: Laws 1955, c. 83, § 10, p. 249; Laws 1957, c. 79, § 4, p. 323; Laws 1959, c. 95, § 4, p. 413; Laws 1965, c. 116, § 3, p. 448; Laws 1965, c. 117, § 1, p. 489; Laws 1969, c. 178, § 4, p. 766; Laws 1973, LB 478, § 2; Laws 1974, LB 740, § 1; Laws 1975, LB 49, § 1; Laws 1977, LB 467, § 2; Laws 1977, LB 344, § 5; Laws 1981, LB 459, § 4; Laws 1981, LB 462, § 4; Laws 1986, LB 92, § 5; Laws 1986, LB 311, § 13; Laws 1989, LB 506, § 7; Laws 1991, LB 549, § 18; Laws 1992, LB 682, § 3; Laws 1992, LB 672, § 32; Laws 1994, LB 833, § 22; Laws 1996, LB 1273, § 21; Laws 1997, LB 624, § 15; Laws 2004, LB 1097, § 15.

24-710.01 Judges; alternative contribution rate and retirement benefit; election; notice.

Any original member, as defined in subdivision (12) of section 24-701, who has not previously retired, may elect to make contributions and receive benefits pursuant to subsection (2) of section 24-703 and subsection (2) of section 24-710, instead of those provided by subsection (1) of section 24-703 and subsection (1) of section 24-710. Such election shall be by written notice delivered to the board not later than November 1, 1981. Such member shall thereafter be considered a future member.

Source: Laws 1977, LB 344, § 1; Laws 1981, LB 459, § 5; Laws 1986, LB 92, § 6.

24-710.02 Retirement benefits; exemption from legal process; exception.

All annuities or benefits which any person shall be entitled to receive under the Judges Retirement Act shall not be subject to garnishment, attachment, levy, the operation of bankruptcy or insolvency laws, or any other process of law whatsoever and shall not be assignable except to the extent that such annuities or benefits are subject to a qualified domestic relations order under the Spousal Pension Rights Act.

Source: Laws 1986, LB 311, § 12; Laws 1989, LB 506, § 8; Laws 1994, LB 833, § 23; Laws 1995, LB 574, § 37; Laws 1996, LB 1273, § 22; Laws 2004, LB 1097, § 16.

Cross References

Spousal Pension Rights Act, see section 42-1101.

24-710.03 Judges; purchase of service credit; application of section.

Any future member who has served as a judge for eighteen years but less than twenty years prior to July 15, 1992, and who has, prior to such date, contributed and earned the maximum benefit pursuant to subsection (2) of section 24-710 may purchase up to two years of service credit in order to qualify for the maximum benefit in effect after July 15, 1992. Service credit may only be purchased for actual time served as a judge. The amount to be paid shall not exceed the amount the member would have paid into the system based on the compensation and two years of service immediately following the year in which the member reached the maximum benefit in effect prior to July 15, 1992, plus the interest on that amount which would have accrued under the retirement system provided by the Judges Retirement Act. Any payment made pursuant to this section by a member to qualify for the maximum benefit in effect after July 15, 1992, shall be received by the retirement system office by December 31, 1993. Any such payment shall be made in a single lump sum.

This section shall not apply to any member who retires prior to July 15, 1992.

Source: Laws 1992, LB 682, § 4; Laws 1993, LB 363, § 1; Laws 1994, LB 833, § 24; Laws 1996, LB 847, § 17.

24-710.04 Reemployment; military service; credit; effect.

Under such rules and regulations as the retirement board adopts and promulgates, any judge who is reemployed on or after December 12, 1994, pursuant to 38 U.S.C. chapter 43, shall be treated as not having incurred a break in service by reason of his or her period of military service. Such military service shall be credited for purposes of determining the nonforfeitability of the member's accrued benefits and the accrual of benefits under the plan. The state shall be liable for funding any obligation of the plan to provide benefits based upon such period of military service.

Source: Laws 1996, LB 847, § 14.

24-710.05 Direct rollover; terms, defined; distributee; powers; board; duties.

(1) For purposes of this section and section 24-710.06:

(a) Distributee means the member, the member's surviving spouse, or the member's former spouse who is an alternate payee under a qualified domestic relations order as defined in section 414(p) of the Internal Revenue Code;

(b) Direct rollover means a payment by the retirement system to the eligible retirement plan or plans specified by the distributee;

(c) Eligible retirement plan means (i) an individual retirement account described in section 408(a) of the Internal Revenue Code, (ii) an individual retirement annuity described in section 408(b) of the code, except for an endowment contract, (iii) a qualified plan described in section 401(a) of the code, (iv) an annuity plan described in section 403(a) or 403(b) of the code, and (v) a plan described in section 457(b) of the code and maintained by a governmental employer. For eligible rollover distributions to a surviving spouse, an eligible retirement plan means subdivisions (1)(c)(i) through (iv) of this section; and

(d) Eligible rollover distribution means any distribution to a distributee of all or any portion of the balance to the credit of the distributee in the plan, except such term shall not include any distribution which is one of a series of substantially equal periodic payments, not less frequently than annually, made for the life of the distributee or joint lives of the distributee and the distributee's beneficiary or for the specified period of ten years or more and shall not include any distribution to the extent such distribution is required under section 401(a)(9) of the Internal Revenue Code.

(2) For distributions made to a distributee on or after January 1, 1993, a distributee may elect to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee.

(3) The board shall adopt and promulgate rules and regulations for direct rollover procedures which are consistent with section 401(a)(31) of the Internal Revenue Code and which include, but are not limited to, the form and time of direct rollover distributions.

Source: Laws 1996, LB 847, § 15; Laws 2002, LB 407, § 14.

24-710.06 Retirement system; accept payments and rollovers; limitations; board; duties.

(1) The retirement system may accept cash rollover contributions from a member who is making payment pursuant to section 24-706 if the contributions do not exceed the amount of payment required for the service credits purchased by the member pursuant to such section and the contributions represent (a) all or any portion of the balance of the member's interest in a qualified plan under section 401(a) of the Internal Revenue Code or (b) the interest of the member from an individual retirement account or an individual retirement annuity, the entire amount of which is attributable to a qualified total distribution, as defined in the Internal Revenue Code, from a qualified plan under section 401(a) of the code and qualified as a tax-free rollover amount. The member's interest under subdivision (a) or (b) of this subsection must be transferred to the retirement system within sixty days from the date of the distribution from the qualified plan, individual retirement account, or individual retirement annuity.

(2) Cash transferred to the retirement system as a rollover contribution shall be deposited as other payments for service credits.

(3) Under the same conditions as provided in subsection (1) of this section, the retirement system may accept eligible rollover distributions from (a) an annuity contract described in section 403(b) of the Internal Revenue Code, (b) a plan described in section 457(b) of the code which is maintained by a state, a political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state, or (c) the portion of a distribution from an individual retirement account or annuity described in section 408(a) or 408(b) of the code that is eligible to be rolled over and would otherwise be includible in gross income. Amounts accepted pursuant to this subsection shall be deposited as all other payments under this section.

(4) The retirement system may accept direct rollover distributions made from a qualified plan pursuant to section 401(a)(31) of the Internal Revenue Code. The direct rollover distribution shall be deposited as all other payments under this section.

(5) The board shall adopt and promulgate rules and regulations defining procedures for acceptance of rollovers which are consistent with sections 401(a)(31) and 402 of the Internal Revenue Code.

Source: Laws 1996, LB 847, § 16; Laws 2002, LB 407, § 15.

24-710.07 Benefits; adjustment.

(1) Beginning July 1, 2000, and each July 1 thereafter, current benefits paid to a member or beneficiary shall be adjusted so that the purchasing power of the benefit being paid is not less than seventy-five percent of the purchasing power of the initial benefit. The purchasing power of the initial benefit in any year following the year in which the initial benefit commenced shall be calculated by dividing the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Urban Wage Earners and Clerical Workers factor on June 30 of the current year by the Consumer Price Index for Urban Wage Earners and Clerical Workers factor on June 30 of the year in which the benefit commenced. The result shall be multiplied by the product that results when the amount of the initial benefit is multiplied by seventy-five percent. In any year in which applying the adjustment provided in subsection (2) of this section results in a benefit which would be less than seventy-five percent of the purchasing power of the initial benefit as calculated above, the adjustment shall instead be equal to the percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers factor from the prior year to the current year. In all other years, the adjustment provided under subsection (2) of this section shall be provided. The adjustment pursuant to this subsection shall not cause a current benefit to be reduced.

(2) Except as provided in subsection (1) of this section:

(a) Beginning July 1, 2000, and until July 1, 2001, the current benefit of a member or the beneficiary of such a member shall be increased annually by the lesser of (i) the percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers factor published by the Bureau of Labor Statistics of the United States Department of Labor for the prior year or (ii) two percent; and

(b) Beginning July 1, 2001, the current benefit of a member or the beneficiary of such a member shall be increased annually by the lesser of (i) the percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers factor published by the Bureau of Labor Statistics of the United States Department of Labor for the prior year or (ii) two and one-half percent.

(3) The state shall contribute to the Nebraska Retirement Fund for Judges an annual level dollar payment certified by the board. For the 1996-97 fiscal year through the 2010-11 fiscal year, the annual level dollar payment certified by the board shall equal 1.04778 percent of six million eight hundred ninety-five thousand dollars.

(4) The board shall adjust the annual benefit adjustment provided in this section so that the total amount of all cost-of-living adjustments provided to the eligible retiree at the time of the annual benefit adjustment does not exceed the percentage change in the National Consumer Price Index for Urban Wage Earners and Clerical Workers factor published by the Bureau of Labor Statistics for the period between June 30 of the prior year to June 30 of the present year. If the consumer price index used in this section is discontinued or replaced, a substitute index published by the United States Department of

Labor shall be selected by the board which shall be a reasonable representative measurement of the cost of living for retired employees.

Source: Laws 1996, LB 700, § 2; Laws 1999, LB 674, § 2; Laws 2001, LB 711, § 1; Laws 2004, LB 1097, § 17; Laws 2008, LB1147, § 6.
Operative date July 18, 2008.

24-710.08 Repealed. Laws 1999, LB 674, § 12.

24-710.09 Annual benefit adjustment; terms, defined.

For purposes of this section and sections 24-710.10 and 24-710.11:

(1) Eligible retiree means (a) a member or beneficiary who has been receiving a retirement benefit for at least five years, which member had at least twenty-five years of creditable service; (b) a member who has been receiving a disability retirement benefit for at least five years pursuant to section 24-709; or (c) a beneficiary who has been receiving a death benefit pursuant to section 24-707 or 24-707.01 for at least five years, and which member's or beneficiary's monthly accrual rate is less than or equal to the minimum accrual rate as determined by section 24-710.10;

(2) Monthly accrual rate means the eligible retiree's total monthly benefit divided by the number of years of creditable service earned by the retiree or deceased member; and

(3) Total monthly benefit means the total benefit received by an eligible retiree pursuant to the Judges Retirement Act, previous adjustments made pursuant to section 24-710.11, or any other provision of Nebraska law which grants a benefit or cost-of-living increase within the act, but total monthly benefit does not include sums received by an eligible retiree from federal sources.

Source: Laws 1998, LB 532, § 2; Laws 2004, LB 1097, § 18.

24-710.10 Annual benefit adjustment; minimum accrual rate.

The minimum accrual rate is thirty-five dollars until adjusted pursuant to this section. Commencing June 30, 1999, the retirement board shall annually adjust the minimum accrual rate to reflect the cumulative percentage change in the National Consumer Price Index for Urban Wage Earners and Clerical Workers factor published by the Bureau of Labor Statistics of the United States Department of Labor from the last adjustment of the minimum accrual rate.

Source: Laws 1998, LB 532, § 3; Laws 1999, LB 703, § 6; Laws 2008, LB1147, § 7.
Operative date July 18, 2008.

24-710.11 Annual benefit adjustment; calculations.

(1) Beginning June 30, 1999, and each June 30 thereafter, the retirement board shall determine the number of eligible retirees in the retirement system and shall grant an annual benefit adjustment to each eligible retiree. The annual benefit adjustment shall be calculated by multiplying the eligible retiree's total monthly benefit by the lesser of:

(a)(i) For calculations on June 30, 1999, the cumulative change in the Consumer Price Index for Urban Wage Earners and Clerical Workers published

by the Bureau of Labor Statistics from June 30, 1998, through June 30, 1999; or

(ii) For calculations on June 30, 2000, and each June 30 thereafter, the cumulative change in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics of the United States Department of Labor from the last adjustment of the total monthly benefit of each eligible retiree pursuant to this section through June 30 of the year for which the annual benefit adjustment is being calculated; or

(b)(i) For calculations on June 30, 1999, an amount equal to three percent per annum compounded from June 30, 1998, through June 30, 1999; or

(ii) For calculations on June 30, 2000, and each June 30 thereafter, an amount equal to three percent per annum compounded for the period from the last adjustment of the total monthly benefit of each eligible retiree pursuant to this section through June 30 of the year for which the annual benefit adjustment is being calculated.

(2) Beginning July 1 each year, each eligible retiree shall receive the sum of the annual benefit adjustment and such retiree's total monthly benefit, which sum shall be the retiree's adjusted total monthly benefit. Each eligible retiree shall receive the adjusted total monthly benefit until the expiration of the annuity option selected by the member or until the eligible retiree again qualifies for the annual benefit adjustment, whichever occurs first. Subsequent to the date of the annual benefit adjustment, an eligible retiree shall never receive less than the adjusted total monthly benefit until the annuity option selected by the member expires.

(3) The retirement board shall adjust the annual benefit adjustment provided in this section so that the total amount of all cost-of-living adjustments provided to the eligible retiree at the time of the annual benefit adjustment does not exceed the change in the National Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics for the period between June 30 of the prior year to June 30 of the present year. If the consumer price index used in this section and section 24-710.10 is discontinued or replaced, a substitute index published by the United States Department of Labor shall be selected by the board which shall be a reasonable representative measurement of the cost of living for retired employees.

Source: Laws 1998, LB 532, § 4; Laws 1999, LB 703, § 7.

24-710.12 Retirement system; accept transfers; limitations; how treated.

The retirement system may accept as payment for withdrawn amounts made pursuant to the Judges Retirement Act a direct trustee-to-trustee transfer from (1) an eligible tax-sheltered annuity plan as described in section 403(b) of the Internal Revenue Code or (2) an eligible deferred compensation plan as described in section 457(b) of the code on behalf of a member who is making payments for such amounts. The amount transferred shall not exceed the amount withdrawn and such transferred amount shall qualify as a purchase of permissive service credit by the member as defined in section 415 of the code.

Source: Laws 2002, LB 407, § 16.

24-711 Retired judge; statement of facts; contents; false or fraudulent actions; prohibited acts; penalty; denial of benefits.

(1) Any judge who retires under the provisions of section 24-708 or 24-709, or his or her guardian, shall give to the board a statement of facts which shall include an accurate record of all service claimed by such judge, his or her compensation when he or she last served as a judge, the amount of contributions he or she has made to the fund, the amount of benefits he or she is receiving or shall be entitled to receive under the Nebraska and federal old-age and survivors insurance acts, designation of beneficiary, and any other information the board may request. The board shall determine the accuracy of all pertinent facts claimed and may call a hearing to determine any or all matters necessary in order to determine the amount of the annuity to which such judge is entitled. After obtaining all facts it deems necessary, the board shall render its decision as to the amount of the annuity, if any, to which such judge shall be entitled.

(2) Any person who, knowing it to be false or fraudulent, presents or causes to be presented a false or fraudulent claim or benefit application, any false or fraudulent proof in support of such a claim or benefit, or false or fraudulent information which would affect a future claim or benefit application to be paid under the retirement system for the purpose of defrauding or attempting to defraud the retirement system shall be guilty of a Class II misdemeanor. The retirement board shall deny any benefits that it determines are based on false or fraudulent information and shall have a cause of action against the member to recover any benefits already paid on the basis of such information.

Source: Laws 1955, c. 83, § 11, p. 249; Laws 1991, LB 549, § 19; Laws 1998, LB 1191, § 38.

24-712 Annuity payments; continuation; physical examinations, when; cost.

Annuity payments to a judge, who has retired under the provisions of section 24-708, shall continue until the end of the month in which such judge shall die. The last annuity payment and any other payments to which such judge shall be entitled and which have not been paid at the time of his or her death shall be paid to his or her beneficiary. A judge who is receiving annuity payments, under the provisions of section 24-709, shall continue to receive such annuities as long as he or she is permanently disabled, and if such judge shall die while so disabled, payment of annuities shall be terminated in the same manner as provided for a judge who dies subsequent to his or her retirement. Any judge, who is receiving annuities under the provisions of section 24-709, may be required by the commission to submit to a reexamination at any time. Any such judge shall have the right to a reexamination, upon an application to the commission, but not more often than once every six months. A physician appointed by the commission shall make such examinations and report his or her findings to the commission which shall make a determination. If the commission shall find that the permanent disability no longer exists, it shall so notify the judge and the board shall discontinue annuity payments to such judge unless the judge has in the meantime qualified for retirement by reason of his or her age. If any judge refuses to submit to such reexamination, the commission shall immediately terminate all annuity payments to such judge. Costs incurred by the commission for the services of a physician, as authorized by the provisions of section 24-709 and this section, shall be paid by the commission out of money from the fund.

Source: Laws 1955, c. 83, § 12, p. 250; Laws 1971, LB 987, § 9; Laws 1994, LB 833, § 25.

Cross References

Confidentiality of proceedings, see section 24-709.01.

24-713 State Treasurer; duties; warrants.

The State Treasurer shall be the custodian of the funds and securities of the retirement system and may deposit the funds and securities in any financial institution approved by the Nebraska Investment Council. The Director of Administrative Services is directed to draw warrants on the State Treasurer against the fund for authorized expenditures upon duly itemized vouchers signed by a person authorized by the retirement board. The State Treasurer shall transmit monthly to the board a detailed statement showing all credits to and disbursements from the funds in his or her custody belonging to the retirement system.

Source: Laws 1955, c. 83, § 13, p. 250; Laws 1969, c. 178, § 5, p. 767; Laws 1997, LB 623, § 10.

24-713.01 Limitation of actions.

Every claim and demand under the Judges Retirement Act and against the retirement system or the board shall be forever barred unless the action is brought within two years of the time at which the claim accrued.

Source: Laws 1996, LB 1076, § 11; Laws 2004, LB 1097, § 19.

24-713.02 Retirement system contributions, property, and rights; how treated.

All contributions to the retirement system, all property and rights purchased with the contributions, and all investment income attributable to the contributions, property, or rights shall be held in trust by the State of Nebraska for the exclusive benefit of members and their beneficiaries and shall only be used to pay benefits to such persons and to pay administrative expenses according to the provisions of the Judges Retirement Act.

Source: Laws 1998, LB 1191, § 39.

24-713.03 Termination of system or contributions; effect.

Upon termination or partial termination of the retirement system or upon complete discontinuance of contributions under the retirement system, the rights of all affected members to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, shall be nonforfeitable.

Source: Laws 1998, LB 1191, § 40.

24-714 Retirement of judge; effect; filling of vacancy.

When the Chief Justice or a judge of the Supreme Court, a judge of the Court of Appeals, a judge of the district court, or a judge of the Nebraska Workers' Compensation Court becomes retired under the Judges Retirement Act, he or she shall be relieved of further active duties on the court. The Governor may fill the vacancy caused by such retirement the same as when a vacancy exists on that court for any other reason. When a judge of the county court or judge of a separate juvenile court becomes retired under the provisions of such sections,

he or she shall also be relieved of further active duties and a vacancy shall be deemed to exist, which vacancy shall be filled as provided by law.

Source: Laws 1955, c. 83, § 14, p. 251; Laws 1957, c. 78, § 3, p. 317; Laws 1957, c. 79, § 5, p. 323; Laws 1959, c. 189, § 15, p. 691; Laws 1965, c. 115, § 4, p. 444; Laws 1984, LB 13, § 34; Laws 1991, LB 732, § 38; Laws 1994, LB 833, § 26; Laws 2004, LB 1097, § 20.

(b) JUDICIAL DISCIPLINE

24-715 Commission on Judicial Qualifications; created; members; appointment.

Pursuant to the Constitution of the State of Nebraska, there is hereby created a Commission on Judicial Qualifications consisting of: (1) Three judges, including one district court judge, one county court judge, and one judge of any other court inferior to the Supreme Court as now exists or may hereafter be created by law, all of whom shall be appointed by the Chief Justice of the Supreme Court; (2) three members of the Nebraska State Bar Association who shall have practiced law in this state for at least ten years and who shall be appointed by the Executive Council of the Nebraska State Bar Association; (3) three citizens, none of whom shall be a Justice or judge of the Supreme Court or a judge of any court, active or retired, nor a member of the Nebraska State Bar Association, and who shall be appointed by the Governor; and (4) the Chief Justice of the Supreme Court, who shall serve as its chairperson.

Source: Laws 1967, c. 141, § 1, p. 430; Laws 1981, LB 475, § 1.

This section does not grant authority to the Nebraska State Bar Association to commence disciplinary actions against sitting judges. State ex rel. NSBA v. Krepela, 259 Neb. 395, 610 N.W.2d 1 (2000).

On a showing of a compelling need for information preliminary to a judicial proceeding, limited disclosures of grand jury testimony granted. United States v. Salanitro, 437 F.Supp. 240 (D. Neb. 1977).

24-716 Commission; members; term; vacancy.

The term of office of each member of the Commission on Judicial Qualifications, except the Chief Justice of the Supreme Court, shall be four years. The term of the Chief Justice shall be permanent. In the event of a vacancy, the vacancy shall be filled by appointment in the same manner as the original members are appointed and the individuals so appointed shall serve for the balance of the original term. Any member of the commission shall be eligible for reappointment for an additional term without regard to the number of years that such individual has served as a member of the commission.

Source: Laws 1967, c. 141, § 2, p. 431; Laws 1972, LB 1032, § 124; Laws 1981, LB 475, § 2.

24-717 Commission; organization; officers.

The Commission on Judicial Qualifications shall annually select a vice-chairperson from its own members and a secretary who may or may not be a member of the commission and who shall keep minutes of all meetings of the commission. Such vice-chairperson and secretary shall each serve for one year or until a successor is selected.

Source: Laws 1967, c. 141, § 3, p. 431; Laws 1981, LB 475, § 3.

24-718 Commission; compensation; expenses.

Members of the Commission on Judicial Qualifications shall serve without compensation but they shall be reimbursed for all reasonable expenses incurred by them in connection with their duties as members of the commission as provided in sections 81-1174 to 81-1177 for state employees.

Source: Laws 1967, c. 141, § 4, p. 431; Laws 1981, LB 204, § 36.

24-719 Commission; meetings; quorum; annual report.

(1) Meetings of the Commission on Judicial Qualifications shall be held at least annually at Lincoln, Nebraska, or at such other place or places within the State of Nebraska and at such time as the commission may determine. A majority of the members of the commission shall constitute a quorum. No action of the commission shall be valid unless concurred in by a majority of its members. The date of the annual meeting of the commission shall be fixed by resolution of the commission and special meetings of the commission may be called at any time by the chairperson or vice-chairperson of the commission or by the Supreme Court or at the written request of any two members of the commission.

(2) To the extent permitted by the Constitution of Nebraska, the commission shall prepare and make available to the public an annual report outlining the activities of the commission in the previous year. The report shall include, but not be limited to:

(a) The total number of meetings held by the commission;

(b) The total number of complaints filed with the commission;

(c) The total number of complaints dismissed by the commission;

(d) The total number of public reprimands issued by the commission;

(e) The total number of formal complaints filed by the commission; and

(f) The costs incurred by the commission which shall include:

(i) Expenses paid to commission members pursuant to section 24-718;

(ii) Expenses paid to special masters appointed by the commission; and

(iii) Expenses paid to special investigators hired by the commission.

Source: Laws 1967, c. 141, § 5, p. 431; Laws 1981, LB 475, § 4; Laws 2005, LB 754, § 1.

24-720 Commission; complaints and requests; form.

Complaints and requests to the Commission on Judicial Qualifications shall be in writing directed to the commission or to any member of the commission. No specified form of complaint or request shall be required.

Source: Laws 1967, c. 141, § 6, p. 432; Laws 1981, LB 475, § 5.

24-721 Commission; complaint or request filed by citizen; investigation; proceedings; rights of judge or justice; special master; commission; recommendations; rules.

Any citizen of the State of Nebraska shall have the right at all times to complain to the Commission on Judicial Qualifications with reference to the acts, activities, or qualifications of any Justice or judge of the Supreme Court or judge of any of the courts of the State of Nebraska or to request that the

commission consider the qualifications of any Justice or judge of the Supreme Court or judge of any of the courts of the State of Nebraska. Upon receipt of any such complaint or request, the commission shall make such investigation as it determines to be necessary. The commission shall have the right to subpoena witnesses; to hold hearings; to require the Justice or judge to submit to physical or mental examination by medical experts; to appoint special masters to conduct hearings; to make independent investigations, either by members of the commission or by special investigators employed by the commission; to hold confidential prehearing proceedings with the person or persons filing the complaint or request, or with his or her or their agents or attorneys; and to hold confidential prehearing proceedings with the judge or Justice involved in the complaint or request. If the commission finds probable cause for the existence of any of the grounds for disciplinary action or retirement specified in section 24-722, it shall reprimand the Justice or judge or order a formal open hearing to be held before it concerning the reprimand, discipline, censure, suspension, removal, or retirement of such Justice or judge. Any reprimand shall be public and shall be announced in a fashion similar to that of a published opinion of the Supreme Court. A judge who receives official notice of a complaint or request pursuant to this section shall not be allowed to retire pursuant to the Judges Retirement Act until the matter is resolved by the commission or the Supreme Court, if the commission recommends action by the court. If a hearing is ordered, the commission shall advise the judge or Justice involved, in writing, of the specific charges which have been made and supported, substantiated, or revealed by the independent investigation of the commission. The judge or Justice shall be given reasonable time in which to formally answer such charges in writing and the matter shall then be set for formal open hearing, at which time the commission shall cause the testimony and the documentary evidence relating to the charges to be produced and recorded in such manner as the commission shall determine to be advisable, giving the judge or Justice involved and his or her attorney a full opportunity to question and cross-examine the witnesses and evidence so produced. The judge or Justice shall have an opportunity to produce at such hearing, testimony, evidence, and documents relating to the charges involved; thereafter any rebuttal evidence may be produced. In the alternative or in addition, the commission may request the Supreme Court to appoint one or more special masters who shall be judges of courts of record to hold a formal open hearing to take evidence in any such matter, and to report to the commission. Whenever any person shall refuse to testify or to produce books, papers, or other evidence when required to do so in any hearing held before the Commission on Judicial Qualifications or before a special master or masters appointed under the provisions of this section for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, he or she may nevertheless be compelled to testify or produce such evidence by order of the Commission on Judicial Qualifications or special master or masters on motion of counsel to the commission. No person who testifies or produces evidence in obedience to the command of the commission or special master or masters in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter, or thing concerning or arising from that as to which he or she may so testify or produce evidence, nor shall such testimony or evidence be used directly or indirectly in any proceedings against him or her, except that no person shall be exempt from prosecution and punishment for perjury or contempt committed in so testifying.

The requirement to testify or produce evidence shall not apply when such person proves the real and substantial danger of a prosecution against him or her in another jurisdiction based on the admissions to be made by him or her in this state. The commission or special master or masters shall have power to punish for contempt for any action specified in section 25-2121. If, after formal open hearing, or after considering the record and report of the masters, the commission finds that the charges are established by clear and convincing evidence, it shall recommend to the Supreme Court that the Justice or judge of the Supreme Court or other judge involved shall be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, removed, or retired as the case may be. All hearings before the commission and all proceedings before masters and before the Supreme Court shall be conducted in accordance with rules promulgated or to be promulgated by the Supreme Court.

Source: Laws 1967, c. 141, § 7, p. 432; Laws 1976, LB 640, § 1; Laws 1981, LB 475, § 6; Laws 2003, LB 320, § 3; Laws 2005, LB 754, § 2.

Cross References

Judges Retirement Act, see section 24-701.01.

24-722 Justice or judge; discipline or removal; grounds.

A Justice or judge of the Supreme Court or judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, or removed from office for (1) willful misconduct in office, (2) willful disregard of or failure to perform his or her duties, (3) habitual intemperance, (4) conviction of a crime involving moral turpitude, (5) disbarment as a member of the legal profession licensed to practice law in the State of Nebraska, or (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or he or she may be retired for physical or mental disability seriously interfering with the performance of his or her duties if such disability is determined to be permanent or reasonably likely to become permanent.

Source: Laws 1967, c. 141, § 8, p. 433; Laws 1981, LB 475, § 7.

Pursuant to subsection (6) of this section, conduct that clearly violates the Code of Judicial Conduct constitutes, at a minimum, a violation of this section, and a judge may be removed from office based on a violation of this section. In re Complaint Against Jones, 255 Neb. 1, 581 N.W.2d 876 (1998).

A clear violation of the Code of Judicial Conduct constitutes, at minimum, a violation of subsection (6) of this section. In re Complaint Against Staley, 241 Neb. 152, 486 N.W.2d 886 (1992).

Crucial to the finding that subsection (1) of this section has been violated is a showing of bad faith. Although a certain amount of ''honest'' error can be expected, blatant, flagrant, and repeated failures to perform judicial duties constitutes a violation of subsection (2) of this section. A clear violation of the Code of Judicial Conduct constitutes, at minimum, a violation of subsection (6) of this section. In re Complaint Against Kelly, 225 Neb. 583, 407 N.W.2d 182 (1987).

24-723 Supreme Court; record of proceedings; review; order; retirement, removal, or suspension; effect.

The Supreme Court shall review the record of the proceedings and in its discretion may permit the introduction of additional evidence. The Supreme Court shall make such determination as it finds just and proper, and may order the reprimand, discipline, censure, suspension without pay for a definite period of time not to exceed six months, removal, or retirement of such Justice or judge of the Supreme Court or other judge, or may wholly reject the recommendation. Upon an order for retirement, the Justice or judge of the Supreme

Court or other judge shall thereby be retired with the same rights and privileges as if he or she had retired pursuant to statute. Upon an order for removal, the Justice or judge of the Supreme Court or other judge shall be removed from office, his or her salary shall cease from the date of such order, and he or she shall be ineligible for judicial office. Upon an order for suspension, the Justice or judge of the Supreme Court or other judge shall draw no salary and shall perform no judicial functions during the period of suspension. Suspension shall not create a vacancy in the office of Justice or judge of the Supreme Court or other judge.

Source: Laws 1967, c. 141, § 9, p. 433; Laws 1981, LB 475, § 8.

24-723.01 Justice or judge; disqualification without loss of salary; Supreme Court order; when.

Upon order of the Supreme Court, a Justice or judge of the Supreme Court or other judge shall be disqualified from acting as a Justice or judge of the Supreme Court or other judge, without loss of salary, while there is pending (1) an indictment or information charging him or her in the United States with a crime punishable as a felony under Nebraska or federal law or (2) a recommendation to the Supreme Court by the Commission on Judicial Qualifications for his or her removal or retirement.

Source: Laws 1981, LB 475, § 9.

24-723.02 Justice or judge; removal or suspension by Supreme Court; grounds.

In addition to the procedure set forth in sections 24-721 to 24-723, on recommendation of the Commission on Judicial Qualifications or on its own motion, the Supreme Court (1) shall remove a Justice or judge of the Supreme Court or other judge from office when in any court in the United States such Justice or judge pleads guilty or no contest to a crime punishable as a felony under Nebraska or federal law, and (2) may suspend a Justice or judge of the Supreme Court or other judge from office without salary when in any court in the United States such Justice or judge is found guilty of a crime punishable as a felony under Nebraska or federal law or any other crime that involves moral turpitude. If his or her conviction is reversed, suspension shall terminate and he or she shall be paid his or her salary for the period of suspension. If he or she is suspended and his or her conviction becomes final the Supreme Court shall remove him or her from office.

Source: Laws 1981, LB 475, § 10.

24-724 Commission; executive secretary; personnel; employ; Attorney General; counsel; special counsel.

The Commission on Judicial Qualifications shall have the authority to employ an executive secretary, investigators, medical experts, and such other employees and experts as the commission in its discretion determines to be necessary to carry out its functions and purposes. The office of the Attorney General shall provide counsel to the commission but the commission may employ special counsel in any proceeding if determined by the commission to be advisable.

Source: Laws 1967, c. 141, § 10, p. 434.

24-725 Commission; budget; submit.

The Commission on Judicial Qualifications shall submit its budget estimate in the manner and form and at the times required by law of all departments, offices, and institutions of the state government requesting appropriations.

Source: Laws 1967, c. 141, § 11, p. 434.

24-726 Proceedings prior to formal hearing; confidential.

All papers filed with and proceedings before the Commission on Judicial Qualifications or masters appointed by the Supreme Court pursuant to section 24-721 prior to any formal open hearing shall be confidential. The filing of papers with and the testimony given before the commission or masters or the Supreme Court shall be deemed a privileged communication.

Source: Laws 1967, c. 141, § 12, p. 434; Laws 1981, LB 475, § 11.

24-727 Supreme Court; procedure; rule; adopt.

The Supreme Court shall by rule provide for procedure under sections 24-709, 24-712, and 24-715 to 24-728 before the Commission on Judicial Qualifications, the masters, and the Supreme Court.

Source: Laws 1967, c. 141, § 13, p. 434; Laws 1981, LB 475, § 13.

24-728 Judge or justice; own discipline, removal, or retirement; participation prohibited.

No Justice or judge of the Supreme Court or other judge shall participate, as a member of the Commission on Judicial Qualifications, or as a master, or as a member of the Supreme Court, in any proceedings involving his or her own reprimand, discipline, censure, suspension, removal, or retirement.

Source: Laws 1967, c. 141, § 14, p. 434; Laws 1981, LB 475, § 14.

(c) RETIRED JUDGES

24-729 Judges; retired; assignment; when; retired judge, defined.

The Supreme Court of Nebraska is empowered, with the consent of the retired judge, (1) to assign judges of the Supreme Court, Court of Appeals, and district court who are now retired or who may be retired hereafter to (a) sit in any court in the state to relieve congested dockets or to prevent the docket of such court from becoming congested or (b) sit for the judge of any court who may be incapacitated or absent for any reason whatsoever and (2) to assign any judge of the separate juvenile court, county court, or Nebraska Workers' Compensation Court who is now retired or who may be retired hereafter to (a) sit in any court having the same jurisdiction as one in which any such judge may have previously served to relieve congested dockets or to prevent the docket of any such court from becoming congested or (b) sit for the judge of any such court who may be incapacitated or absent for any reason. Any judge who has retired on account of disability may not be so assigned.

For purposes of sections 24-729 to 24-733, retired judge shall include a judge who, before, on, or after March 31, 1993, has retired upon the attainment of age fifty-five and has elected to defer the commencement of his or her retirement annuity to a later date.

Source: Laws 1974, LB 832, § 1; Laws 1976, LB 296, § 1; Laws 1979, LB 240, § 1; Laws 1991, LB 732, § 39; Laws 1993, LB 363, § 2.

The Nebraska Constitution clearly permits district court judges, retired or not, to act as associate Supreme Court judges when necessary for prompt submission and determination of causes. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

This provision, which authorized the Supreme Court to assign retired district judges to sit in any court to relieve or prevent congested dockets, or to sit for a judge of any court who is incapacitated or absent, is not limited by article V, section 2, of the Nebraska Constitution, which expressly authorizes district judges to sit in specific cases. ConAgra, Inc. v. Cargill, Inc., 223 Neb. 92, 388 N.W.2d 458 (1986).

24-730 Retired judge; temporary duty; compensation.

A retired judge holding court pursuant to sections 24-729 to 24-733 shall receive, in addition to his or her retirement benefits, for each day of temporary duty an amount established by the Supreme Court.

Source: Laws 1974, LB 832, § 2; Laws 1983, LB 268, § 1; Laws 2008, LB1014, § 5.
Operative date January 1, 2009.

24-731 Retired judge; temporary duty; expenses.

A retired judge on temporary duty shall be reimbursed for his or her expenses at the same rate as provided in sections 81-1174 to 81-1177 for state employees but shall submit a request for payment or reimbursement in the manner provided in section 24-733.

Source: Laws 1974, LB 832, § 3; Laws 1981, LB 204, § 37; Laws 1988, LB 864, § 3.

24-732 Retired judge; temporary duty; not contribute to retirement fund; retirement benefits not affected.

A retired judge on temporary duty shall not be required to contribute to the Nebraska Retirement Fund for Judges, and the retirement benefits of such a retired judge shall neither be increased nor decreased on account of his temporary duty.

Source: Laws 1974, LB 832, § 4.

24-733 Retired judge; temporary duty; request for compensation and expenses.

Within fifteen days following completion of a temporary duty assignment, the retired judge shall submit to the Chief Justice of the Supreme Court, on forms provided by the Chief Justice, a request for payment or reimbursement for services rendered and expenses incurred during such temporary duty assignment. Upon receipt of such request, the Chief Justice shall endorse on the request that the services were performed and expenses incurred pursuant to an assignment of the Supreme Court of Nebraska and file such request with the proper authority for payment.

Source: Laws 1974, LB 832, § 5; Laws 1979, LB 240, § 2; Laws 1984, LB 13, § 35; Laws 1988, LB 864, § 4.

(d) GENERAL POWERS

24-734 Judges; powers; enumerated.

(1) A judge of any court of this state, established under the laws of the State of Nebraska, at chambers anywhere within the state, shall, in any case in which that judge is authorized to act, have power to exercise the powers conferred upon a judge and upon a court, and specifically to:

(a) Upon the stipulation of the parties to an action, hear and determine any matter, including the trial of an equity case or case at law in which a jury has been waived;

(b) Hear and determine pretrial and posttrial matters in civil cases not involving testimony of witnesses by oral examination;

(c) With the consent of the defendant, receive pleas of guilty and pass sentences in criminal cases;

(d) With the consent of the defendant, hear and determine pretrial and posttrial matters in criminal cases;

(e) Hear and determine cases brought by petition in error or appeal not involving testimony of witnesses by oral examination;

(f) Hear and determine any matter in juvenile cases with the consent of the guardian ad litem or attorney for the minor, the other parties to the proceedings, and the attorneys for those parties, if any;

(g) Without notice, make any order and perform any act which may lawfully be made or performed by him or her ex parte in open court in any action or proceeding which is on file in any district of this state; and

(h) Render any judgment or make any order at any location even though the action is pending in a county other than the place in which the judge is physically present.

(2) A judgment or order made pursuant to this section shall be deemed effective when the judgment is entered in accordance with the provisions of subsection (3) of section 25-1301.

(3) The judge, in his or her discretion, may in any proceeding authorized by the provisions of this section not involving testimony of witnesses by oral examination, use telephonic methods to conduct such proceedings. The court may require the parties to make reimbursement for any telephone charges incurred.

(4) The enumeration of the powers in subsections (1), (2), and (3) of this section shall not be construed to deny the right of a party to trial by jury in the county in which the action was first filed if such right otherwise exists.

(5) Nothing in this section shall be construed to exempt proceedings under this section from the provisions of the Guidelines for Use by Nebraska Courts in Determining When and Under What Conditions a Hearing Before Such Court May Be Closed in Whole or in Part to the Public, adopted by the Supreme Court of the State of Nebraska September 8, 1980, and any amendments to those provisions.

Source: Laws 1879, § 39, p. 90; Laws 1913, c. 209, § 1, p. 635; R.S. 1913, § 1176; Laws 1921, c. 177, § 1, p. 676; C.S.1922, § 1099; C.S.1929, § 27-317; R.S.1943, § 24-317; Laws 1953, c. 64, § 1, p. 208; Laws 1965, c. 111, § 1, p. 435; R.S.1943, (1979), § 24-317; Laws 1983, LB 272, § 1; Laws 1999, LB 43, § 1.

1. Constitutionality
2. Jurisdiction at chambers
3. No jurisdiction at chambers
4. Notice
5. Miscellaneous

1. Constitutionality

Constitutionality of act is closed question. Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900, 65 N.W. 1059 (1896).

2. Jurisdiction at chambers

Conditions are specified under which district judges may exercise powers in chambers. Mueller v. Keeley, 163 Neb. 613, 80 N.W.2d 707 (1957).

District judge sitting in chambers may impose sentence on plea of guilty. Duggan v. Olson, 146 Neb. 248, 19 N.W.2d 353 (1945).

District judge at chambers on ten days' notice, or where hearing is had on stipulation of parties, has jurisdiction to enter an order directing the issuance of a writ of assistance on confirmation of sale of property. Erwin v. Brunke, 133 Neb. 745, 277 N.W. 48 (1938).

Judge may confirm sale of land to pay debts by administrator, in vacation, without notice. Brusha v. Phipps, 86 Neb. 822, 126 N.W. 856 (1910).

Judge in chambers has jurisdiction to issue mandamus when right is clear. Hopkins v. State ex rel. Omaha Cooperage Co., 64 Neb. 10, 89 N.W. 401 (1902); Wheeler v. State ex rel. Londrosh, 32 Neb. 472, 49 N.W. 442 (1891); Clark v. State ex rel. Dunham, 24 Neb. 263, 38 N.W. 752 (1888).

Judge in chambers may appoint receiver. Morris v. Linton, 62 Neb. 731, 87 N.W. 958 (1901).

Judge in chambers may receive plea of guilty in felony though prosecution is started in another county. McCarty v. Hopkins, 61 Neb. 550, 85 N.W. 540 (1901).

Order may be made in chambers to enforce habeas corpus by contempt proceedings. Nebraska Children's Home Society v. State, 57 Neb. 765, 78 N.W. 267 (1899).

Judge in chambers may confirm sale. Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900, 65 N.W. 1059 (1896); Lawson v. Gibson, 18 Neb. 137, 24 N.W. 447 (1885).

Judge has jurisdiction to dissolve injunction but not to dismiss action. Browne v. Edwards & McCullough Lumber Co., 44 Neb. 361, 62 N.W. 1070 (1895).

Order may be made in chambers to compel assignee for creditors to convey to successor. Strunk v. State ex rel. Lipp, 33 Neb. 322, 50 N.W. 14 (1891).

Writ of mandamus may be granted in chambers though writ will operate in another county. Linch v. State ex rel. Eckles, 30 Neb. 740, 47 N.W. 88 (1890).

Guardian may be licensed in chambers to sell real estate though estate is in another county in district. Dietrichs v. Lincoln & N. W. R. R. Co., 14 Neb. 355, 15 N.W. 728 (1883).

Judge may license guardian to sell real estate. Stewart v. Daggy, 13 Neb. 290, 13 N.W. 399 (1882).

District judge has jurisdiction to receive plea of guilty in chambers. Canada v. Jones, 170 F.2d 606 (8th Cir. 1948).

3. No jurisdiction at chambers

Judge has no jurisdiction in chambers to modify or correct decree of district court by nunc pro tunc except by consent of all parties affected. Nicholson v. Getchell, 113 Neb. 248, 202 N.W. 618 (1925).

Judge has no jurisdiction in chambers to enter decree of mortgage foreclosure. Shold v. Van Treeck, 82 Neb. 99, 117 N.W. 113 (1908).

Judge has no jurisdiction at chambers to hear and to decide a motion to vacate a judgment made after the term at which judgment was rendered. Kime v. Fenner, 54 Neb. 476, 74 N.W. 869 (1898); Fisk v. Thorp, 51 Neb. 1, 70 N.W. 498 (1897).

Judge cannot issue mandamus where facts are in issue. Mayer v. State ex rel. Wilkinson, 52 Neb. 764, 73 N.W. 214 (1897).

Judge has no jurisdiction, outside of county where action is pending, to issue order for examination of plaintiff. Ellsworth v. City of Fairbury, 41 Neb. 881, 60 N.W. 336 (1894).

Judge in chambers cannot enter decree in mechanics' lien foreclosure. Conover v. Wright, 3 Neb. Unof. 211, 91 N.W. 545 (1902).

4. Notice

Trial judge at chamber within his district was not required to give ten days' notice prior to modification of judgment concerning an estate. In re Estate of Weinberger, 207 Neb. 711, 300 N.W.2d 818 (1981).

Deficiency judgment entered in chambers without notice was void. In re Estates of Anderson, 149 Neb. 551, 31 N.W.2d 562 (1948).

Requirement of ten days' notice to exercise of jurisdiction in chambers may be waived. Smith v. Olson, 44 F.Supp. 456 (D. Neb. 1942).

5. Miscellaneous

This section should not be relied upon with respect to an on-the-record transaction which takes place in chambers while court is in session. State v. Carney, 220 Neb. 906, 374 N.W.2d 59 (1985).

Without a written stipulation of the parties, a district judge can hear application to modify an award of child support in county where the proceeding is pending, only. Hanson v. Hanson, 195 Neb. 836, 241 N.W. 2d 131 (1976).

Statute was not amended by act authorizing district judge to perform official acts at chambers in bank liquidation proceedings. Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98 (1933).

Judge at chambers possesses only such jurisdiction as is conferred by statute. Johnson v. Bouton, 56 Neb. 626, 77 N.W. 57 (1898).

Judges at chambers have no inherent authority but only such as the statutes give them. Browne v. Edwards & McCullough Lumber Co., 44 Neb. 361, 62 N.W. 1070 (1895).

Order entered in chambers confirming sale is a final order and appealable. State Bank of Nebraska v. Green, 8 Neb. 297, 1 N.W. 210 (1879).

(e) JUDICIAL RESOURCES COMMISSION

24-735 Repealed. Laws 1991, LB 181, § 5.

24-736 Repealed. Laws 1991, LB 181, § 5.

24-737 Repealed. Laws 1991, LB 181, § 5.

24-738 Repealed. Laws 1991, LB 181, § 5.

(f) DISQUALIFICATION

24-739 Disqualification of judge; grounds.

A judge shall be disqualified from acting as such in the county court, district court, Court of Appeals, or Supreme Court, except by mutual consent of the parties, which mutual consent is in writing and made part of the record, in the following situations:

(1) In any case in which (a) he or she is a party or interested, (b) he or she is related to either party by consanguinity or affinity within the fourth degree, (c) any attorney in any cause pending in the county court or district court is related to the judge in the degree of parent, child, sibling, or in-law or is the copartner of an attorney related to the judge in the degree of parent, child, or sibling, or (d) he or she has been attorney for either party in the action or proceeding; and

(2) When the judge was in copartnership, at the time of his or her election or appointment, in the law business with a practicing attorney in the district in which the judge was elected or appointed, the copartnership continued in the practice of law in the district and occupied the same office or rooms which were occupied by the copartnership at the time of his or her election or appointment, and the judge continues to occupy the same office or rooms with his or her ex-copartner, in all proceedings or litigation in which the ex-copartner is retained or interested, so long as the judge occupies the same office or room with his or her ex-copartner.

Source: Laws 1879, § 37, p. 89; Laws 1907, c. 42, § 1, p. 180; R.S.1913, § 1174; Laws 1915, c. 22, § 1, p. 83; C.S.1922, § 1097; Laws 1923, c. 107, § 1, p. 265; C.S.1929, § 27-315; Laws 1935, c. 56, § 1, p. 186; C.S.Supp.,1941, § 27-315; R.S.1943, § 24-315; Laws 1972, LB 1032, § 119; Laws 1979, LB 80, § 82; R.S.1943, (1985), § 24-315; Laws 1991, LB 732, § 40.

Cross References

For change of venue, see sections 25-410 to 25-412.

1. Disqualification because of interest
2. When not disqualified
3. Effect of disqualification
4. Effect of refusal to disqualify
5. Miscellaneous

1. Disqualification because of interest

The principle of disqualification because of a pecuniary interest is applicable to a justice of the peace. Conkling v. DeLany, 167 Neb. 4, 91 N.W.2d 250 (1958).

Interest of trial judge in outcome of an action must be of a pecuniary nature to disqualify him. Masonic Bldg. Corporation v. Carlsen, 128 Neb. 108, 258 N.W. 44 (1934); Uerling v. State, 125 Neb. 374, 250 N.W. 243 (1933).

Interest must be pecuniary to disqualify a judge. State v. Omaha Nat. Bank, 66 Neb. 857, 93 N.W. 319 (1903); Chicago, B. & Q. R. R. Co. v. Kellogg, 55 Neb. 754, 76 N.W. 466 (1898).

While the relationship of ''spouse'' is not specifically included in subsection (1)(c) of this section, the obvious intent of the statute is to ensure that parties are not forced to litigate before a partial judge or before a judge who appears to be partial, regardless of whether he or she actually is. When an attorney in a case (filing and signing the information used to charge the defendant) is the judge's spouse, the judge is disqualified and may not sit on the case, whether that judge had knowledge of the spouse's involvement or not. State v. Vidales, 6 Neb. App. 163, 571 N.W.2d 117 (1997).

2. When not disqualified

A showing that appellee's attorney had sent to the court a personal letter received by him from the appellee did not come within the provisions of this section and did not require the judge to disqualify himself. Deacon v. Deacon, 207 Neb. 193, 297 N.W.2d 757 (1980).

When a judge advises the parties during the trial, that he may have an interest in the case and neither party objects to his hearing the case, the parties have mutually consented, under the terms of this section. Farm Bureau Ins. Co. of Nebraska v. Wozny, 206 Neb. 639, 294 N.W.2d 363 (1980).

District judge not disqualified to hear case because he previously presided in a proceeding involving one of the parties or presided in a proceeding involving both parties. Liberty Finance Corp. v. Jones, 184 Neb. 529, 169 N.W.2d 289 (1969).

Judge is not disqualified because of marriage to a sister of a party to the action, which sister had died before action was commenced leaving children surviving her. Zimmerer v. Prudential Ins. Co., 150 Neb. 351, 34 N.W.2d 750 (1948).

It is not grounds for disqualification that trial judge had been county attorney between time of filing complaint and trial, when shown he took no action whatever in case. Barnhart v. State, 104 Neb. 529, 177 N.W. 820 (1920).

Judge is not disqualified because he was counsel in case presenting identical questions. Hamilton County v. Aurora Nat. Bank, 89 Neb. 256, 131 N.W. 221 (1911).

Disqualification does not result because of relationship to complaining witness. Ingraham v. State, 82 Neb. 553, 118 N.W. 320 (1908).

Judge is not disqualified because, while Governor, he directed Attorney General to sue. State v. Omaha Nat. Bank, 66 Neb. 857, 93 N.W. 319 (1903).

Judge may hear action to vacate his own judgment. Chicago, B. & Q. R. R. Co. v. Kellogg, 55 Neb. 754, 76 N.W. 466 (1898), affirming 54 Neb. 138, 74 N.W. 403 (1898).

3. Effect of disqualification

Confirmation of sale under judgment procured while attorney is void. Harrington v. Hayes County, 81 Neb. 231, 115 N.W. 773 (1908).

Where judge is disqualified, judgment may be attacked collaterally. Harrington v. Hayes County, 81 Neb. 231, 115 N.W. 773 (1908).

Judgment is void if judge is disqualified. Walters v. Wiley, 1 Neb. Unof. 235, 95 N.W. 486 (1901).

4. Effect of refusal to disqualify

In an equity suit, the trial judge's refusal to disqualify himself is immaterial on appeal since the reviewing court examines the record and tries the case de novo. Deacon v. Deacon, 207 Neb. 193, 297 N.W.2d 757 (1980).

In equity suit, denial by district court of disqualification is immaterial on appeal since case is tried de novo in reviewing court. Lippincott v. Lippincott, 144 Neb. 486, 13 N.W.2d 721 (1944).

5. Miscellaneous

The statutory grounds for the disqualification of a judge are set out in this section. State v. Rader, 223 Neb. 741, 393 N.W.2d 60 (1986).

Clear and convincing proof is necessary to overcome presumption of impartiality. State v. Smith, 77 Neb. 824, 110 N.W. 557 (1906).

Federal district court may stay proceedings pending determination of action subsequently instituted in district court of state between the same parties to determine validity of a foreclosure decree where sole matter to be determined was alleged nullity under this section disqualifying judge. Prudential Ins. Co. of America v. Zimmerer, 66 F.Supp. 492 (D. Neb. 1946).

24-740 Probate; disqualification of judge.

No judge of probate shall act in any case or matter where he is next of kin to the deceased, nor where he is legatee or devisee under a will, nor where he is named as executor or trustee in a will, or is one of the subscribing witnesses thereto, nor where he is related to any party in interest in any case before him, by consanguinity or affinity, or has such an interest therein as would exclude him from acting as a juror in such case or matter, nor where he has acted as attorney or counsel in any case or matter before him.

Source: G.S.1873, c. 14, § 3, p. 264; R.S.1913, § 1206; C.S.1922, § 1129; C.S.1929, § 27-503; R.S.1943, § 24-503; Laws 1972, LB 1032, § 52; R.S.1943, (1985), § 24-552.

(g) CANDIDACY FOR OFFICE

24-741 Judges; when ineligible as candidates for other offices.

No judge shall be eligible as a candidate for any office except a judicial office during the time he or she is serving as a judge.

Source: Laws 1911, c. 37, § 1, p. 204; R.S.1913, § 1139; C.S.1922, § 1068; C.S.1929, § 27-203; R.S.1943, § 24-203; R.S.1943, (1989), § 24-203; Laws 1991, LB 732, § 31.

ARTICLE 8

SELECTION AND RETENTION OF JUDGES

(a) JUDICIAL NOMINATING COMMISSIONS

Section

(a) JUDICIAL NOMINATING COMMISSIONS

24-801 Judicial nominating commissions; subject to sections.

All judicial nominating commissions under Article V of the Constitution of Nebraska shall be subject to the provisions of sections 24-801 to 24-812.

Source: Laws 1963, c. 124, § 1, p. 472.

Sections 24-801 to 24-812.01 constitute a special, independent legislative act, complete in itself, which is intended to cover the subject of the selection of nominees by judicial nominating commissions. Marks v. Judicial Nominating Comm., 236 Neb. 429, 461 N.W.2d 551 (1990).

24-801.01 Judicial nominating commission; members; oath.

All voting members of each nominating commission, before they enter upon their official duties, shall take the following oath or affirmation: ''I do solemnly

swear (or affirm) that I will faithfully discharge my duties as a member of the Judicial Nominating Commission for the ..... Court, that I will neither accept nor receive, directly or indirectly, any money or other valuable thing or any promise of office or assistance from any corporation, company, or person, for any vote or influence I may give or withhold in connection with the nomination of any person to a judicial vacancy; that I will, as necessary or expedient, encourage qualified candidates to accept judicial office or nomination for such judicial office, and that I will vote to nominate to judicial vacancies only candidates I believe are sufficiently qualified for judicial office''. Such oath shall be administered by the Supreme Court Judge serving as chairperson of the judicial nominating commission to which the oath-taker is appointed.

Source: Laws 1980, LB 730, § 2.

24-802 Judicial nominating commission; residence requirements.

Except for the judge of the Supreme Court who is required to be a member of a judicial nominating commission, each member or alternate member of a commission shall be a resident of the judicial district or area of the state served by such commission except as provided in subsection (2) of section 24-806. Except for the Chief Justice, the member of the Supreme Court designated to serve on a particular nominating commission shall not be a member who was originally selected from the district served by such nominating commission.

Source: Laws 1963, c. 124, § 2, p. 472; Laws 1973, LB 110, § 1; Laws 1991, LB 251, § 1; Laws 1995, LB 303, § 1.

24-803 Judicial nominating commission; members; term; appointments by Governor; elections by lawyers.

(1) Except as provided in subsection (3) of this section, as the term of a member of a judicial nominating commission initially appointed or selected expires, the term of office of each successor member shall be for a period of four years. The Governor shall appoint all successor members of each nominating commission who are judges of the Supreme Court and citizen members or alternate citizen members. The Governor shall appoint two alternate citizen members, not of the same political party, to each nominating commission. The term of office of an alternate citizen member of a commission shall be for a period of four years except that the initial appointments shall terminate on December 31, 1999. The lawyers residing in the judicial district or area of the state served by a judicial nominating commission shall select all successor and alternate lawyer members of such commission in the manner prescribed in section 24-806. The term of office of an alternate lawyer member of a commission shall be for a period of four years. No member of any nominating commission, including the Supreme Court member of any such commission, shall serve more than a total of eight consecutive years as a member of the commission, and if such member has served for more than six years as a member of the commission, he or she shall not be eligible for reelection or reappointment. Alternate lawyer and citizen members shall be selected to fill vacancies in their order of election or appointment.

(2) For purposes of this section and Article V, section 21, of the Constitution of Nebraska, a member of a judicial nominating commission shall be deemed to have served on such commission if he or she was a member of the commission

at the time of the publication of the notice required by subsection (1) of section 24-810.

(3) On and after January 1, 1997, members of the judicial nominating commissions for the office of judge of the district court shall also serve as members of the judicial nominating commissions for the office of judge of the county court for counties located within the district court judicial districts served, except that members of the judicial nominating commissions for district judge and county judge in districts 1, 3, 4, and 10 shall be appointed or selected separately to serve on such commissions.

Source: Laws 1963, c. 124, § 3, p. 472; Laws 1973, LB 110, § 2; Laws 1991, LB 251, § 2; Laws 1992, LB 1059, § 6; Laws 1995, LB 189, § 3; Laws 1995, LB 303, § 2.

24-804 Judicial nominating commissions; judges of Supreme Court; service as members.

Judges of the Supreme Court shall serve on as many judicial nominating commissions as may be necessary. Each judge of the Supreme Court shall be a member of at least three nominating commissions. The judge of the Supreme Court who serves as a member of a Supreme Court judicial nominating commission relating to a Supreme Court judicial district shall be a nonresident of that district. The Judge of the Supreme Court serving on a nominating commission for Chief Justice of the Supreme Court shall be a judge of the Supreme Court other than the Chief Justice.

Source: Laws 1963, c. 124, § 4, p. 473.

24-805 Judicial nominating commissions; members serve on no more than one commission; exceptions.

Except for the Supreme Court members of judicial nominating commissions, no individual lawyer or citizen member of any judicial nominating commission shall serve on more than one judicial nominating commission at the same time; *Provided*, judicial nominating commissioners for the office of district judge may also serve as judicial nominating commissioners for county judge.

Source: Laws 1963, c. 124, § 5, p. 473; Laws 1974, LB 785, § 5.

24-806 Judicial nominating commission; lawyer members; qualifications; nominations; election.

(1) Lawyer members and alternate lawyer members of any judicial nominating commission shall be members of the bar of the State of Nebraska and shall reside in the judicial district or area of the state served by the commission except as provided in subsection (2) of this section. Not more than two lawyer members of each commission shall be registered members of the same political party or category, and not more than two alternate lawyer members shall be registered members of the same political party or category. Nominations for lawyer members of each commission shall be solicited in writing by the Clerk of the Supreme Court from all the lawyers of the district or area served on or before September 1 of each even-numbered year. Nominations of lawyer members shall be made in writing and filed in the office of the Clerk of the Supreme Court on or before October 1 of each even-numbered year. Each nomination of a lawyer member shall be accompanied by a written consent of the nominee to serve as a member of the commission if elected. The nomina-

tions shall be solicited and distributed on the ballot by the Clerk of the Supreme Court from the legally recognized political parties and in such a manner as will permit the final selection to be made within the required political party.

(2) If solicited nominations are insufficient to provide candidates from the permissible political parties for each vacancy, the Executive Council of the Nebraska State Bar Association, within ten days after the last day for filing nominations, shall nominate additional candidates for the position so that there shall be a qualified candidate for each position. Such candidates need not reside in the judicial district or area served by such judicial nominating commission.

(3) The Clerk of the Supreme Court shall mail a ballot with the name of each nominee to all members of the bar of Nebraska residing in the judicial district or area designating a date at least ten days and not more than fourteen days after the date of such mailing by the Clerk of the Supreme Court when the ballots will be opened and counted. The ballots shall be counted by a board consisting of the Clerk of the Supreme Court, the Secretary of State, and the Attorney General or by alternates designated by any of them to serve in his or her place. The Clerk of the Supreme Court shall insure that the election is so conducted as to maintain the secrecy of the ballot and the validity of the results. The candidate of the required political party receiving the highest number of votes shall be considered as having been elected to the commission. The candidate of the required political party receiving the next highest number of votes shall be considered as having been elected an alternate lawyer member of the commission and shall serve as a lawyer member of the commission in the event of a lawyer member vacancy of the same political party or category on the commission created either by resignation or disqualification. In the case of a resignation, an alternate lawyer member shall continue to serve as a member of the commission until the term of office of his or her predecessor expires.

(4) In any election when more than one lawyer member of a judicial nominating commission is to be elected, the nominees shall be submitted without designation of the term. Each voter shall be instructed to vote for as many nominees as there are vacancies to be filled. The candidate receiving the highest number of votes shall be considered as having been elected for the longest term. The candidate receiving the next highest number of votes shall be deemed to have been elected for next to the longest term, and if an alternate lawyer member or members are to be elected, the candidate or candidates receiving the third and fourth highest number of votes shall be deemed elected as the alternate lawyer member or members. In case of ties the determination shall be made by lot by the counting board.

Source: Laws 1963, c. 124, § 6, p. 473; Laws 1973, LB 110, § 3; Laws 1975, LB 57, § 1; Laws 1991, LB 251, § 3; Laws 1995, LB 303, § 3; Laws 1998, LB 1158, § 1.

24-807 Judicial nominating commission; lawyer members; certificate of selection.

Upon the selection of any lawyer member or alternate lawyer member of any judicial nominating commission, the Clerk of the Supreme Court shall promptly certify his or her selection to the Governor and the Secretary of State.

Source: Laws 1963, c. 124, § 7, p. 475; Laws 1973, LB 110, § 4; Laws 1991, LB 251, § 4; Laws 1995, LB 303, § 4.

24-808 Judicial nominating commissions; vacancies; filled, how.

Each year, on or before September 1, the Clerk of the Supreme Court shall determine what, if any, vacancies exist on any judicial nominating commission and shall report the status of each judicial nominating commission to the Governor. Vacancies relating to any members or alternate citizen members of such commissions appointed by the Governor shall be filled promptly by appointment by the Governor for the unexpired term. Vacancies of lawyer members or alternate lawyer members of the judicial nominating commission shall be filled promptly by a special election for the unexpired term, conducted by the Clerk of the Supreme Court in the manner applicable to the regular election of lawyer members of the commissions.

Source: Laws 1963, c. 124, § 8, p. 475; Laws 1995, LB 303, § 5.

24-809 Judicial nominating commission; chairperson; manner of voting; vacancies; procedure.

The judge of the Supreme Court on each judicial nominating commission shall be the chairperson of the commission and shall preside at all of its meetings. He or she shall not be entitled to vote. In selecting or rejecting judicial nominees, the members of the commission shall vote by oral roll call vote. When it is determined that a judicial vacancy exists in a particular district, the chairperson of the commission shall determine whether there will be eight qualified members of the appropriate judicial nominating commission, including alternate members. If it is determined that there will not be eight members present and capable of voting at the time the commission meets to vote, the chairperson of the commission shall inform the Governor of the number of citizen members which need to be appointed and shall inform the Executive Director of the Nebraska State Bar Association of the number of lawyer members which need to be elected. The Governor shall promptly make such number of citizen appointments as are necessary. The Executive Council of the Nebraska State Bar Association shall nominate at least one lawyer candidate for each vacancy on the nominating commission which needs to be filled. If the Executive Council is unable, with reasonable effort, to obtain a sufficient number of candidates for each vacancy, it may nominate candidates who do not reside in the judicial district or area served by such nominating commission. The nominations shall be sent to the Clerk of the Supreme Court, and the lawyer vacancies shall be filled by election as provided in section 24-806. There shall be eight qualified commission members present and capable of voting at the time the vote is taken. In the event that a nominating commission public hearing is postponed due to the lack of a full complement of commission members entitled to vote, the time limits specified in subsection (4) of section 24-810 shall be extended for an additional thirty days for each such postponement. The chairperson of the commission shall cause appropriate notice of the time and place of the newly scheduled judicial nominating commission public hearing to be published as provided in subsection (1) of section 24-810. The postponement of a commission hearing shall not extend the initial application filing deadline of twenty-one days prior to the initial public hearing. Each candidate shall receive five votes from the voting members of the nominating commission to have his or her name submitted to the Governor.

Source: Laws 1963, c. 124, § 9, p. 475; Laws 1973, LB 110, § 5; Laws 1991, LB 251, § 5; Laws 1995, LB 303, § 6; Laws 2007, LB290, § 1.

24-809.01 Transferred to section 24-1201.

24-809.02 Transferred to section 24-1202.

24-809.03 Transferred to section 24-1203.

24-809.04 Judicial vacancy; date of final determination.

For purposes of sections 24-809.05 and 24-810, the date of a final determination of a district, county, or separate juvenile court judicial vacancy shall be:

(1) The date a judicial vacancy is determined by the Judicial Resources Commission pursuant to section 24-1204 or 24-1206; or

(2) If a determination is made by the commission that a move of a judgeship from one district to another or between county and district court, a new judgeship, or a change in number of judicial districts or boundaries is appropriate pursuant to section 24-1204 or 24-1205, the date the Governor approves legislation or the Legislature overrides a veto of legislation creating or moving a judicial vacancy.

Source: Laws 1995, LB 189, § 9.

24-809.05 Judgeship; primary office; relocation of judge authorized; when.

If a final determination of a district or county court judicial vacancy is made, the Supreme Court shall, after consultation with a representative sampling of the lawyers of the judicial district, determine and announce the county where the primary office for the judgeship shall be located. In designating a primary office, the Supreme Court shall locate judges so as to provide maximum service to all areas of the judicial district. If more than one county is acceptable as a primary office, the Supreme Court may so state and may leave the final choice of the location of the primary office to the judge. The Supreme Court may, after consultation with a representative sampling of the lawyers of the judicial district, relocate a district or county court judge within his or her judicial district. The Supreme Court may pay reasonable moving expenses of a judge when so relocated. The principal criterion used by the Supreme Court when designating a primary office and in relocating judges within a judicial district shall be the judicial workload statistics compiled by the State Court Administrator pursuant to section 24-1007.

Source: Laws 1995, LB 189, § 10; Laws 2004, LB 1207, § 2.

24-810 Judicial vacancy; judicial nominating commission; meeting; notice; hearing; application; investigations; submission of names.

(1) When a final determination of a district, county, or separate juvenile court judicial vacancy has been made pursuant to section 24-809.04 or in the event of a judicial vacancy in any other court, the Clerk of the Supreme Court shall contact the chairperson of the judicial nominating commission relating to such vacancy and shall ascertain from him or her a time and place for the first meeting of such judicial nominating commission, at which time a public hearing will be held. The first public hearing shall be held within sixty days after final determination of the vacancy occurs. The chairperson shall notify each commission member in writing of the time and place of the meeting and shall also cause appropriate notice to be published by various news media of the time and place of the public hearing of the judicial nominating commission and of the interest of the commission in receiving information relating to

qualified candidates for the judicial vacancy. Any lawyer meeting the statutory requirements to serve as a judge who is interested in being nominated and appointed to such judgeship shall signify his or her interest by filing the appropriate application with the proper entity at least twenty-one days prior to the public hearing. At least ten days prior to the public hearing, the chairperson shall release to the public the names of all lawyers who have applied for such judgeship. Any member of the public shall be entitled to attend the public hearing to express, either orally or in writing, his or her views concerning candidates for the judicial vacancy.

(2) After the public hearing, the judicial nominating commission shall hold such additional private or confidential meetings as it determines to be necessary. Additional information may be submitted in writing to the commission at any time prior to its selection of qualified candidates to fill the vacancy. The commission shall make such independent investigation and inquiry as it considers necessary or expedient to determine the qualifications of candidates for the judicial vacancy and shall take such action as it deems necessary or expedient to encourage qualified candidates to accept judicial office or nomination for judicial office.

(3) The judicial nominating commission may, before or after the hearing provided for in subsection (1) of this section, institute a search for additional candidates. If additional candidates are obtained, the commission shall hold further public hearings in the same manner as provided in such subsection.

(4) The names of candidates shall be submitted to the Governor within ninety days after the date a final determination has been made of a district, county, or separate juvenile court judicial vacancy or, in the event of a judicial vacancy in any other court, after a judicial vacancy occurred if one public hearing is held and within one hundred twenty days if more than one public hearing is held.

Source: Laws 1963, c. 124, § 10, p. 475; Laws 1973, LB 110, § 6; Laws 1980, LB 730, § 1; Laws 1986, LB 516, § 9; Laws 1990, LB 822, § 16; Laws 1991, LB 251, § 6; Laws 1991, LB 181, § 3; Laws 1992, LB 1059, § 10; Laws 1995, LB 189, § 11.

24-810.01 Judicial nominating commission; registration as independent voters; removal from district; change in party registration; effect.

(1) For purposes of sections 24-801 to 24-812.01, members and prospective members of judicial nominating commissions who are registered as independent voters shall be considered to be members of the same political party.

(2) Removal from the State of Nebraska or a change in party registration shall automatically terminate the tenure of any member of a judicial nominating commission.

Source: Laws 1973, LB 110, § 7; Laws 1991, LB 251, § 7.

24-811 Judicial nominating commissions; unlawful to attempt to influence; violations; penalty.

It shall be unlawful and a breach of ethics for any judge, public officeholder, lawyer or any other person or organization to attempt to influence any judicial nominating commission in any manner and on any basis except by presenting facts and opinions relevant to the judicial qualifications of the proposed nominees to an individual member of the commission or to the commission

acting as a body, at or prior to the time of the public hearing. Violation of this section shall be considered as contempt of the Supreme Court of the State of Nebraska and shall be punishable as for contempt or by appropriate discipline with respect to any member of the bar involved in any such unlawful or unethical conduct.

Source: Laws 1963, c. 124, § 11, p. 476; Laws 1973, LB 110, § 8.

24-811.01 Judicial nominating commission; nominations; number; considerations.

Any judicial nominating commission which has for its consideration three or more candidates for a judicial vacancy shall nominate at least three candidates for consideration by the Governor if the commission, in its discretion, finds them to be sufficiently qualified. In determining whether a candidate is sufficiently qualified to be nominated for a judicial vacancy, a judicial nominating commission shall consider the candidate's knowledge of the law, experience in the legal system, intellect, capacity for fairness, probity, temperament, industry, and such other factors relating to judicial quality as the Supreme Court may by rule promulgate.

Source: Laws 1973, LB 110, § 9; Laws 1980, LB 730, § 3.

24-811.02 Judicial nominating commission; send report to State Court Administrator; contents.

Within thirty days after the list of nominees for a judicial vacancy is presented to the Governor by a judicial nominating commission, the chairperson of the commission shall prepare and send to the State Court Administrator a report containing the following:

(1) Names of all candidates for the judicial vacancy;

(2) Copies of all applications submitted by candidates; and

(3) The names of the candidates nominated for the judicial vacancy.

Such report shall be available to the public and shall be preserved by the State Court Administrator for ten years.

Source: Laws 1980, LB 730, § 6.

24-812 Judicial nominating commissions; members; communications; confidential.

All communications between members of judicial nominating commissions and between any member of the commission and any prospective candidate for judicial office and all other communications with members of the commission except those at the public hearing, shall be confidential. Additionally, all such communications including those at the public hearing shall be privileged from use in any legal action, except one charging misconduct in office of a member of a judicial nominating commission or one involving contempt of court, or misconduct of an attorney, based on such communication.

Source: Laws 1963, c. 124, § 12, p. 476; Laws 1980, LB 730, § 4.

24-812.01 Judicial nominations; Supreme Court; promulgate rules.

The Supreme Court shall promulgate rules regarding procedures to be followed in the nominating procedure, including the type of application to be

filed, the type of presentation an applicant may make at the public hearing, factors, if any, other than those specifically described in section 24-811.01 relating to judicial quality for commission members to consider in determining whether a candidate is sufficiently qualified to be nominated, and such other rules as it feels will induce qualified lawyers to seek judicial office, and which will otherwise promote the true spirit of the judicial selection process now used in this state.

Source: Laws 1973, LB 110, § 10; Laws 1980, LB 730, § 5.

(b) CONTINUANCE IN OFFICE

24-813 Judicial officeholders; subject to sections.

All judicial officeholders who are subject to the terms and provisions of Article V, section 21, of the Constitution of Nebraska, as provided by the Constitution of Nebraska or by law, shall be subject to the terms and provisions of sections 24-813 to 24-818.

Source: Laws 1963, c. 125, § 1, p. 477.

24-814 Judicial officeholder; continuance in office; request in writing to be retained.

Any judicial officeholder, subject to the terms of sections 24-813 to 24-818, who desires to continue in office for an additional term, shall indicate his desire in this respect in writing filed with the Secretary of State, on or before August 1 immediately preceding the expiration of his term in office, and shall request in writing that the Secretary of State submit to the electorate of the appropriate district or area, the question of his right to be retained in office for an additional term.

Source: Laws 1963, c. 125, § 2, p. 477.

24-815 Judicial officeholder; request to be retained; Secretary of State; submit to electorate; form of ballot.

Upon receipt of such information and request within the time provided in section 24-814, the Secretary of State shall cause the question of said judicial officeholder's right to continue in office for an additional term to be submitted to the appropriate electorate at the next general election, on the nonpolitical ballot. Said question shall be submitted in substance as follows: ''Shall Judge ..... be retained in office? .... Yes .... No''.

Source: Laws 1963, c. 125, § 3, p. 478.

24-816 Judicial officeholder; retention election; how conducted.

Said election shall be conducted in the manner and form provided for elections generally with respect to the nonpolitical ballot and the results of said election shall be certified in like manner.

Source: Laws 1963, c. 125, § 4, p. 478.

24-817 Judicial officeholder; retention election; determination by vote of electorate.

If the majority of the electors voting with regard to said question at said election vote in the affirmative, said judge shall be retained in office for an

additional term. If the majority of the voters voting on said question at said election vote in the negative, a vacancy in said office shall occur at the end of the term of office of said judge.

Source: Laws 1963, c. 125, § 5, p. 478.

24-818 Judicial officeholder; request to be retained; failure to file; vacancy.

Unless the judicial officeholder, who is subject to sections 24-813 to 24-818, files with the Secretary of State within the time and in the manner provided in section 24-814 an indication of his desire to continue in office for an additional term, a vacancy in said office shall occur at the end of the term of office of said judge.

Source: Laws 1963, c. 125, § 6, p. 478.

(c) TERM OF OFFICE

24-819 Judges; full term; commencement.

The full term of office of each judge shall commence: (1) On the first Thursday after the first Tuesday in January next succeeding the election referred to in sections 24-813 to 24-818, or (2) if appointed pursuant to Article V of the Constitution of the State of Nebraska, on the date of his appointment, as the case may be.

Source: Laws 1969, c. 178, § 8, p. 768.

Action of Legislature in adopting this section simply declaratory of Constitution. Garrotto v. McManus, 185 Neb. 644, 177 N.W.2d 570 (1970).

(d) COUNTY JUDGES—RETENTION IN OFFICE

24-820 County judge; selection; retained in office; vacancy, how filled.

County judges shall be selected and retained in office in accordance with the provisions of Article V, section 21, of the Constitution of Nebraska. Each judge shall (1) be selected for a term of six years, and (2) hold office until his successor is selected and qualified. Any vacancy in the office of county judge shall be filled in the same manner as vacancies are filled under the provisions of Article V, section 21, of the Constitution.

Source: Laws 1974, LB 785, § 2.

24-821 Repealed. Laws 1991, LB 732, § 160.

24-822 Repealed. Laws 1991, LB 732, § 160.

ARTICLE 9
VENUE

Section
24-901. Transferred to section 25-412.01.
24-902. Transferred to section 25-412.02.
24-903. Transferred to section 25-412.03.
24-904. Transferred to section 25-412.04.

24-901 Transferred to section 25-412.01.

24-902 Transferred to section 25-412.02.

24-903 Transferred to section 25-412.03.

24-904 Transferred to section 25-412.04.

ARTICLE 10
COURTS, GENERAL PROVISIONS

Section

24-1001 Proceedings to be public.

All judicial proceedings of all courts established in this state must be open to the attendance of the public unless otherwise specially provided by statute.

Source: Laws 1879, § 35, p. 89; R.S.1913, § 1179; C.S.1922, § 1093; C.S.1929, § 27-311; R.S.1943, § 24-311; Laws 1969, c. 175, § 1, p. 756; R.S.1943, (1985), § 24-311.

Cross References

Trial to establish paternity of child is not open to general public, see section 43-1412.

Pretrial proceedings in criminal cases may be closed to the public, including representatives of the news media, unless the presiding officer determines there is no substantial likelihood of interference with defendant's right to a fair trial. State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975).

24-1002 Oaths and affirmations; power to administer.

All courts have power to administer oaths connected with any matter pending before them, either by any judge, justice, or clerk thereof or by any other person appointed for that purpose by them. Oaths and affirmations may be administered, in all cases whatsoever, by judges of the Supreme Court, judges of the Court of Appeals, judges of the district court, judges of the county court, the Clerk of the Supreme Court, clerks of the district courts, and clerks of the county courts, within their respective jurisdictions, and by clerk magistrates within their respective counties.

Source: Laws 1879, § 36, p. 89; R.S.1913, § 1173; C.S.1922, § 1096; C.S.1929, § 27-314; R.S.1943, (1985), § 24-314; Laws 1990, LB 822, § 17; Laws 1991, LB 732, § 41.

Information may be sworn to before clerk. Sharp v. State, 61 Neb. 187, 85 N.W. 38 (1901).

24-1003 Evidence; recording and preservation; court reporters; appointment; uniform salary schedules; payment.

The Supreme Court shall provide by rule for the recording and preservation of evidence in all cases in the district and separate juvenile courts and for the preparation of transcripts and bills of exceptions. Court reporters and other persons employed to perform the duties required by such rules shall be

appointed by the judge under whose direction they work. The Supreme Court shall prescribe uniform salary schedules for such employees, based on their experience and training and the methods used by them in recording and preserving evidence and preparing transcripts and bills of exceptions. Salaries and actual and necessary expenses of such employees shall be paid by the State of Nebraska from funds appropriated to the Supreme Court. Such employees shall be reimbursed for their expenses as provided in sections 81-1174 to 81-1177 for state employees.

Source: Laws 1974, LB 647, § 1; Laws 1981, LB 204, § 34; R.S.1943, (1985), § 24-342.02.

24-1004 Records and exhibits; preservation; disposition.

The Supreme Court shall provide by rule for the preservation of all records and of all exhibits offered or received in evidence in the trial of any action. When the records of the district court do not show any unfinished matter pending in the action, a judge of the district court if satisfied they are no longer valuable for any purpose may, upon such notice as the judge may direct, order the destruction, return, or other disposition of such exhibits as he deems appropriate when approval is given by the State Records Administrator pursuant to sections 84-1201 to 84-1220.

Source: Laws 1957, c. 75, § 1, p. 311; Laws 1969, c. 105, § 4, p. 480; Laws 1974, LB 647, § 3; R.S.1943, (1985), § 24-342.01.

24-1005 Records; microfilm; admissible in evidence; destruction of original record.

The clerk of any district court or of any other court of record may microfilm any court record. The original record may be destroyed only with the approval of the State Records Administrator pursuant to sections 84-1201 to 84-1220. The reproduction of the microfilm shall be admissible as evidence in any court of record in the State of Nebraska.

Source: Laws 1967, c. 134, § 1, p. 419; Laws 1969, c. 105, § 2, p. 480; Laws 1971, LB 128, § 2; R.S.1943, (1985), § 24-337.02.

24-1006 Clerk; judicial statistics; report.

The clerk of each court shall report judicial statistics to the Supreme Court at such times and in such manner as prescribed by the Supreme Court.

Source: Laws 1961, c. 103, § 1, p. 335; R.S.1943, (1989), § 24-337.01; Laws 1991, LB 732, § 35.

24-1007 State Court Administrator; compile statistics; how.

The State Court Administrator shall compile uniform and accurate statistics which will assist in the evaluation of judicial workloads. The judicial workload statistics shall be based on caseload numbers weighted by category of case. The judicial workload statistics shall be compiled annually for each district, county, and separate juvenile court judicial district in the state.

Source: Laws 1995, LB 189, § 5.

ARTICLE 11
COURT OF APPEALS

24-1101 Court of Appeals; created; panels; judges; appointment; salary; other laws applicable.

(1) There is hereby created the Court of Appeals which shall consist of six judges. The court shall sit in panels of three judges to conduct the business of the court. The decision of a majority of the judges of the panel to which a case is submitted shall constitute the decision of the court for that case. The membership of the panels shall be assigned and regularly rotated by the Chief Judge of the Court of Appeals in such a manner as to provide each judge the opportunity to serve a proportionate amount of time with every other judge on the court.

(2) One judge of the Court of Appeals shall be appointed by the Governor from each Supreme Court judicial district. For purposes of this section, a judge's residence on the effective date of appointment shall be considered the judge's residence while he or she serves on the Court of Appeals. Prior to September 13, 1997, the Supreme Court shall each year select one judge of the Court of Appeals as Chief Judge. Upon the expiration of the term of the Chief Judge in office on September 13, 1997, and each two years thereafter, the judges of the Court of Appeals shall by majority vote nominate one of their number to be Chief Judge for the ensuing two years, which judge shall, upon the ratification of the selection by the Supreme Court, serve as Chief Judge for that two-year period.

(3) Judges of the Court of Appeals shall be paid an amount equal to ninety-five percent of the salary set for the Chief Justice and judges of the Supreme Court.

(4) Judges of the Court of Appeals shall be subject to the same provisions relating to selection, filling of a vacancy, term of office, discipline, removal from office, and retirement as are all other judges covered by Article V of the Constitution of Nebraska.

Source: Laws 1991, LB 732, § 1; Laws 1997, LB 246, § 1.

24-1102 Judge; eligibility.

No person shall be eligible for the office of judge of the Court of Appeals unless he or she (1) is at the time of consideration for appointment a resident of Nebraska, (2) is at least thirty years of age, (3) is a citizen of the United States, (4) has been engaged in the practice of law in the State of Nebraska for at least

five years which may include prior service as a judge, and (5) is currently admitted to practice before the Nebraska Supreme Court.

Source: Laws 1991, LB 732, § 2.

24-1103 Active or retired judges; assignment; expenses.

(1) The Chief Justice of the Supreme Court may call active judges of the district court to serve on the Court of Appeals in case of incapacity or absence for any reason whatsoever or temporary vacancy in the office of a judge of the Court of Appeals. Any active judge designated to serve on the Court of Appeals shall be reimbursed for his or her actual and necessary expenses as provided in sections 81-1174 to 81-1177.

(2) The number of retired judges assigned to serve pursuant to subdivision (1) of section 24-729 may not at any one time exceed three, and no panel of the Court of Appeals may contain a majority of retired judges so assigned. Payments to a retired judge shall be made in the manner prescribed in sections 24-730 to 24-733.

Source: Laws 1991, LB 732, § 3.

24-1104 Decisions; form; when published.

(1) Decisions of the Court of Appeals shall be in the form of an order which may be accompanied by a memorandum opinion. The memorandum opinion shall not be published unless publication is ordered by the Court of Appeals. All memorandum opinions shall be filed with the Clerk of the Supreme Court, shall be public records, and shall be made available to the public in such manner as may be determined by the Court of Appeals.

(2) In determining whether to publish a memorandum opinion, the Court of Appeals may take into consideration one or more of the following factors:

(a) Whether the decision enunciates a new rule of law;

(b) Whether the decision applies an established rule of law to a factual situation significantly different from that in published opinions;

(c) Whether the decision resolves or identifies a conflict between prior Court of Appeals decisions;

(d) Whether the decision will contribute to legal literature by collecting case law or reciting legislative history; and

(e) Whether the decision involves a case of substantial and continuing public interest.

Source: Laws 1991, LB 732, § 4; Laws 1992, LB 360, § 3; Laws 1993, LB 462, § 1; Laws 1996, LB 1296, § 3; Laws 1997, LB 68, § 1.

This section envisions that decisions of the Court of Appeals be published only in limited circumstances. Metro Renovation v. State, 249 Neb. 337, 543 N.W.2d 715 (1996).

An opinion of a single judge of the Court of Appeals is not an opinion of the Court of Appeals; thus, this section does not provide the Supreme Court with jurisdiction to order its publication, nor does authority exist for publication absent such an order. State v. Chambers, 242 Neb. 124, 493 N.W.2d 328 (1992).

24-1105 Cases pending on September 6, 1991; assignment to Court of Appeals.

Any case on appeal before the Supreme Court on September 6, 1991, except cases in which a sentence of death or life imprisonment has been imposed and cases involving the constitutionality of a statute, may be assigned to the Court of Appeals by the Supreme Court.

Source: Laws 1991, LB 732, § 5.

24-1106 Jurisdiction; direct review by Supreme Court; when; removal of case.

(1) In cases which were appealable to the Supreme Court before September 6, 1991, the appeal, if taken, shall be to the Court of Appeals except in capital cases, cases in which life imprisonment has been imposed, and cases involving the constitutionality of a statute.

(2) Any party to a case appealed to the Court of Appeals may file a petition in the Supreme Court to bypass the review by the Court of Appeals and for direct review by the Supreme Court. The procedure and time for filing the petition shall be as provided by rules of the Supreme Court. In deciding whether to grant the petition, the Supreme Court may consider one or more of the following factors:

(a) Whether the case involves a question of first impression or presents a novel legal question;

(b) Whether the case involves a question of state or federal constitutional interpretation;

(c) Whether the case raises a question of law regarding the validity of a statute;

(d) Whether the case involves issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court; and

(e) Whether the case is one of significant public interest.

When a petition for direct review is granted, the case shall be docketed for hearing before the Supreme Court.

(3) The Supreme Court shall by rule provide for the removal of a case from the Court of Appeals to the Supreme Court for decision by the Supreme Court at any time before a final decision has been made on the case by the Court of Appeals. The removal may be on the recommendation of the Court of Appeals or on motion of the Supreme Court. Cases may be removed from the Court of Appeals for decision by the Supreme Court for any one or more of the reasons set forth in subsection (2) of this section or in order to regulate the caseload existing in either the Court of Appeals or the Supreme Court. The Chief Judge of the Court of Appeals and the Chief Justice of the Supreme Court shall regularly inform each other of the number and nature of cases docketed in the respective court.

Source: Laws 1991, LB 732, § 6.

The Nebraska Court of Appeals may determine the constitutionality of a municipal ordinance. State v. Ruisi, 9 Neb. App. 435, 616 N.W.2d 19 (2000).

The Nebraska Court of Appeals has jurisdiction to consider the constitutionality of a city ordinance. State v. Champoux, 5 Neb. App. 68, 555 N.W.2d 69 (1996).

While the Nebraska Court of Appeals does not have jurisdiction to determine the constitutionality of a statute, the court may, when necessary to the decision in a case, determine whether a constitutional question has properly been raised. Bartunek v. Geo. A. Hormel & Co., 2 Neb. App. 598, 513 N.W.2d 545 (1994).

24-1107 Decision; review by Supreme Court.

Within thirty days after the Court of Appeals has issued its decision in a case, any party to the case may petition the Supreme Court for further review of the decision in the manner prescribed by the rules of the Supreme Court.

Source: Laws 1991, LB 732, § 7.

An opinion of a single judge of the Court of Appeals is not an opinion of the Court of Appeals; thus, this section does not provide the Supreme Court with jurisdiction to review an opinion of a single judge of the Court of Appeals. State v. Chambers, 242 Neb. 124, 493 N.W.2d 328 (1992).

24-1108 Administrative office; arguments heard throughout state; judge's offices.

The Court of Appeals shall have its principal administrative office in Lincoln, Nebraska. The Court of Appeals shall hear arguments at sites throughout the state by designation of the Chief Judge of the Court of Appeals. The Chief Judge shall give primary consideration to the convenience of the litigants and counsel when designating sites to hear arguments. Each judge of the Court of Appeals may maintain a principal office at any location in Nebraska and shall be entitled to staff as determined by the Supreme Court. The State Court Administrator shall make arrangements for office space and courtrooms to be used by the Court of Appeals.

Source: Laws 1991, LB 732, § 8.

24-1109 Clerk; reporter; State Court Administrator; duties; expenses of court; rules and regulations.

The Clerk of the Supreme Court shall serve as the clerk of the Court of Appeals. The Reporter of the Supreme Court and Court of Appeals shall serve as the reporter of the Court of Appeals. The State Court Administrator shall provide facilities, supplies, equipment, and support staff needed by the Court of Appeals. All expenses of the Court of Appeals shall be included in the budget of the Supreme Court. The Supreme Court shall adopt and promulgate rules to implement sections 24-1101 to 24-1109.

Source: Laws 1991, LB 732, § 9; Laws 1995, LB 271, § 5.

ARTICLE 12

JUDICIAL RESOURCES COMMISSION

Section

24-1201 Judicial Resources Commission; created; membership; quorum.

There is hereby created the Judicial Resources Commission consisting of: (1) Four judges, including one district court judge, one county court judge, one separate juvenile court judge, and one Justice or judge of the Supreme Court, all of whom shall be appointed by the Supreme Court; (2) one member of the Nebraska State Bar Association from each of the six judicial districts prescribed in Article V, section 5, of the Constitution of Nebraska who shall have practiced law in this state for at least ten years and who shall be appointed by the Executive Council of the Nebraska State Bar Association; and (3) one citizen from each of the six judicial districts prescribed in Article V, section 5, of the Constitution of Nebraska appointed by the Governor and one additional citizen who shall be appointed at large, none of whom shall be (a) a justice or judge of the Supreme Court or a judge of any other court, active or retired, (b) a member of the Nebraska State Bar Association, or (c) an immediate family member of any person listed in subdivisions (a) and (b) of this subdivision. The

Justice or judge of the Supreme Court serving on the commission shall also serve as chairperson of the commission. A majority of the members of the commission shall constitute a quorum for the transaction of business. The commission shall act by a vote of the majority of its members.

Source: Laws 1992, LB 1059, § 7; R.S.Supp.,1994, § 24-809.01; Laws 1995, LB 189, § 4; Laws 1997, LB 229, § 3.

24-1202 Judicial Resources Commission; term; vacancy.

The term of office of each member of the Judicial Resources Commission shall be six years. In the event of a vacancy, the vacancy shall be filled by appointment in the same manner as the original member was appointed, and the individual so appointed shall serve for the balance of the original term. Any member of the commission shall be eligible for reappointment for an additional term without regard to the number of years that such individual has served as a member of the commission.

Source: Laws 1992, LB 1059, § 8; R.S.Supp.,1994, § 24-809.02.

24-1203 Judicial Resources Commission; expenses.

Members of the Judicial Resources Commission shall be reimbursed for their actual and necessary expenses as provided in sections 81-1174 to 81-1177.

Source: Laws 1992, LB 1059, § 9; R.S.Supp.,1994, § 24-809.03.

24-1204 Existence of judicial vacancy; determination.

In the event of the death, retirement, resignation, or removal of a district, county, or separate juvenile judge or the failure of a district, county, or separate juvenile judge to be retained in office or upon the request of a majority of the members of the Judicial Resources Commission, the commission shall, after holding a public hearing, determine whether a judicial vacancy exists in the affected district or any other judicial district or whether a new judgeship or change in number of judicial districts or boundaries is appropriate. If the commission determines a vacancy exists in a district or county court district, the commission may also make a recommendation to the Supreme Court of the site for a primary office location. The public hearing may include videoconferencing, or if the judicial workload statistics compiled pursuant to section 24-1007 indicate a need for a number of judges equal to or greater than the number currently authorized by law, the commission may conduct a hearing by telephone conference. If a telephone conference is used, a recording shall be made of the telephone conference and maintained by the commission for at least one year and the telephone conference shall conform to the requirements of subsection (2) of section 84-1411, and the commission shall only determine whether a judicial vacancy exists in the affected district and make no other determinations.

Source: Laws 1995, LB 189, § 6; Laws 1997, LB 229, § 4; Laws 1999, LB 47, § 1.

24-1205 Judgeships; annual hearing; recommendations.

By December 15, 1995, and each year thereafter, the Judicial Resources Commission shall hold a hearing to determine whether (1) a new judgeship is appropriate in any judicial district or a reduction in judgeships is appropriate

in any judicial district or (2) the judicial district boundaries or the number of judicial districts should be changed for the district or county courts. The commission shall also examine current caseload statistics and make any appropriate recommendations for the more balanced use of existing judicial resources. The State Court Administrator shall provide adequate administrative support and information as requested by the commission. A report of this hearing and any recommendations shall be filed by the commission with the Legislature, the Governor, and the Supreme Court on or before December 31 of each year.

Source: Laws 1995, LB 189, § 7.

24-1206 Commission; basis for determination; report to Legislature; legislative action.

The Judicial Resources Commission's determination of whether a judicial vacancy exists or a new judgeship, a reduction in judgeships, a change in number of judicial districts or boundaries, or the reallocation of a judgeship from a district, county, or separate juvenile court in one judicial district to a district, county, or separate juvenile court in another judicial district is appropriate pursuant to section 24-1204 or 24-1205 shall be based upon (1) its analysis of judicial workload statistics compiled pursuant to section 24-1007, (2) whether litigants in the judicial district have adequate access to the courts, (3) the population of the judicial district, (4) other judicial duties and travel time involved within the judicial district, and (5) other factors determined by the Supreme Court to be necessary to assure efficiency and maximum service. The State Court Administrator shall provide adequate administrative support and information as requested by the commission.

After making a determination, the commission shall report the results to the Legislature and recommend any legislative changes which are needed. If no changes in existing law are needed and none are recommended by the commission, no legislative action shall be necessary to fill any judicial vacancy determined to exist. The Legislature shall not create a new judgeship unless the commission recommends the creation of a new judgeship in its report. If legislative action is required but none is taken in the first legislative session commencing after receipt of the report by the Legislature, the commission shall hold another hearing on the matter and shall determine whether a judicial vacancy exists or again recommend legislative changes to the Legislature in its report.

Source: Laws 1995, LB 189, § 8; Laws 1997, LB 229, § 5.

ARTICLE 13

DRUG COURT PROGRAMS

Section
24-1301. Legislative findings.
24-1302. Supreme Court; rules; legislative intent.

24-1301 Legislative findings.

The Legislature finds and declares that drug use and other offenses contribute to increased crime in Nebraska, cost millions of dollars in lost productivity, and contribute to the burden placed upon law enforcement, court, and correctional systems in Nebraska.

The Legislature also finds and declares that drug court programs and problem solving court programs are effective in reducing recidivism of persons who participate in and complete such programs. The Legislature recognizes that a drug court program or a problem solving court program offers a person accused of drug offenses and other offenses an alternative to traditional criminal justice or juvenile justice proceedings.

Source: Laws 2004, LB 454, § 1; Laws 2008, LB1014, § 6.
Operative date July 18, 2008.

24-1302 Supreme Court; rules; legislative intent.

(1) Drug court programs and problem solving court programs shall be subject to rules which shall be promulgated by the Supreme Court for procedures to be implemented in the administration of such programs.

(2) It is the intent of the Legislature that funds be appropriated separately to the Supreme Court for each of the programs, the drug court programs and the problem solving court programs, to carry out this section and section 24-1301.

Source: Laws 2004, LB 454, § 2; Laws 2008, LB1014, § 7.
Operative date July 18, 2008.

CHAPTER 25
COURTS; CIVIL PROCEDURE

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- (u) Surrogate Parenthood Contracts. 25-21,200.
- (v) Actions in which the State or a State Agency is a Party. 25-21,201 to 25-21,218.

Cross References

Constitutional provisions, see Article V, Constitution of Nebraska.
Courts, see Chapter 24.
Evidence, see Chapter 27.

ARTICLE 1
FORM OF ACTIONS

Section
25-102. Parties; how designated.
25-103. Feigned issues prohibited; issue not plead; tried, when.

25-101 Civil action.

The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action.

Source: R.S.1867, Code § 2, p. 394; Laws 1867, § 1, p. 71; R.S.1913, § 7560; C.S.1922, § 8503; C.S.1929, § 20-101.

1. Nature and scope
2. Miscellaneous

1. Nature and scope

Despite the fact that the traditional distinctions between law and equity have been abolished, those distinctions do control in determining an appellate court's standard of review. Waite v. A. S. Battiato Co., 238 Neb. 151, 469 N.W.2d 766 (1991).

Application erroneously denominated as for coram nobis considered as petition for post conviction relief for reasons stated. State v. Turner, 194 Neb. 252, 231 N.W.2d 345 (1975).

This section is modified by special statute, section 25-1925. Larutan Corp. v. Magnolia Homes Manuf. Co., 190 Neb. 425, 209 N.W.2d 177 (1973).

In this state there has been a complete merger of legal and equitable remedies. Wischmann v. Raikes, 168 Neb. 728, 97 N.W.2d 551 (1959).

Distinction between legal and equitable rights has not been abolished. First Nat. Bank of Wayne v. Gross Real Estate Co., 162 Neb. 343, 75 N.W.2d 704 (1956).

Eminent domain procedure act was not unconstitutional as being amendatory of this section. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N.W.2d 591 (1954).

Code of civil procedure, as a statute complete in all its parts, should be so construed as to make all of its parts harmonize with each other and render them consistent with its general scope and object. State ex rel. Johnson v. Consumers Public Power Dist., 142 Neb. 114, 5 N.W.2d 202 (1942).

Code of civil procedure expressly abolished all forms of actions and suits theretofore existing, and substituted one form of action called a civil action. In re Guardianship of Warner, 137 Neb. 25, 288 N.W. 39 (1939).

The character of the cause of action, as shown by the allegations of the petition, determines whether a particular action is at law or equity, unaffected by the conclusions of the pleader. Mills v. Heckendorn, 135 Neb. 294, 281 N.W. 49 (1938).

Abolition of common-law names and forms of action has not changed the essential character of judicial remedies. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

To review errors of law occurring upon the trial of an equity case, a motion for new trial is necessary. Danbom v. Danbom, 132 Neb. 858, 273 N.W. 502 (1937).

Both legal and equitable principles may be enforced in the same action, according to the facts. City of Beatrice v. Gage County, 130 Neb. 850, 266 N.W. 777 (1936).

To maintain a civil action, it is not essential that the action be given any particular name. Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N.W. 174 (1935).

Provisions of civil code not only abolish bills of equity with discovery as incident thereto, but prevent incorporation in petition and answer of essential elements on which discovery as it formerly existed, was based. Marshall v. Rowe, 126 Neb. 817, 254 N.W. 480 (1934).

The distinction between actions at law and suits in equity is abolished. State Bank of Omaha v. Todd, 122 Neb. 557, 240 N.W. 754 (1932).

Contract between husband and wife may be enforced in civil action. Stenger Benevolent Assn. v. Stenger, 54 Neb. 427, 74 N.W. 846 (1898).

Abolishing distinctions between law and equity does not deprive the court, while sitting as the court of equity, to submit disputed question of fact to a jury. Alter v. Bank of Stockham, 53 Neb. 223, 73 N.W. 667 (1897).

2. Miscellaneous

Cross-petitions are not limited to strictly equitable actions. Rogers v. Western Electric Co., 179 Neb. 359, 138 N.W.2d 423 (1965).

Rules of law and doctrines of equity may be enforced in one form of action. Schreiner v. Witte, 143 Neb. 109, 8 N.W.2d 831 (1943).

A court of equity, having jurisdiction at commencement of suit, will retain it, where issues presented are in nature of an accounting, and are so numerous and distinct, and evidence to sustain them so variant, technical and voluminous that jury is incompetent to deal with them intelligently. Parsons Construction Co. v. Gifford, 129 Neb. 617, 262 N.W. 508 (1935).

Procedure in workmen's compensation case was equivalent to "civil action." Keil v. Farmers' Irr. Dist., 119 Neb. 503, 229 N.W. 898 (1930).

There is no distinction as to right of plaintiff to judgment on default, without making proof, whether the cause of action is legal or equitable. Weir v. Woodruff, 107 Neb. 585, 186 N.W. 988 (1922).

This is only one form of action, in which legal or equitable principles, either or both, may be enforced according to the facts. Kazebeer v. Nunemaker, 82 Neb. 732, 118 N.W. 646 (1908); State ex rel. Horton v. Dickinson, 63 Neb. 869, 89 N.W. 431 (1902); Hopkins v. Washington County, 56 Neb. 596, 77 N.W. 53 (1898).

Statute of limitations was intended to apply to all forms of the civil action. Boevink v. Christiaanse, 69 Neb. 256, 95 N.W. 652 (1903).

25-102 Parties; how designated.

In all civil actions, the complaining party shall be known as the plaintiff and the adverse party as the defendant.

Source: R.S.1867, Code § 3, p. 394; R.S.1913, § 7561; C.S.1922, § 8504; C.S.1929, § 20-102.

Designation of party appealing as plaintiff in eminent domain proceeding was not prevented by this section. Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N.W.2d 591 (1954).

25-103 Feigned issues prohibited; issue not plead; tried, when.

There can be no feigned issues; but a question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried, and such order is the only authority necessary for a trial.

Source: R.S.1867, Code § 4, p. 394; R.S.1913, § 7562; C.S.1922, § 8505; C.S.1929, § 20-103.

Common law remedies are still in force except as abolished by statute. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Jury is not allowed in quo warranto. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

Jury is not allowed as of right in equity cases generally, though special facts may be submitted. Alter v. Bank of Stockham, 53 Neb. 223, 73 N.W. 667 (1897); Harral & Uhl v. Gray, 10 Neb. 186, 4 N.W. 1040 (1880).

Jury is not allowed in contempt cases. Gandy v. State, 13 Neb. 445, 14 N.W. 143 (1882).

Fictitious issues abolished. Cropsey v. Wiggenhorn, 3 Neb. 108 (1873).

ARTICLE 2

COMMENCEMENT AND LIMITATION OF ACTIONS

Section

25-201 Civil actions; when commenced.

A civil action shall be commenced only within the time prescribed in this chapter, after the cause of action has accrued. Notwithstanding any other provision in this chapter, when an action has been stayed by any court of

competent jurisdiction or by statute, such action shall be commenced within the longer of (1) the time prescribed in this chapter, after the cause of action has accrued, or (2) one year after the date the stay is no longer in effect.

Source: R.S.1867, Code § 5, p. 395; R.S.1913, § 7563; C.S.1922, § 8506; C.S.1929, § 20-201; R.S.1943, § 25-201; Laws 2001, LB 48, § 1.

1. When action is commenced
2. When cause of action accrues
3. Limitation; applicability
4. Limitation; defense
5. Miscellaneous

1. When action is commenced

An action is deemed commenced on the date of the summons which is properly served on the defendant. George P. Rose Sodding & Grading Co. v. Dennis, 195 Neb. 221, 237 N.W.2d 418 (1976).

A civil action is commenced by filing a petition and causing a summons to be issued thereon. Gorgen v. County of Nemaha, 174 Neb. 588, 118 N.W.2d 758 (1962).

Action is deemed commenced upon filing of first petition, where cause of action is not changed in amended petition. Davis v. Manning, 98 Neb. 707, 154 N.W. 239 (1915), vacating former judgment 97 Neb. 658, 150 N.W. 1019 (1915).

2. When cause of action accrues

Cause of action accrues when the aggrieved party has the right to institute and maintain suit. Weiss v. Weiss, 179 Neb. 714, 140 N.W.2d 15 (1966).

A civil action to recover a statutory penalty must be commenced within a year after the cause of action accrued in favor of plaintiff. Hoffman v. Geiger, 135 Neb. 349, 281 N.W. 625 (1938).

A cause of action against a bank director participating in making of an excessive loan is complete the moment the loan is made, and statute of limitations begins to run, and action is barred after four years in absence of fraud or concealment. Department of Banking v. McMullen, 134 Neb. 338, 278 N.W. 551 (1938).

Statute of limitations on right to recover illegally imposed taxes runs from time of payment of tax and not from time illegality of tax is judicially determined. Monteith v. Alpha High School Dist. of Chase County, 125 Neb. 665, 251 N.W. 661 (1933).

Statute of limitations does not run on claims against state until legislative leave to sue has been given. Commonwealth Power Co. v. State, 104 Neb. 439, 177 N.W. 745 (1920).

When cause of action accrues stated. City of Omaha v. Redick, 61 Neb. 163, 85 N.W. 46 (1901).

3. Limitation; applicability

An oral promise by which defendant was paid some undisclosed amount in settlement of claim for damages based on loss of securities through conspiracy and fraud, which was not a promise made as a part of the alleged fraudulent transaction, did not operate to toll statute of limitations. Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N.W.2d 330 (1944).

An action for relief upon the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to discovery. Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N.W.2d 327 (1941).

Where Legislature has created a new right and prescribed a special statute of limitations, the general statute of limitations is not applicable. Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N.W. 139 (1938).

Where trustee of trust fund, who was also president and managing officer of bank, invested part of trust funds in worthless notes belonging to bank in 1923, but concealed the fact from the county court and the cestui que trust until 1930, running of statute was tolled. First Trust Co. of Lincoln v. Exchange Bank, 126 Neb. 856, 254 N.W. 569 (1934).

Statute does not run against claims depending upon the result of pending litigation. First Nat. Bank of Plattsmouth v. Gibson, 74 Neb. 232, 104 N.W. 174 (1905), reversed on rehearing 74 Neb. 236, 105 N.W. 1081 (1906).

General law as to limitations of actions is not applicable to revivor of dormant judgment. Bankers Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N.W. 484 (1899).

Set-off was barred by statute of limitations. Baker Ice Machine Co. v. Hebert, 76 F.2d 73 (8th Cir. 1935).

4. Limitation; defense

Statute of limitations is an affirmative defense and must be pleaded. Central Bridge & Constr. Co. v. Chicago & N. W. Ry. Co., 128 Neb. 779, 260 N.W. 172 (1935).

Statute of limitations does not raise a presumption of payment but is a statute of repose. Torgeson v. Department of Trade and Commerce, 127 Neb. 49, 254 N.W. 740 (1934).

One asking affirmative equitable relief is required to do equity and may not plead statute of limitations as defense to such requirement. Wiseman v. Guernsey, 107 Neb. 647, 187 N.W. 55 (1922).

Ordinarily third parties may not plead it as defense. Plummer, Perry & Co. v. Rohman, 61 Neb. 61, 84 N.W. 600 (1900).

Statute of limitations must be pleaded or is considered waived. Hobson v. Cummins, 57 Neb. 611, 78 N.W. 295 (1899).

Statute applies to facts or rights pleaded as defense, counterclaim or cross action. Parker v. Kuhn, 21 Neb. 413, 32 N.W. 74 (1887).

5. Miscellaneous

The fact that a claim against an heir is barred by the statute of limitations does not prevent the application of the doctrine of retainer. Fischer v. Wilhelm, 139 Neb. 583, 298 N.W. 126 (1941), opinion partially vacated on rehearing, 140 Neb. 448, 300 N.W. 350 (1941).

Plaintiff may not amend a cause of action barred by statute of limitations by substituting another and different cause not so barred. Thurston County v. Farley, 128 Neb. 756, 260 N.W. 397 (1935).

If petition shows on its face that it is barred by statute of limitations but pleads further facts in avoidance thereof, which are denied by defendant who also pleads affirmatively the statute, plaintiff cannot recover without first establishing facts alleged in avoidance. Baxter v. National Mtg. Loan Co., 128 Neb. 537, 259 N.W. 630 (1935).

Where a necessary party defendant is not made defendant because statute of limitations has run on claim against him, action should be dismissed. Dempster v. Ashton, 125 Neb. 535, 250 N.W. 917 (1933).

Contracts providing different periods are void. Miller v. State Ins. Co. of Des Moines, 54 Neb. 121, 74 N.W. 416 (1898).

Where statute confers and limits duration of right, it also limits the remedy. Goodwin v. Cunningham, 54 Neb. 11, 74 N.W. 315 (1898).

Defendant may present question of statute of limitations by motion to dismiss or demurrer if petition shows on its face that action is barred. Harrop v. United States, 10 F.Supp. 753 (D. Neb. 1935).

25-201.01 Civil actions; savings clause; conditions.

(1) If an action is commenced within the time prescribed by the applicable statute of limitations but the plaintiff fails in the action for a reason other than a reason specified in subsection (2) of this section and the applicable statute of limitations would prevent the plaintiff from commencing a new action, the plaintiff, or his or her representatives if the plaintiff has died and the cause of action survived, may commence a new action within the period specified in subsection (3) of this section.

(2) A new action may not be commenced in accordance with subsection (1) of this section when the original action failed (a) on the merits of the action, (b) as a result of voluntary dismissal by the plaintiff for a reason other than loss of diversity jurisdiction in a federal court, (c) as a result of the plaintiff's failure to serve a defendant within the time prescribed in section 25-217, or (d) as a result of any other inaction on the part of the plaintiff where the burden of initiating an action was on the plaintiff.

(3) A new action may be commenced in accordance with subsection (1) of this section within a period equal to the lesser of (a) six months after the failure of the action or (b) a period after the failure of the action equal to the period of the applicable statute of limitations of the original action.

Source: Laws 2000, LB 55, § 1.

25-201.02 Amendment of pleading; effect.

(1) An amendment of a pleading that does not change the party or the name of the party against whom the claim is asserted relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

(2) If the amendment changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Source: Laws 2002, LB 876, § 2.

25-202 Actions for the recovery of title or possession of real estate or foreclosure of mortgages or deeds of trust as mortgages.

(1) An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages or the foreclosure of deeds of trust as mortgages thereon, can only be brought within ten years after the cause of action accrues. No limitation shall apply to the time within which any

county, city, town, village, other municipal corporation, public power and irrigation district, public power district, public irrigation district organized under Chapter 70, article 6, irrigation district organized under Chapter 46, article 1, or natural resources district may begin an action for the recovery of the title or possession of any public road, street, or alley, other public or political subdivision grounds or lands, or city or town lots.

(2) For the purposes of this section as relates only to the rights and interests of subsequent purchasers and encumbrancers for value:

(a) The cause of action for foreclosure of the mortgage or foreclosure of the deed of trust as a mortgage accrues on the last date of maturity of the debt or other obligation secured by the mortgage or deed of trust as the date is stated in or is ascertainable from the filed record of the mortgage or deed of trust or the filed record of an extension of the mortgage or deed of trust;

(b) If no date of maturity is stated or is ascertainable from the filed mortgage or deed of trust or the filed extension, the cause of action for foreclosure of the mortgage or foreclosure of the deed of trust as a mortgage accrues no later than thirty years after the date of the mortgage or deed of trust; or

(c) If the mortgage creditor files an affidavit to the effect that the mortgage or deed of trust is unpaid and is still a valid lien, the affidavit is filed before the cause of action is barred under this section, and the affidavit is filed for record in the office of the register of deeds, the cause of action is not barred until ten years after the date the affidavit is filed. The period of ten years shall not be extended by nonresidence, legal disability, partial payment, acknowledgment of debt, or promise to pay.

Source: R.S.1867, Code § 6, p. 395; Laws 1869, § 1, p. 67; Laws 1899, c. 79, § 6, p. 335; R.S.1913, § 7564; C.S.1922, § 8507; Laws 1925, c. 64, § 1, p. 220; C.S.1929, § 20-202; Laws 1941, c. 35, § 1, p. 145; C.S.Supp.,1941, § 20-202; R.S.1943, § 25-202; Laws 1977, LB 208, § 1; Laws 1995, LB 297, § 1; Laws 2008, LB851, § 18.
Operative date March 20, 2008.

Cross References

Part payment shall not be applicable as against subsequent encumbrancers and purchasers for value, see section 25-216.

1. Definitions
2. Limitation as to adverse possession
3. Limitation as to remainderman
4. Adverse possession not applicable
5. When cause of action accrues
6. Tolling of statute
7. Inverse condemnation
8. Miscellaneous

1. Definitions

''Subsequent purchaser for value'' is one acquiring title after statute has run against prior encumbrance shown on record. Purchaser who assumed mortgage and paid interest thereon could not defend against mortgage as ''subsequent purchaser for value,'' on ground of mortgagee's failure to refile mortgage. Tynon v. Bliss, 121 Neb. 80, 236 N.W. 184 (1931).

''Subsequent encumbrancer'' hereunder is one who acquires his encumbrance after the statute has run against prior recorded encumbrance. Bank acquiring mortgage expressly subject to prior mortgage against which statute has not yet run did not thereafter acquire priority as ''subsequent encumbrancer.'' Bliss v. Redding, 121 Neb. 69, 236 N.W. 181 (1931).

2. Limitation as to adverse possession

An action to recover possession of real property from a tenant who remains in possession without the landlord's consent after a lease has expired or been terminated under section 76-1437 is an action for the possession of real property and is therefore subject to the 10-year statute of limitations for the possession of real property as provided for in this section. Blankenau v. Landess, 261 Neb. 906, 626 N.W.2d 588 (2001).

One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the full 10-year period mandated by this section. A claim in the nature of a life estate is not a ''claim of ownership'' within the meaning of the adverse possession

doctrine. Lewis v. Poduska, 240 Neb. 312, 481 N.W.2d 898 (1992).

Where the evidence shows that irrigation rights have not been used for more than ten years, a water appropriator loses his rights, independent of any cancellation proceeding. Northport Irr. Dist. v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983).

The ten-year period necessary to bar an action to recover land applies in an action seeking to establish a prescriptive easement. Sturm v. Mau, 209 Neb. 865, 312 N.W.2d 272 (1981).

Adverse possession is founded upon the intent with which an occupant held possession, and can best be determined by his acts. The intent, even though mistaken, is sufficient as where claimant occupies to the wrong boundary line believing it to be the true line, and even though he does not intend to claim more than that described in the deed. Weiss v. Meyer, 208 Neb. 429, 303 N.W.2d 765 (1981).

In determining the rights of an adverse owner, the entry and possession of his tenant, expressly authorized to act, is the entry and possession of such owner. Weiss v. Meyer, 208 Neb. 429, 303 N.W.2d 765 (1981).

Where a fence is constructed as a boundary line, although it is not the actual boundary line, and parties claim ownership of land up to the fence for the uninterrupted statutory period, parties gain title to such land by adverse possession. Conkey v. Anderson Farms, Inc., 205 Neb. 708, 289 N.W.2d 541 (1980); McCain v. Cook, 184 Neb. 147, 165 N.W.2d 734 (1969).

Possession by permission of the owner cannot ripen into adverse possession until after such change of position has been brought home to the adverse party. Imperial Service Corp. v. Phipps, 205 Neb. 622, 288 N.W.2d 749 (1980).

A person claiming title by adverse possession must occupy and possess the land adversely to the record owners with the requisite intent and purpose of asserting ownership. Rentschler v. Walnofer, 203 Neb. 84, 277 N.W.2d 548 (1979).

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of ten years. Rentschler v. Walnofer, 203 Neb. 84, 277 N.W.2d 548 (1979).

Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years. Rentschler v. Walnofer, 203 Neb. 84, 277 N.W.2d 548 (1979).

Where a person claims title to land by adverse possession by the previous occupants, the claimant must prove previous occupants had a hostile intent to occupy land that was not theirs. Barnes v. Milligan, 200 Neb. 450, 264 N.W.2d 186 (1978).

Section 76-701 et seq., R.R.S.1943, provides no specific statute of limitations; therefore the ten-year period in section 25-202, R.R.S.1943, applies in inverse condemnation proceedings. Krambeck v. City of Gretna, 198 Neb. 608, 254 N.W.2d 691 (1977).

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious adverse possession under claim of ownership for full period of ten years. Campbell v. Buckler, 192 Neb. 336, 220 N.W.2d 248 (1974).

A party, in order to establish title to real estate by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession thereof under claim of ownership for the full period required by the statute. Shirk v. Schmunk, 192 Neb. 25, 218 N.W.2d 433 (1974).

An easement by prescription for discharge of waste irrigation waters into a natural depression through land of another cannot be acquired until it has been exercised without material change under a claim of right for ten years. Peters v. Langrehr, 188 Neb. 480, 197 N.W.2d 698 (1972).

Statutory period for the establishment of title to real estate by adverse possession is ten years. Mentzer v. Dolen, 178 Neb. 42, 131 N.W.2d 671 (1964); Fitch v. Slama, 177 Neb. 96, 128 N.W.2d 377 (1964); Beebe v. Reichert, 172 Neb. 172, 108 N.W.2d 804 (1961); Jones v. Schmidt, 170 Neb. 351, 102 N.W.2d 640 (1960).

Water rights may be lost by nonuser for the period of statutory limitations relating to real estate. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

One who has taken possession of real estate as tenant of another cannot hold the real estate adversely to his lessor until he surrenders possession, or, by some unequivocal act, notifies the landlord that he no longer holds under the lease. Kennedy v. Gottschalk, 138 Neb. 842, 295 N.W. 813 (1941).

Where a fence is constructed as a boundary between two pieces of property, and where the parties claim ownership to the fence for a full ten year period, and are not interrupted in their possession or control during such period, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own. Ohme v. Thomas, 134 Neb. 727, 279 N.W. 480 (1938).

City discharging sewage into creek for a period of ten years in an adverse manner may acquire an easement for that purpose. Hall v. City of Friend, 134 Neb. 652, 279 N.W. 346 (1938).

Where a boundary, supposed to be the true line established by the government survey, is acquiesced in by the adjoining owners for more than ten years, it is conclusive of the location. Romine v. West, 134 Neb. 274, 278 N.W. 490 (1938).

Plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive, and continuous possession under claim of ownership for the full statutory period of ten years. Ellsworth Corporation v. Stratbucker, 134 Neb. 246, 278 N.W. 381 (1938).

Where title to land has been quieted in plaintiff as against claims of defendant, and defendant does not re-enter after such decree, the statute of limitations does not begin to run in favor of defendant and he cannot assert adverse possession until he brings express notice to plaintiff or his vendees that he claims adversely to plaintiff. Lennon v. Kearney, 132 Neb. 180, 271 N.W. 351 (1937).

Where mortgage contains clause accelerating due date or maturity on default in payment of interest, and mortgagee elects to declare mortgage due under such option, statute of limitations begins to run from date of such election. Hatch v. Ely, 131 Neb. 882, 270 N.W. 480 (1936).

An easement acquired by prescription is limited in extent to adverse use during the ten year period. Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N.W. 556 (1935).

Elements of adverse possession discussed. DeWulf v. DeWulf, 104 Neb. 105, 175 N.W. 884 (1919); Peterson v. Kouty, 103 Neb. 321, 171 N.W. 905 (1919); Armstrong v. Johnson, 97 Neb. 119, 149 N.W. 361 (1914); Jankee v. Robb, 97 Neb. 118, 149 N.W. 362 (1914); Prugh v. Searcy, 97 Neb. 116, 149 N.W. 362 (1914); Dringman v. Keith, 93 Neb. 180, 139 N.W. 1044 (1913); Delatour v. Wendt, 93 Neb. 175, 139 N.W. 1023 (1913); Ryan v. City of Lincoln, 85 Neb. 539, 123 N.W. 1021 (1909); Hull v. Chicago, B. & Q. Ry. Co., 21 Neb. 371, 32 N.W. 162 (1887); Haywood v. Thomas, 17 Neb. 237, 22 N.W. 460 (1885); Gregory v. Lincoln, 13 Neb. 352, 14 N.W. 423 (1882); Horbach v. Miller, 4 Neb. 31 (1875).

Tract contiguous to right-of-way acquired by railroad by adverse possession. Ferber v. McQuillen, 99 Neb. 280, 156 N.W. 506 (1916).

Right by adverse possession in village street upheld where acquired before amendment of 1899 to this section. Torbitt v. Village of Bennett, 98 Neb. 129, 152 N.W. 301 (1915).

Statute runs against bill to declare deed absolute in form a mortgage, in favor of grantee in possession, from time such possession becomes adverse to grantor's title. Minick v. Reichenbach, 97 Neb. 629, 150 N.W. 1001 (1915); Stall v. Jones, 47 Neb. 706, 66 N.W. 653 (1896).

There must be adverse public user of defined track or way for period sufficient to bar action to recover land. Smith v. Nofsing-

er, 86 Neb. 834, 126 N.W. 659 (1910); Nelson v. Sneed, 76 Neb. 201, 107 N.W. 255 (1906).

Notorious and exclusive possession without right constitutes a disseizin. Fitzgerald v. Brewster, 31 Neb. 51, 47 N.W. 475 (1890).

3. Limitation as to remainderman

An action for recovery of title to, or possession of lands, can only be brought within ten years after the cause of action has accrued, and a remainderman is not required to bring action to quiet title in order to protect his remainder estate from a claim of adverse possession by a grantee of the life estate in possession under the grant. Maxwell v. Hamel, 138 Neb. 49, 292 N.W. 38 (1940).

When statute runs against remaindermen stated. Anderson v. Miller, 103 Neb. 549, 172 N.W. 688 (1919); Mohr v. Harder, 103 Neb. 545, 172 N.W. 753 (1919); Criswell v. Criswell, 101 Neb. 349, 163 N.W. 302 (1917).

Statute does not always run against remainderman until death of owner of life estate. Criswell v. Criswell, 101 Neb. 349, 163 N.W. 302 (1917); Bohrer v. Davis, 94 Neb. 367, 143 N.W. 209 (1913); McFarland v. Flack, 87 Neb. 452, 127 N.W. 375 (1910).

4. Adverse possession not applicable

Actions to recover annual payments provided for by indenture granting perpetual easement for flow of water and to enforce equitable lien growing out of the indenture are not controlled by this section. Frye v. Sibbitt, 145 Neb. 600, 17 N.W.2d 617 (1945).

A fee simple title holder under an unrecorded deed does not forfeit title by failure to assert it affirmatively for ten years or any other period. Hadley v. Platte Valley Cattle Co., 143 Neb. 482, 10 N.W.2d 249 (1943).

Action for damages against city for changing grade of street, held not barred by statute of limitations. Quivey v. City of Mitchell, 133 Neb. 727, 277 N.W. 50 (1938).

Exception as to municipalities does not extend to irrigation districts. Central Irr. Dist. v. Gering Irr. Dist., 122 Neb. 199, 240 N.W. 289 (1932).

Railroad right-of-way is not divested by adverse possession so long as railroad operates over same. Edholm v. Missouri Pac. R. R. Corp., 114 Neb. 845, 211 N.W. 206 (1926); McLucas v. St. Joseph & G. I. Ry. Co., 67 Neb. 603, 93 N.W. 928 (1903), former judgment adhered to 67 Neb. 612, 97 N.W. 312 (1903).

Public easement in land used for highway cannot be divested by adverse possession; width of highway acquired by public user is question of fact determined by character and extent of use. Donovan v. Union P. R. Co., 104 Neb. 364, 177 N.W. 159 (1920).

Statute does not run against action to remove cloud on title while landowner is in exclusive possession. Essex v. Smith, 97 Neb. 649, 150 N.W. 1022 (1915).

Where party was placed in possession of land under agreement that he should hold possession until settlement was made, statute would not run on either action for land or claim for money. Tillson v. Holloway, 94 Neb. 635, 143 N.W. 939 (1913).

Action to foreclose mortgage may be commenced within ten years even though action on note has become barred. Campbell v. Upton, 56 Neb. 385, 76 N.W. 910 (1898).

5. When cause of action accrues

The statute of limitations does not begin to run in case of a resulting trust until trustee clearly repudiates his trust, and the time it commences to run must be determined upon facts in each case. Jirka v. Prior, 196 Neb. 416, 243 N.W.2d 754 (1976).

As between cotenants, statute of limitations begins to run from time of ouster. Unick v. St. Joseph Loan and Trust Co., 146 Neb. 789, 21 N.W.2d 752 (1946).

Partial payments do not extend period of time for commencing action as against purchaser for value. Weekes v. Rumbaugh, 144 Neb. 103, 12 N.W.2d 636 (1944).

Before possession can become adverse between co-owners, notice that the part owner in possession is claiming the entire estate in hostility to his co-owners must be brought home to the latter in some plain and unequivocal manner. Gramann v. Beatty, 134 Neb. 568, 279 N.W. 204 (1938).

Petition showing cause accrued twenty-six years before action was begun was demurrable. Parkin v. Parkin, 123 Neb. 836, 244 N.W. 638 (1932).

Statute does not begin to run against cestui que trust until trustee repudiates trust, since until then the fraud has not become known. Wiseman v. Guernsey, 107 Neb. 647, 187 N.W. 55 (1922).

Action to enforce lien of specific money bequest upon land in hands of residuary legatee, when barred. Overton v. Sack, 99 Neb. 64, 155 N.W. 222 (1915); Klug v. Seegabarth, 98 Neb. 272, 152 N.W. 385 (1915).

The statute will continue to run against one who has executed a valid deed of the premises under which the land is so held, although a later conveyance in the chain of title is found to be invalid. Davidge v. Talbot, 98 Neb. 816, 154 N.W. 543 (1915).

In mortgagor's action to redeem, statute begins to run when mortgagee takes possession with color of title. Essex v. Smith, 97 Neb. 649, 150 N.W. 1022 (1915); Jackson v. Rohrberg, 94 Neb. 85, 142 N.W. 290 (1913).

Statute does not run until notice that trustee denies his right in the property. Goodman v. Smith, 94 Neb. 227, 142 N.W. 521 (1913).

Action by heir to recover homestead illegally sold at administrator's sale must be commenced within ten years after attaining his majority. Holmes v. Mason, 80 Neb. 448, 114 N.W. 606 (1908).

Action may be brought any time before statutory bar is complete. Clark v. Hannafeldt, 79 Neb. 566, 113 N.W. 135 (1907); Dickson v. Stewart, 71 Neb. 424, 98 N.W. 1085 (1904); Dorsey v. Conrad, 49 Neb. 443, 68 N.W. 645 (1896).

Statute does not run against claim of subrogation under prior mortgage until ten years from maturity of latter. Boevink v. Christiaanse, 69 Neb. 256, 95 N.W. 652 (1903).

To obtain deficiency judgment upon mortgage indebtedness, action must be brought within five years. Omaha Savings Bank v. Simeral, 61 Neb. 741, 86 N.W. 470 (1901).

Subsequent mortgagee, not made party to foreclosure of prior mortgage, is not barred from action until ten years after cause of action accrues. Baldwin v. Burt, 43 Neb. 245, 61 N.W. 601 (1895).

Statute begins to run, when in favor of entryman on public lands. Mills v. Traver, 35 Neb. 292, 53 N.W. 67 (1892); Carroll v. Patrick, 23 Neb. 834, 37 N.W. 671 (1888).

6. Tolling of statute

A subsequent encumbrancer is one who acquires one's encumbrance for value after the statute has run against a prior encumbrance. A mortgage on real estate continues as a lien thereon for only 10 years from the maturity of the debt secured unless a payment has been made thereon, or the statute of limitations has otherwise been tolled. Vanice v. Oehm, 247 Neb. 298, 526 N.W.2d 648 (1995).

An action to foreclose a real estate mortgage may be brought within the limitation hereunder even though an action on the debt is barred. J. I. Case Credit Corp. v. Thompson, 187 Neb. 626, 193 N.W.2d 283 (1971).

Absence from state will not extend the time in which a real estate mortgage foreclosure may be brought against a nonresident. Brainard v. Hall, 137 Neb. 491, 289 N.W. 845 (1940).

Death of party against whom statute has commenced to run does not toll statute; it continues to run as against heirs. McNeill v. Schumaker, 94 Neb. 544, 143 N.W. 805 (1913).

Running of statute is arrested by service of summons. Butler v. Smith, 84 Neb. 78, 120 N.W. 1106 (1909).

Unless tolled, statute of limitations for foreclosure of real mortgage is ten years from maturity of the debt secured. Herbage v. McKee, 82 Neb. 354, 117 N.W. 706 (1908).

In determining period of limitation on action to foreclose mortgage, partial payments or written acknowledgment operate to toll statute. Teegarden v. Burton, 62 Neb. 639, 87 N.W. 337 (1901).

Conveyance by adverse occupant to one not competent to take title will not arrest running of statute. Myers v. McGavock, 39 Neb. 843, 58 N.W. 522 (1894).

7. Inverse condemnation

The period of limitations for inverse condemnation actions is the ten years within which actions for adverse possession must be brought pursuant to this section. Kimco Addition v. Lower Platte South N.R.D., 232 Neb. 289, 440 N.W.2d 456 (1989).

Section 76-701 et seq., R.R.S.1943, provides no specific statute of limitations; therefore the ten-year period in section 25-202, R.R.S.1943, applies in inverse condemnation proceedings. Krambeck v. City of Gretna, 198 Neb. 608, 254 N.W.2d 691 (1977).

8. Miscellaneous

This section is applicable to an action to quiet title to an interest in real estate. Olsen v. Olsen, 265 Neb. 299, 657 N.W.2d 1 (2003).

The statute of limitations for a judicial action to foreclose on real property under a deed of trust is 10 years. PSB Credit Servs. v. Rich, 251 Neb. 474, 558 N.W.2d 295 (1997).

Courts of equity have the inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations. Cizek v. Cizek, 201 Neb. 4, 266 N.W.2d 68 (1978).

Where plaintiff's predecessor in title had been in actual, continuous, notorious adverse possession of island for ten years he became the owner thereof. Winkle v. Mitera, 195 Neb. 821, 241 N.W.2d 329 (1976).

A school district is an other municipal corporation and its real estate is other public grounds within provisions of this section. Buras v. School Dist. No. 37 of Sarpy County, 190 Neb. 836, 212 N.W.2d 632 (1973).

Undisputed evidence indicated defendants, by maintenance of drainage ditch through plaintiff's land for a period in excess of ten years, but for the public interest involved, acquired easement in their own right. Franz v. Nelson, 183 Neb. 137, 158 N.W.2d 606 (1968).

Subsequent encumbrancer is one who acquires his encumbrance for value after statute has run against prior encumbrance. Alexanderson v. Wessman, 158 Neb. 614, 64 N.W.2d 306 (1954).

A person, claiming right to mortgaged realty prior to mortgagee whose mortgage was extended by unrecorded written agreement, must show that the person is purchaser or encumbrancer who has parted with something of value. Franklin v. Zarmstorf, 145 Neb. 21, 15 N.W.2d 190 (1944).

Where an occupant of real estate disclaims title prior to the running of the statute of limitations, he is precluded from acquiring title by adverse possession. Weisel v. Hobbs, 138 Neb. 656, 294 N.W. 448 (1940).

The requirement that mortgage be rerecorded within ten years after cause of action accrues is limited in its application to subsequent purchasers and encumbrancers for value. Hadley v. Corey, 137 Neb. 204, 288 N.W. 826 (1939).

Adverse possession of accreted lands must be proved by actual, open, exclusive, and continuous possession under claim of ownership for ten years. Conkey v. Knudsen, 135 Neb. 890, 284 N.W. 737 (1939).

Action for relief based on mistake and accident is not governed by this section, as such relief is classed as fraud. Sweley v. Fox, 135 Neb. 780, 284 N.W. 318 (1939).

In determining period of limitation in action to foreclose real estate mortgage given as security for note, this section should be construed in connection with section providing that part payment or acknowledgment of debt tolls statute. Steeves v. Nispel, 132 Neb. 597, 273 N.W. 50 (1937).

Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of statute of limitations. Perry v. Markle, 127 Neb. 29, 254 N.W. 692 (1934).

Bank held not subsequent encumbrancer within meaning of section. O'Connor v. Power, 124 Neb. 113, 245 N.W. 417 (1932), overruled in 124 Neb. 594, 247 N.W. 414 (1933).

Possession as between parties in parental or filial relation is deemed permissive. Chase v. Lavelle, 105 Neb. 796, 181 N.W. 936 (1921).

Mortgagor must do equity by tendering amount due on mortgage debt. Pettit v. Louis, 88 Neb. 496, 129 N.W. 1005 (1911).

Statute applied to streets. Agnew v. City of Pawnee City, 79 Neb. 603, 113 N.W. 236 (1907); Webster v. City of Lincoln, 56 Neb. 502, 76 N.W. 1076 (1898).

25-203 Actions for forcible entry and detainer of real property.

An action for the forcible entry and detainer, or forcible detainer only, of real property, can only be brought within one year after the cause of such action shall have accrued.

Source: R.S.1867, Code § 8, p. 395; R.S.1913, § 7565; C.S.1922, § 8508; C.S.1929, § 20-203.

Where tenancy by sufferance is terminated by statutory three-day notice, cause of action for forcible detainer accrues and statute runs from service of notice. Federal Trust Co. v. Overlander, 118 Neb. 167, 223 N.W. 797 (1929); Clark v. Tukey Land Co., 75 Neb. 326, 106 N.W. 328 (1905).

When the right to bring an action of forcible entry and detention is barred as against the grantor, so likewise it is against the grantee. Weatherford v. Union Pacific R. Co., 74 Neb. 229, 104 N.W. 183 (1905).

25-204 Actions other than for the recovery of real property.

Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued.

Source: R.S.1867, Code § 9, p. 395; R.S.1913, § 7566; C.S.1922, § 8509; C.S.1929, § 20-204.

Cause of action to establish right to pension accrued at time fireman was totally and permanently disabled. Barney v. City of Lincoln, 144 Neb. 537, 13 N.W.2d 870 (1944).

Cause of action ''accrued'' when buyer acknowledged and promised to pay balance. W. T. Rawleigh Co. v. Smith, 142 Neb. 527, 7 N.W.2d 80 (1942).

Action by a husband for damages on account of assault and battery committed on wife must be brought within one year after cause of action occurred. Markel v. Glassmeyer, 137 Neb. 243, 288 N.W. 821 (1939).

The defense of statute of limitations is personal privilege of debtor, and can only be made by persons standing in his place. Neill v. Burke, 81 Neb. 125, 115 N.W. 321 (1908).

When not apparent on face of petition that action is barred, statute must be pleaded as a defense, or it is waived. Hanna v. Emerson, 45 Neb. 708, 64 N.W. 229 (1895).

Time may be extended by part payment or written acknowledgment. Lee, Fried & Co. v. Brugmann, 37 Neb. 232, 55 N.W. 1053 (1893); Rolfe v. Pilloud, 16 Neb. 21, 19 N.W. 615 (1884).

Promise by one joint debtor will not toll statute as to other joint debtors. Mayberry v. Willoughby, 5 Neb. 368 (1877).

Under this and other statutes of limitations suit against employer to enforce agreement made in 1893 to deliver corporate stock was barred, in view of lapse of time, change in value, and repudiation of trust. Reed v. Fairmont Creamery Co., 37 F.2d 332 (8th Cir. 1929).

25-205 Actions on written contracts, on foreign judgments, or to recover collateral.

(1) Except as provided in subsection (2) of this section, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years. No action at law or equity may be brought or maintained attacking the validity or enforceability of or to rescind or declare void and uncollectible any written contract entered into pursuant to, in compliance with, or in reliance on, a statute of the State of Nebraska which has been or hereafter is held to be unconstitutional by the Supreme Court of Nebraska where such holding is the basis for such action, unless such action be brought or maintained within one year from the effective date of such decision. The provisions hereof shall not operate to extend the time in which to bring any action or to revive any action now barred by reason of the operation of any previously existing limitation provision.

(2) An action to recover collateral (a) the possession and ownership of which a debtor has in any manner transferred to another person and (b) which was used as security for payment pursuant to an agreement, contract, or promise in writing which covers farm products as described in section 9-102, Uniform Commercial Code, or farm products which become inventory of a person engaged in farming, shall be brought within eighteen months from the date possession and ownership of such collateral was transferred.

Source: R.S.1867, Code § 10, p. 395; R.S.1913, § 7567; C.S.1922, § 8510; C.S.1929, § 20-205; R.S.1943, § 25-205; Laws 1963, Spec. Sess., c. 2, § 1, p. 61; Laws 1983, LB 343, § 9; Laws 1999, LB 550, § 3.

1. Acts that toll the statute
2. Acts that do not toll the statute
3. Specific actions covered by statute
4. Miscellaneous

1. Acts that toll the statute

Voluntary payment of any part of principal or interest tolls statute of limitations and new right of action accrues after each payment, not tolled as to joint maker unless payment made with his authority or consent. Pick v. Pick, 184 Neb. 716, 171 N.W.2d 766 (1969).

Where a new independent cause of action is filed by way of amendment, the statute of limitations runs until the filing of the amended petition. Horn's Crane Service v. Prior, 182 Neb. 94, 152 N.W.2d 421 (1967).

Mortgage subsequently given was an acknowledgment in writing of prior note. Alexanderson v. Wessman, 158 Neb. 614, 64 N.W.2d 306 (1954).

Where a bank assumed and agreed to pay the liabilities of another bank, the statute of limitations commenced to run against the assuming bank upon a certificate of deposit that had already matured at the time the assumption agreement was made. Diss v. State Bank of Holdrege, 141 Neb. 146, 3 N.W.2d 89 (1942).

Where a municipal warrant has been registered, statute of limitations does not commence to run until treasurer of municipal corporation gives notice to the holder of the warrant that there is sufficient money in the treasury to pay the warrant. Havelock Nat. Bank v. Northport Irr. Dist., 139 Neb. 747, 298 N.W. 695 (1941).

In determining whether statute of limitations has run upon a written instrument, part payments made by a debtor without specific direction may be applied by the creditor on any indebtedness owing by the debtor to the creditor. Fox v. Carman, 139 Neb. 34, 296 N.W. 343 (1941).

Where judgment is obtained on promissory note through fraud, court of equity will set it aside where it appears the maker had a good defense in that statute of limitations had run. Pavlik v. Burns, 134 Neb. 175, 278 N.W. 149 (1938).

Payments by one partner out of partnership funds, where partnership has become inactive but has not been dissolved, toll statute of limitations as to both partners. Jensen v. Romigh, 133 Neb. 71, 274 N.W. 199 (1937).

In suit on insurance policy based on presumption of death after seven years' unexplained absence, statute of limitations does not begin to run until expiration of seven-year period. Wells v. Equitable Life Assurance Society, 130 Neb. 722, 266 N.W. 597 (1936).

Cashier of bank who endorsed to bank a note of which he was payee, and, instead of collecting the note as was his duty, made payments of principal and interest on note from time to time, and, in three instances marked the note extended for two years each, was estopped, when sued on his endorsement, to plead statute of limitations. Atlas Corporation v. Magdanz, 130 Neb. 519, 265 N.W. 743 (1936).

Where a judgment of revivor had been obtained within five years before bringing action in this state, it was not barred by the statute of limitations of this state. Packer v. Thompson, 25 Neb. 688, 41 N.W. 650 (1889).

2. Acts that do not toll the statute

Partial payments made without the authority or consent of a surety, unless ratified by the surety, do not toll the statute of limitations as to the surety. Watkins Products, Inc. v. Rains, 175 Neb. 57, 120 N.W.2d 368 (1963).

Action against surety on written contract of guaranty was barred although payments were made by principal within five years. W. T. Rawleigh Co. v. Smith, 142 Neb. 529, 9 N.W.2d 286 (1943), affirming 142 Neb. 527, 7 N.W.2d 80 (1942).

Surety was not liable when he did nothing to prevent running of statute of limitations. W. T. Rawleigh Co. v. Smith, 142 Neb. 527, 7 N.W.2d 80 (1942).

Payments on note by principal without authority or consent of surety does not prevent running of statute of limitations against surety. In re Estate of Soukup, 142 Neb. 456, 6 N.W.2d 615 (1942).

The right to retain the debt of an heir upon a promissory note from his distributive share of estate is not precluded even though action to recover upon the note is barred by the statute of limitations. Fischer v. Wilhelm, 139 Neb. 583, 298 N.W. 126 (1941), opinion partially vacated on rehearing, 140 Neb. 448, 300 N.W. 350 (1941).

Where will provided that any sum owing to testator by heirs should be deducted from share of such heir, an heir cannot successfully object upon the ground of the statute of limitations to deduction of notes which had not run five years at time of death of testator. In re Estate of Nissen, 134 Neb. 794, 279 N.W. 782 (1938).

Payment by one of several joint debtors on note, without authority or consent of other debtors, does not toll statute of limitations as to them. Kuhse v. Luther, 130 Neb. 623, 266 N.W. 66 (1936).

Stipulation contained in a note permitting the holder to extend the time of payment without notice, is not an agreement waiving the right to plead the bar of the statute. Allen v. Estate of Allen, 81 Neb. 600, 116 N.W. 509 (1908).

3. Specific actions covered by statute

The statute of limitations provided in this section applies to an action on a contract of guaranty. The statute of limitations begins to run against a contract of guaranty the moment a cause of action first accrues, and a guarantor's liability arises when the principal debtor defaults. In the absence of provisions to the contrary in the controlling documents, a cause of action does not accrue against a guarantor until the guarantor's liability has arisen, and a guarantor's liability does not arise until the debtor defaults. City of Lincoln v. PMI Franchising, 267 Neb. 562, 675 N.W.2d 660 (2004).

This section, which provides for a 5-year statute of limitations on written contracts, applies in an insured's suit against its uninsured or underinsured motorist coverage insurer when the insured has timely filed the underlying claim against the uninsured or underinsured motorist. Schrader v. Farmers Mut. Ins. Co., 259 Neb. 87, 608 N.W.2d 194 (2000).

Generally, absent a more specific statute, actions on written contracts may be brought within 5 years. Kratochvil v. Motor Club Ins. Assn., 255 Neb. 977, 588 N.W.2d 565 (1999).

An action for damages for breach of a covenant of warranty contained in a deed conveying land is an action upon a specialty and must be brought within 5 years after the cause of action accrues; this rule applies in actions for damages for breach of a covenant against encumbrances. Omega Chemical Co. v. Rogers, 246 Neb. 935, 524 N.W.2d 330 (1994).

An action based on breach of a written contract must be commenced within five years of accrual of a cause of action. Grand Island School Dist. #2 v. Celotex Corp., 203 Neb. 559, 279 N.W.2d 603 (1979).

Five-year statute of limitations applies to a third party beneficiary under a real estate sales contract. Mid-Continent Properties, Inc. v. Pflug, 197 Neb. 429, 249 N.W.2d 476 (1977).

Actions to recover annual payments provided by indenture granting perpetual easement for flow of water and to enforce equitable lien growing out of the indenture are controlled by this section. Frye v. Sibbitt, 145 Neb. 600, 17 N.W.2d 617 (1945).

Cause of action on indemnity contract accrues when loss thereunder occurs. Lyhane v. Durtschi, 144 Neb. 256, 13 N.W.2d 130 (1944); Bankers Surety Co. v. Willow Springs Beverage Co., 104 Neb. 173, 176 N.W. 82 (1920).

A domestic judgment is a specialty and suit thereon is barred after five years from date of judgment. Farmers & Merchants Bank of Axtell V. Merryman, 126 Neb. 684, 254 N.W. 428 (1934); Reed v. Occidental Bldg. & Loan Assn., 122 Neb. 817, 241 N.W. 769 (1932); Armstrong v. Marr, 120 Neb. 182, 231 N.W. 758 (1930); Fisher v. Woodard, 103 Neb. 253, 170 N.W. 907 (1919); Armstrong v. Patterson, 97 Neb. 229, 149 N.W. 408 (1914), reversed on rehearing 97 Neb. 871, 152 N.W. 311 (1915).

Action for breach of covenant of warranty in deed is specialty, barred unless commenced within five years from date of breach. Campbell v. Gallentine, 115 Neb. 789, 215 N.W. 111 (1927); Kern v. Kloke, 21 Neb. 529, 32 N.W. 574 (1887).

Statute runs against married woman during coverture. Watkins v. Adamson, 113 Neb. 715, 204 N.W. 816 (1925).

Time of commencing action on city warrants stated. Trenerry v. City of So. Omaha, 86 Neb. 7, 124 N.W. 920 (1910); Rogers v. City of Omaha, 82 Neb. 118, 117 N.W. 119 (1908).

Time of commencing action for money had and received stated. Thiele v. Carey, 85 Neb. 454, 123 N.W. 442 (1909).

Time of commencing action on draft stated. Wrigley v. Farmers and Merchants State Bank of Beatrice, 76 Neb. 862, 108 N.W. 132 (1906).

Time of commencing action to reform policy of insurance stated. Grand View Building Assn. v. Northern Assur. Co., 73 Neb. 149, 102 N.W. 246 (1905).

Time of commencing action on county warrants stated. Bacon v. Dawes County, 66 Neb. 191, 92 N.W. 313 (1902).

Time of commencing action on award of damages stated. City of Omaha v. Clarke, 66 Neb. 33, 92 N.W. 146 (1902).

Time of commencing action on covenant against encumbrances stated. Johnson v. Hesser, 61 Neb. 631, 85 N.W. 894 (1901); Bellamy v. Chambers, 50 Neb. 146, 69 N.W. 770 (1897).

Time of commencing action on guaranty of payment stated. Cummins v. Tibbetts, 58 Neb. 318, 78 N.W. 617 (1899).

Time of commencing action on bank check stated. Connor v. Becker, 56 Neb. 343, 76 N.W. 893 (1898).

Time of commencing action on foreign judgments stated. Lonergan v. Lonergan, 55 Neb. 641, 76 N.W. 16 (1898); Hepler v. Davis, 32 Neb. 556, 49 N.W. 458 (1891); Marx & Kempner v. Kilpatrick, 25 Neb. 107, 41 N.W. 111 (1888).

Time of commencing action on contract for transportation of goods stated. Denman v. Chicago, B. & Q. R. Co., 52 Neb. 140, 71 N.W. 967 (1897).

Time of commencing action for foreclosure of tax lien stated. Alexander v. Thacker, 43 Neb. 494, 61 N.W. 738 (1895); Shepherd v. Burr, 27 Neb. 432, 43 N.W. 256 (1889).

Time of commencing action on insurance policy stated. Phenix Ins. Co. v. Rad Bila Hora Lodge, 41 Neb. 21, 59 N.W. 752 (1894).

An action upon a foreign judgment is barred in five years. Nelson v. Becker, 32 Neb. 99, 48 N.W. 962 (1891).

Warrant issued by a village will be barred in five years from time it becomes due. Arapahoe Village v. Albee, 24 Neb. 242, 38 N.W. 737 (1888).

Time of commencing action on school district bonds stated. School Dist. No. 42 of Pawnee County v. First Nat. Bank of Xenia, 19 Neb. 89, 26 N.W. 912 (1886).

Time of commencing action on promissory notes stated. Hedges v. Roach, 16 Neb. 673, 21 N.W. 404 (1884).

Suit by employee against employer for breach of written employment contract was governed by Nebraska five-year statute of limitations rather than the four-year statute of limitations relating to actions upon a contract not in writing. Sandobal v. Armour & Co., 429 F.2d 249 (8th Cir. 1979).

Cause of action for breach of contract of employment accrued on date of alleged wrongful discharge. Howard v. Chicago, B. & Q. R. R. Co., 146 F.2d 316 (8th Cir. 1945).

4. Miscellaneous

Where there is an ongoing contractual obligation, a separate cause of action accrues at the time of each breach. Where an obligation is payable by installments, the statute of limitations runs against each installment individually from the time it becomes due. Andersen v. A.M.W., Inc., 266 Neb. 238, 665 N.W.2d 1 (2003).

A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to. An insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy. Snyder v. Case and EMCASCO Ins. Co., 259 Neb. 621, 611 N.W.2d 409 (2000).

The filing of a foreign judgment in a Nebraska court pursuant to section 25-1587.03 is not an action upon a foreign judgment within the meaning of this section. Deuth v. Ratigan, 256 Neb. 419, 590 N.W.2d 366 (1999).

Pursuant to subsection (1) of this section, the statute of limitations started running when the city failed to timely post notice of a promotion examination under the terms of a collective bargaining agreement, not when the city actually administered the exam. Cavanaugh v. City of Omaha, 254 Neb. 897, 580 N.W.2d 541 (1998).

To toll the statute of limitations and to remove the bar of the statute, a debtor must unqualifiedly acknowledge an existing liability. Kotas v. Sorensen, 216 Neb. 648, 345 N.W.2d 1 (1984).

In a suit on a promissory note and security agreement, the statute of limitations begins to run when the creditor exercises his option to accelerate the debt, thereby making the entire amount of the debt due. State Security Savings Co. v. Pelster, 207 Neb. 158, 296 N.W.2d 702 (1980).

Where a covenant against encumbrances and covenants of warranty or quiet enjoyment appear in the same instrument, they are separate and independent covenants and one does not embrace the other. Cape Co. v. Wiebe, 196 Neb. 204, 241 N.W.2d 830 (1976).

This section bars action on the note, but not on the mortgage given to secure it. J. I. Case Credit Corp. v. Thompson, 187 Neb. 626, 193 N.W.2d 283 (1971).

Where insurance policy issued in this state provides twelve months' limitation for filing action, but also contains provision amending terms to conform with conflicting statutes, limitations in state statutes are applicable. Hiram Scott College v. Insurance Co. of North America, 187 Neb. 290, 188 N.W.2d 688 (1971).

Where community of interest or privity of estate exists between intervener and plaintiff, the commencement of action by plaintiff inures to benefit of intervener. Baker v. A. C. Nelson Co., 185 Neb. 128, 174 N.W.2d 197 (1970).

This section did not govern bringing of action on fire insurance policy. Rhodes v. Continental Ins. Co., 180 Neb. 10, 141 N.W.2d 415 (1966).

An action upon a contract in writing must be commenced within five years after cause of action has accrued. Weiss v. Weiss, 179 Neb. 714, 140 N.W.2d 15 (1966).

Instrument must in itself contain contract or promise. Grant v. Williams, 158 Neb. 107, 62 N.W.2d 532 (1954).

In action upon written instrument, where more than five years have elapsed from date of maturity, claimant must plead and prove facts to avoid bar of statute. In re Estate of Anderson, 148 Neb. 436, 27 N.W.2d 632 (1947).

Burden of proof rests upon plaintiff who pleads written extension of time of payment to avoid the bar of statute of limitations upon a promissory note. Prokop v. Mlady, 136 Neb. 644, 287 N.W. 55 (1939).

By failing to make demand, payee of a demand note cannot do away with the statute of limitations, which begins to run the day after the note is executed and delivered. Melville Lumber Co. v. Scott, 135 Neb. 379, 281 N.W. 803 (1938).

The statute of limitations on a note payable on demand begins to run the day after the note is executed and delivered. Luikart v. Hoganson, 135 Neb. 280, 281 N.W. 27 (1938).

Provision in insurance policy issued by fraternal benefit society that suit must be commenced within one year from date of member's death will be enforced in Nebraska if valid in state where contract was made. Avondale v. Sovereign Camp, W.O.W., 134 Neb. 717, 279 N.W. 355 (1938).

Defense of statute of limitations was properly pleaded. Nebraska State Bank Liquidation Assn. v. Village of Burton, 134 Neb. 623, 279 N.W. 319 (1938).

Defense of recoupment must arise out of same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative action on the subject of the recoupment is barred by statute of limitations. Oft v. Dornacker, 131 Neb. 644, 269 N.W. 418 (1936).

When state bank, against which a creditor had taken judgment, reorganized as national bank, and creditor sues the national bank to enforce his judgment formerly obtained against state bank, the statute of limitations begins to run on judgment from date it was obtained. Wilson v. Continental Nat. Bank, 130 Neb. 614, 266 N.W. 68 (1936).

Forum state's statute of limitations was procedural rather than substantive and was properly applied in diversity action for breach of contract. Player Pianette, Inc. v. Dale Electronics, Inc., 478 F.2d 336 (8th Cir. 1973).

In applying provision of Bankruptcy Act relating to proving of debt founded on contract express or implied, the character of the debt is determined by the law of the state where created. Erickson v. Richardson, 86 F.2d 963 (9th Cir. 1936).

25-206 Actions on oral contracts or statutory liabilities.

An action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within four years.

Source: R.S.1867, Code § 11, p. 395; R.S.1913, § 7568; C.S.1922, § 8511; C.S.1929, § 20-206.

1. When cause of action accrues
2. When statute is applicable
3. When statute is not applicable
4. Miscellaneous

1. When cause of action accrues

Plaintiff's cause of action on oral contract for the sale of grain, to be paid for on demand, accrued when demand could have been made and not when demand was actually made and was, therefor, barred by this section. Stock v. Meissner, 209 Neb. 636, 309 N.W.2d 86 (1981).

Action to recover payments made by county for maintenance of insane patient in state hospital is barred after four years. County of Adams v. Ernst, 158 Neb. 15, 62 N.W.2d 110 (1954).

Claim for reimbursement from estate of recipient of old age assistance did not accrue until death of recipient. Boone County Old Age Assistance Board v. Myhre, 149 Neb. 669, 32 N.W.2d 262 (1948).

Where services are rendered under a contract of employment which does not fix the term of service or the time of payment, the statute does not commence to run until the employee's services are terminated. In re Baker's Estate, 144 Neb. 797, 14 N.W.2d 585 (1944).

Under oral contract of hire terminated by mutual agreement, and superseded by another written contract between the same parties, cause of action for payment of salary under the first contract accrues immediately upon Termination. Price v. Platte Valley Public Power & Irr. Dist., 139 Neb. 787, 298 N.W. 746 (1941).

The statute of limitations does not begin to run against the claim of an adult child for services continually performed under an oral contract for parents during their lives, until the contract is terminated by their death. In re Estate of Skade, 135 Neb. 712, 283 N.W. 851 (1939).

Where action is brought to recover on implied obligation to repay money borrowed on void warrants, statute of limitations begins to run on date of last payment on the warrant. Nebraska State Bank Liquidation Assn. v. Village of Burton, 134 Neb. 623, 279 N.W. 319 (1938).

Liability of a bank director for loss sustained on excess loan is barred four years after the excessive loan is made. Department of Banking v. McMullen, 134 Neb. 338, 278 N.W. 551 (1938).

Liability of county judge as recipient of distributive share of absent devisee, which he failed to turn over to his successor in office or to said devisee, is not a liability created by statute but an original and primary action on his bond and may be brought within ten years after cause of action accrued. Ericsson v. Streitz, 132 Neb. 692, 273 N.W. 17 (1937).

Statute runs from the date of an account stated, and not from incurring of original debt. In re Estate of Black, Robinson v. Wittera, 125 Neb. 75, 249 N.W. 84 (1933).

Time of commencing action on contract for transportation of goods stated. Denman v. Chicago, B. & Q. R. R. Co., 52 Neb. 140, 71 N.W. 967 (1897).

Action on commission account was barred four years from last item. In re Automatic Equipment Mfg. Co., 103 F.Supp. 427 (D. Neb. 1952).

2. When statute is applicable

An action for an accounting of rents and profits of land is limited to four years. In re Estate of Widger, 235 Neb. 179, 454 N.W.2d 493 (1990).

Excluding September 5, 1969, the last day on which work was done, the last day of the four-year period of limitations was September 5, 1973. George P. Rose Sodding & Grading Co. v. Dennis, 195 Neb. 221, 237 N.W.2d 418 (1976).

Claim for services rendered was not barred until four years after death of promisor. Houser v. Houser, 178 Neb. 401, 133 N.W.2d 618 (1965).

This section applies to action in mandamus to place fireman on pension rolls of city. State ex rel. McIlvain v. City of Falls City, 177 Neb. 677, 131 N.W.2d 93 (1964).

This section was applicable to action by city to recover amount paid on void contract. Arthur v. Trindel, 168 Neb. 429, 96 N.W.2d 208 (1959).

Statute of limitations applies to claims by one county against another for maintenance of an incompetent person in a state hospital. County of Kearney v. County of Buffalo, 167 Neb. 117, 91 N.W.2d 304 (1958).

Action for accounting of the rents and profits of land is limited to four years. Beacom v. Daley, 164 Neb. 120, 81 N.W.2d 907 (1957).

Contract partly written and partly oral falls under this section. Grant v. Williams, 158 Neb. 107, 62 N.W.2d 532 (1954).

Action against city to recover pension is based on liability created by statute and is barred if not brought within four years of accrual of action. Barney v. City of Lincoln, 144 Neb. 537, 13 N.W.2d 870 (1944).

Statute applies to claims against counties. Bryant v. Cedar County, 122 Neb. 853, 241 N.W. 538 (1932).

Liability of stockholder, under Article XII, section 4, Constitution of Nebraska, is not a penalty barred in one year, but is contractual and governed by this section. Bourne v. Baer, 107 Neb. 255, 185 N.W. 408 (1921).

Action to recover on implied assumpsit is barred in four years. O'Neill v. City of So. Omaha, 102 Neb. 836, 170 N.W. 174 (1918).

Where more than four years intervenes between execution sale and action to set it aside, the action is barred. Best v. Zutavern, 53 Neb. 604, 74 N.W. 64 (1898).

Section applies to action for money received by agent for principal. Arnett v. Zinn, 20 Neb. 591, 31 N.W. 240 (1886).

Action for money had and received must be brought within four years from receipt of the money. Murphy v. Omaha, 1 Neb. Unof. 488, 95 N.W. 680 (1901).

Suit against employer to enforce agreement made in 1893 to deliver corporate stock was barred by this and other statutes of limitation in view of lapse of time. Reed v. Fairmont Creamery Co., 37 F.2d 332 (8th Cir. 1929).

3. When statute is not applicable

Right of retainer against heir is not affected by lapse of time, even though action upon the debt is barred by statute of limitations. Fischer v. Wilhelm, 139 Neb. 583, 298 N.W. 126 (1941), opinion partially vacated on rehearing, 140 Neb. 448, 300 N.W. 350 (1941).

Oral agreement to compensate one for past services, not performed as gratuity and not barred by statute, as well as for future services, out of promisor's estate by testamentary provi-

sion, is an independent contract to which statute requiring new promise to be in writing does not apply, where promisee performs agreement. Weideman v. Peterson's Estate, 129 Neb. 74, 261 N.W. 150 (1935).

Lien of special assessments is not barred by this section. Lincoln St. Ry. Co. v. City of Lincoln, 61 Neb. 109, 84 N.W. 802 (1901).

Section does not apply to recover delinquent personal taxes collected by distress. Price v. Lancaster County, 18 Neb. 199, 24 N.W. 705 (1885).

4. Miscellaneous

Section 76-701 et seq., R.R.S.1943, provides no specific statute of limitations; therefore the ten-year period in section 25-202, R.R.S.1943, applies in inverse condemnation proceedings. Krambeck v. City of Gretna, 198 Neb. 608, 254 N.W.2d 691 (1977).

In absence of agreement, or directions by debtor, a credit for work and labor may be applied by creditor in such manner as to interrupt running of statute of limitations. Heineman v. Thimgan, 136 Neb. 357, 285 N.W. 920 (1939).

Where the defense raised is statute of limitations, the issue should be presented to the jury for determination. Nocita v. Guiliano, 130 Neb. 241, 264 N.W. 672 (1936).

Statute of limitations, not being pleaded, will not be considered. State ex rel. Davis v. Banking House of A. Castetter, 118 Neb. 231, 224 N.W. 21 (1929).

The unilateral crediting of defendant's debt without defendant's consent or knowledge was not a voluntary acknowledgment of the debt sufficient to toll the statute of limitations. Hejco, Inc. v. Arnold, 1 Neb. App. 44, 487 N.W.2d 573 (1992).

Section 25-219 was applicable to federal civil rights claim of former guidance counselor in action against school district on allegations dismissal was due to his race and his exercise of First Amendment rights. Chambers v. Omaha Public School Dist., 536 F.2d 222 (8th Cir. 1976).

25-207 Actions for trespass, conversion, other torts, and frauds; exceptions.

The following actions can only be brought within four years: (1) An action for trespass upon real property; (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, except as provided in sections 30-2206 and 76-288 to 76-298.

Source: R.S.1867, Code § 12, p. 395; R.S.1913, § 7569; C.S.1922, § 8512; C.S.1929, § 20-207; R.S.1943, § 25-207; Laws 1947, c. 243, § 11, p. 766; Laws 1975, LB 481, § 9.

1. Conversion
2. Fraud
3. Real property
4. Trusts
5. Damages or injury
6. Miscellaneous

1. Conversion

Statute of limitations against trustee for conversion of trust property does not commence to run until knowledge is brought home to beneficiary of repudiation of trust. Bratt v. Wishart, 136 Neb. 899, 287 N.W. 769 (1939).

Where mortgagee of chattels unlawfully seizes mortgaged property before condition broken, action is barred after four years from date of seizure. Brashier v. Tolleth, 31 Neb. 622, 48 N.W. 398 (1891).

2. Fraud

An action for fraud must be brought within 4 years of when the cause of action accrues. Such action does not accrue until there has been discovery of the facts constituting the fraud or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which would lead to such discovery. NECO, Inc. v. Larry Price & Assocs., Inc., 257 Neb. 323, 597 N.W.2d 602 (1999).

An action for relief on the ground of fraud can only be brought within 4 years. Such action accrues once there has been a discovery of facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. Bowling Assocs., Ltd. v. Kerrey, 252 Neb. 458, 562 N.W.2d 714 (1997).

In the context of a fraud action, the limitations period begins to run upon discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. A cause of action cannot ''accrue'' before occurrence of all the elements which constitute a defendant's violation of a plaintiff's judicially protected right. Henderson v. Forman, 240 Neb. 939, 486 N.W.2d 182 (1992).

If facts pleaded in a petition are sufficient to plead an excuse to the operation of the statute limiting action based on fraud, a general demurrer will be defeated. Lee v. Brodbeck, 196 Neb. 393, 243 N.W.2d 331 (1976).

Where fraud should have been discovered within four years of recording of mineral deed, statute of limitations was complete defense. Jameson v. Graham, 159 Neb. 202, 66 N.W.2d 417 (1954).

Accrual of cause of action for fraud is fixed as of the time of discovery. Abels v. Bennett, 158 Neb. 699, 64 N.W.2d 481 (1954).

In action for relief based on fraud, suit was instituted when summons was served on original petition where amended petition merely set forth a more complete statement of original cause of action. Horrigan v. Quinlan, 149 Neb. 538, 31 N.W.2d 430 (1948).

An action for relief on the ground of fraud may be commenced only within four years after the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence on inquiry, which, if pursued, would lead to such discovery. Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N.W.2d 330 (1944); Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N.W.2d 327 (1941); Baxter v. National

Mtg. Loan Co., 128 Neb. 537, 259 N.W. 630 (1935); Branham v. Ayers, 126 Neb. 688, 254 N.W. 259 (1934).

In a bill of interpleader, a defendant is chargeable with notice of a cross-petition charging fraud filed against him by another defendant before answer day, and such notice may prevent the statute from running against the claim set up in the cross-petition. Provident Savings & Loan Assn. v. Booth, 138 Neb. 424, 293 N.W. 293 (1940).

Actions for relief based on mistake and accident are analogous to actions for relief based on fraud, and are limited to four years. Sweley v. Fox, 135 Neb. 780, 284 N.W. 318 (1939).

Action against bank officer for fraudulent diversion of assets of bank must be brought within four years of discovery of fraud. Department of Banking v. Hall, 135 Neb. 191, 280 N.W. 844 (1938).

Lapse of four years after creditor of corporation acquired knowledge of facts sufficient to require inquiry as to fraud in connection with officer's purchase of corporation's assets barred creditor's action for relief on ground of fraud. Nipp v. Puritan Mfg. Supply & Co., 128 Neb. 459, 259 N.W. 53 (1935).

Cause of action for fraud does not accrue until discovery of fraud. Marshall v. Rowe, 126 Neb. 817, 254 N.W. 480 (1934).

Petition in action to set aside satisfaction of judgment executed in 1917, on ground of fraud, alleged to have been discovered in 1926, was not demurrable. Marshall v. Rowe, 119 Neb. 591, 230 N.W. 446 (1930).

Action must be commenced within four years of discovery. Hanna v. Bergquist, 102 Neb. 658, 168 N.W. 365 (1918); Coad v. Dorsey, 96 Neb. 612, 148 N.W. 155 (1914).

Where defendant took title in her own name to lands belonging to herself and her children, statute of limitations commenced to run on date of discovery of fraud. Bell v. Dingwell, 91 Neb. 699, 136 N.W. 1128 (1912).

Statute of limitations does not bar the defense of recoupment. Kaup v. Schinstock, 88 Neb. 95, 129 N.W. 184 (1910).

If relief is sought on the ground of fraud after four years, plaintiff should allege reason for delay in prosecuting action. Bank of Miller v. Moore, 81 Neb. 566, 116 N.W. 167 (1908).

Action to set aside fraudulent conveyance is not tolled by death of the fraudulent grantor. Lesieur v. Simon, 73 Neb. 645, 103 N.W. 302 (1905).

Equitable action by heir, who claims deed of ancestor is void on account of duress and fraud, must be brought within four years of accrual of action. Aldrich v. Steen, 71 Neb. 33, 98 N.W. 445 (1904), affirmed on rehearing 71 Neb. 57, 100 N.W. 311 (1904).

Where plaintiff was defrauded in purchase of shares of stock of bank, cause of action did not accrue until discovery of fraud. Gerner v. Mosher, 58 Neb. 135, 78 N.W. 384 (1899).

Matters appearing of public record operate as constructive notice and constitute discovery of facts with respect to fraud. State ex rel. County Commissioners of Brown County v. Boyd, 49 Neb. 303, 68 N.W. 510 (1896).

Relief from the effect of accident or mistake comes within the same rule of limitation as fraud. Ainsfield v. More, 30 Neb. 385, 46 N.W. 828 (1890).

Statute begins to run when party learns facts sufficient to suggest fraud. Wright v. Davis, 28 Neb. 479, 44 N.W. 490 (1890); Hellman v. Davis, 24 Neb. 793, 40 N.W. 309 (1888).

Statute applies to fraud affecting real estate as well as personal property. Kohout v. Thomas, 4 Neb. Unof. 80, 93 N.W. 421 (1903).

Where a third-party petition generally involves the title to certain real estate but the specific factual allegations involve fraud and the cause of action clearly seeks relief on the ground of fraud, the 4-year statute of limitations under this section applies rather than the 10-year statute of limitations found in section 25-202, involving recovery of the title or possession of lands. McGinley v. McGinley, 7 Neb. App. 410, 583 N.W.2d 77 (1998).

Where action for fraud is commenced more than four years after fraudulent acts occurred, burden is on plaintiff to allege and prove that fraud was not discovered until within statutory period. Brictson v. Woodrough, 164 F.2d 107 (8th Cir. 1947).

Four-year Nebraska limitations statute on fraud could not commence to run until reinsurers were informed of extent of reinsured's misrepresentations regarding size of unearned premium portfolio, existence of excess and special risks department, and agent's status as managing general agent. Calvert Fire Ins. Co. v. Unigard Mut. Ins. Co., 526 F.Supp. 623 (D. Neb. 1980).

3. Real property

Where a covenant against encumbrances and covenants of warranty or quiet enjoyment appear in the same instrument, they are separate and independent covenants and one does not embrace the other. Cape Co. v. Wiebe, 196 Neb. 204, 241 N.W.2d 830 (1976).

Statute of limitations did not begin to run against a remainderman until knowledge was brought home to him that another was claiming title adversely. Graff v. Graff, 179 Neb. 345, 138 N.W.2d 644 (1965).

Actions for slander of title are not governed by this section. Norton v. Kanouff, 165 Neb. 435, 86 N.W.2d 72 (1957).

In action to quiet title to easement, an affirmative claim by defendant for damages for land taken is barred by statute of limitations. Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N.W.2d 602 (1942), vacated on rehearing, 142 Neb. 435, 8 N.W.2d 507 (1943).

Where defendant mortgagor in foreclosure proceeding claims damages for alleged misrepresentations by mortgagee, such defense is not barred by statute of limitations though it would be barred in an original action on the same cause of action. Mettlen v. Sandoz, 131 Neb. 625, 269 N.W. 98 (1936).

Whether fraud by misrepresentation in real estate trade should have been discovered within limitation period was for jury. Vrbsky v. Arendt, 119 Neb. 443, 229 N.W. 337 (1930).

Statute may run in favor of one in possession of land so as to bar claim for rents and profits beyond period of limitation. Davis v. Davis, 112 Neb. 178, 199 N.W. 113 (1924).

Statute does not run against action of rescission of exchange of lands until discovery of fraud. Carson v. Greeley, 107 Neb. 609, 187 N.W. 47 (1922).

Action to remove cloud on title to real estate, created by recorded deed, must be brought within four years after defendant took possession claiming title under deed. Dringman v. Keith, 93 Neb. 180, 139 N.W. 1044 (1913); Dringman v. Keith, 86 Neb. 476, 125 N.W. 1080 (1910).

Fraudulent deed recorded is not of itself sufficient to charge parties with notice. Forsyth v. Easterday, 63 Neb. 887, 89 N.W. 407 (1902); Gillespie v. Cooper, 36 Neb. 775, 55 N.W. 302 (1893), overruled in Jones v. Danforth, 71 Neb. 722, 99 N.W. 495 (1904).

4. Trusts

This section is the applicable statute of limitations with regard to the establishment of a constructive trust on personal property. Manker v. Manker, 263 Neb. 944, 644 N.W.2d 522 (2002).

The statute of limitations does not begin to run in case of a resulting trust until trustee clearly repudiates his trust, and the time it commences to run must be determined upon facts in each case. Jirka v. Prior, 196 Neb. 416, 243 N.W.2d 754 (1976).

Statute does not begin to run against an action to restore beneficial interests in land under resulting trust until trustee denies the interest of the beneficiaries. Windle v. Kelly, 135 Neb. 143, 280 N.W. 445 (1938).

Where trustee, through himself as president of bank, purchased with trust funds valueless notes from bank and concealed transactions, running of statute was tolled. First Trust Co. of Lincoln v. Exchange Bank, 126 Neb. 856, 254 N.W. 569 (1934).

Statute runs in favor of trustee ex maleficio from time of discovery of fraud. Abbott v. Wagner, 108 Neb. 359, 188 N.W. 113 (1922).

5. Damages or injury

This statute of limitations applies to actions allegedly arising under 42 U.S.C. section 1983. Bauers v. City of Lincoln, 245 Neb. 632, 514 N.W.2d 625 (1994).

Under this section, plaintiff had four years from date of damage to file product liability action. New product liability statute of limitations appears at section 25-224. Morris v. Chrysler Corp., 208 Neb. 341, 303 N.W.2d 500 (1981).

An action grounded in tort must be commenced within four years of the occurrence of the event giving rise to the cause of action. Grand Island School Dist. #2 v. Celotex Corp., 203 Neb. 559, 279 N.W.2d 603 (1979).

Where defendant, which was plaintiff's insurance carrier, had made no payment to plaintiff for damage caused by a third party, it had no duty to sue as subrogee, and its failure to do so before the statute of limitations ran did not make it liable. Schmer v. Hawkeye-Security Ins. Co., 194 Neb. 94, 230 N.W.2d 216 (1975).

An action for an injury hereunder accrues when the damage occurs and not when plaintiff discovers cause of the damage. Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc., 193 Neb. 848, 230 N.W.2d 87 (1975).

Recovery for loss of crops was limited to period of four years before action was brought. Wischmann v. Raikes, 168 Neb. 728, 97 N.W.2d 551 (1959).

Damages to growing crops from floodwaters are limited to period commencing four years before commencement of action. Wischmann v. Raikes, 167 Neb. 251, 92 N.W.2d 708 (1958).

Where intention to inflict injury is entirely lacking, action in tort may be brought within four years. Newman v. Christensen, 149 Neb. 471, 31 N.W.2d 417 (1948).

Right to damages for obstruction of a stream by an insufficient culvert or drain does not accrue when the structure is built but when the overflow actually results. Schmutte v. State, 147 Neb. 193, 22 N.W.2d 691 (1946).

Action for damages for alienation of affections was not barred by statute of limitations. Baltzly v. Gruenig, 127 Neb. 520, 256 N.W. 4 (1934).

In actions for tortious interference with a business relationship, the statute of limitations under this section begins to run when the injury actually occurs. Additionally, this section does not provide for a discovery rule for tortious interference. Under this section, a claim for damages based on intentional interference with a contractual relationship accrues when the subject contract is breached, regardless of when the defendant supposedly induced the breach. Hroch v. Farmland, 4 Neb. App. 709, 548 N.W.2d 367 (1996).

Husband's action for alienation of affection accrues when wife leaves home and severs relationship, and the limitations period is not extended by the fact that the husband does not give up on the possibility of renewal of relationship until later, and thus suffers continuing damages. Mattice v. Messer, 493 F.2d 498 (8th Cir. 1974).

In tort action for occupational disease, statute begins to run when employee acquires knowledge of compensable injury. Sylvania Electric Products, Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955).

Where buyer sued to recover on substitute arbitrator's award because grain delivered did not equal sample, but creditors for whose benefit debtor's grain was being sold refused to be bound by agent's unauthorized appointment of substitute, claim for damages in amended petition was not barred by statute of limitations as change in character of relief sought did not prevent original petition from tolling statute. Otoe County National Bank v. Delaney, 88 F.2d 238 (8th Cir. 1937).

Statute of limitations was not tolled by absence from state of alleged tort-feasor, a California resident who was involved in automobile accident within the state, if at all times following accident California resident could be sued in the state by virtue of nonresident motor vehicle statute. Gatliff v. Little Audrey's Transportation Co., Inc., 317 F.Supp. 1117 (D. Neb. 1970).

6. Miscellaneous

This section applies to counterclaims when read in conjunction with sections 25-201 and 25-217 and the rule that a counterclaim must be an existing, valid, and enforceable cause of action. However, whether a counterclaim is barred by this section is determined by the date the related petition was filed, rather than the date the counterclaim was filed. Becker v. Hobbs, 256 Neb. 432, 590 N.W.2d 360 (1999).

''Discovery,'' as used in this statute, means that an individual acquires knowledge of a fact which existed but was previously unknown to the discoverer. If a petition challenged under the statute of limitations facially shows that a cause of action is barred by the statute, a plaintiff must allege facts sufficient to avoid the bar of the statute and must prove those facts at trial; but if a petition does not disclose on its face that an action is barred by the statute of limitations, the defendant must plead and prove the statute as an affirmative defense. Broekemeier Ford v. Clatanoff, 240 Neb. 265, 481 N.W.2d 416 (1992).

The filing of a petition does not toll the running of this statute of limitations for the purpose of bringing subsequent actions on the same set of facts. Sluka v. Herman, 229 Neb. 200, 425 N.W.2d 891 (1988).

This statute provides the applicable statute of limitations for actions for mutual mistake. The statute of limitations begins to run when mutual mistake was discoverable by reasonable diligence. Newton v. Brown, 222 Neb. 605, 386 N.W.2d 424 (1986).

The point at which a statute of limitations commences to run must be determined from the facts of each case; a cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. Mangan v. Landen, 219 Neb. 643, 365 N.W.2d 453 (1985).

Four-year general statute of limitations applies to employer liable as joint tort-feasor with employee killed in accident, even if plaintiff's claim against estate of employee was filed out of time and barred by two-year nonclaim statute. S.M.S. Trucking Co. v. Midland Vet, Inc., 186 Neb. 647, 185 N.W.2d 667 (1971).

This section is not applicable to misrepresentation as to nature and cause of patient's condition in action against physician. Stacey v. Pantano, 177 Neb. 694, 131 N.W.2d 163 (1964).

Where petition was amended to change cause of action from action on contract to action based on tort, statute of limitations continued to run until filing of amended petition. Blair v. Klein, 176 Neb. 245, 125 N.W.2d 669 (1964).

The defense of the statute of limitations is a personal privilege of the debtor, and may be waived. Gurske v. Strate, 165 Neb. 882, 87 N.W.2d 703 (1958).

Where answer pleaded defense of statute of limitations, instruction thereon was required. Harsche v. Czyz, 157 Neb. 699, 61 N.W.2d 265 (1953).

Limitation in surety bond, that any loss for which claim is made must be discovered during term of bond or within fifteen months after termination of surety's liability as to the employee involved is not void as attempting to shorten by contract the time within which action for fraud can be brought. Dunbar v. National Surety Corporation, 140 Neb. 833, 2 N.W.2d 116 (1942).

Under the United States Constitution, conferring on Congress power to pass uniform laws on the subject of bankruptcy, the two-year statute of limitations in the bankruptcy act supersedes all statutes of limitations passed by the various states. Engebretson v. West, 133 Neb. 846, 277 N.W. 433 (1938).

Second amended petition, introducing new causes of action which are barred by statute of limitations, cannot be basis for recovery against defendant. Rule does not apply to allegations of original petition, filed before statute had run. Streight v. First Trust Co. of Omaha, 133 Neb. 340, 275 N.W. 278 (1937).

Actions which in substance and effect are actions for money had and received, in the absence of specific statute of limitations, must be brought within four years from receipt of the money. Torgeson v. Department of Trade and Commerce, 127 Neb. 49, 254 N.W. 740 (1934).

Bank receiver's suit to recover bank's assets used to repay deposit of bankers' conservation fund was barred by statute of limitations. Torgeson v. Department of Trade and Commerce, 127 Neb. 38, 254 N.W. 735 (1934).

Statute will not run against action by pledgor to recover collaterals until liability is determined or repudiation of trust by pledgee. Parker v. First Nat. Bank of Omaha, 118 Neb. 96, 223 N.W. 651 (1929).

Statute does not begin to run against action for money had and received, where suit is for recovery of payment on land, until contract is terminated. Thiele v. Carey, 85 Neb. 454, 123 N.W. 442 (1909).

Time of commencing action for support of child born out of wedlock stated. Denham v. Watson, 24 Neb. 779, 40 N.W. 308 (1888).

Section 25-222 is a specific exception as to professional negligence from the normal four-year statute of limitations. Horn v. Burns & Roe, 536 F.2d 251 (8th Cir. 1976).

While a party is prevented from enforcing a legal right by some paramount authority, the statute of limitations ordinarily is not treated as running against the right. Yoder v. Nu-Enamel Corporation, 145 F.2d 420 (8th Cir. 1944).

Tort claim in state court against estate of deceased was barred by statute of limitations, but a federal diversity action against representatives of the estate not barred for four-years. Williams v. Hawkeye-Security Ins. Co., 428 F.Supp. 976 (D. Neb. 1977).

25-208 Actions for libel, slander, malpractice, and recovery of tax.

The following actions can only be brought within the periods stated in this section: Within one year, an action for libel or slander; and within two years, an action for malpractice which is not otherwise specifically limited by statute.

In the absence of any other shorter applicable statute of limitations, any action for the recovery of any excise or other tax which has been collected under any statute of the State of Nebraska and which has been finally adjudged to be unconstitutional shall be brought within one year after the final decision of the court declaring it to be unconstitutional. This section shall not apply to any action for the recovery of a property tax.

The changes made to this section by Laws 2000, LB 921, shall apply to causes of action accruing on and after July 13, 2000.

Source: R.S.1867, Code § 13, p. 395; R.S.1913, § 7570; C.S.1922, § 8513; C.S.1929, § 20-208; Laws 1933, c. 42, § 1, p. 248; Laws 1937, c. 43, § 1, p. 187; C.S.Supp.,1941, § 20-208; R.S. 1943, § 25-208; Laws 1972, LB 1132, § 2; Laws 1991, LB 829, § 2; Laws 2000, LB 921, § 2.

1. Libel and slander
2. Assault and battery
3. Malicious prosecution
4. Penalty or forfeiture
5. Malpractice
6. Miscellaneous

1. Libel and slander

Publication of slander occurs when the words are spoken to and understood by a third party to pertain to the individual slandered. The statute of limitations on slander under this section begins to run from publication and will not be tolled unless the slanderer wrongfully concealed a material fact necessary for the accrual of the cause of action. Mere ignorance concerning the alleged slanderer's identity will not toll the statute of limitations. Lathrop v. McBride, 209 Neb. 351, 307 N.W.2d 804 (1981).

The statute of limitations in a libel action commences to run upon publication of the defamatory matter upon which action is based. Patterson v. Renstrom, 188 Neb. 78, 195 N.W.2d 193 (1972).

Action for damages for wrongfully encumbering plaintiff's title to real estate is a slander of title action and barred in one year. Gentry v. State, 174 Neb. 515, 118 N.W.2d 643 (1962).

Action for libel must be commenced within one year of publication of defamatory matter. Tennyson v. Werthman, 167 Neb. 208, 92 N.W.2d 559 (1958).

Actions for slander of title must be brought within one year. Norton v. Kanouff, 165 Neb. 435, 86 N.W.2d 72 (1957).

Action for libel must be brought within one year. Reller v. Ankeny, 160 Neb. 47, 68 N.W.2d 686 (1955).

A cause of action for libel or slander accrues on the date of publication of the defamatory matter. Publication of an allegedly libelous statement occurs when it is communicated to someone other than the person defamed. Vergara v. Lopez-Vasquez, 1 Neb. App. 1141, 510 N.W.2d 550 (1993).

2. Assault and battery

Action for a battery is founded upon an intentionally administered injury to the person. Newman v. Christensen, 149 Neb. 471, 31 N.W.2d 417 (1948).

Action by husband for damages for assault and battery committed upon wife is barred unless brought within one year after the cause of action accrued. Markel v. Glassmeyer, 137 Neb. 243, 288 N.W. 821 (1939).

Action of damages for assault and battery must be brought within one year. Borchert v. Bash, 97 Neb. 593, 150 N.W. 830 (1915).

3. Malicious prosecution

Statute does not begin to run in a case of malicious prosecution until the criminal case is dismissed, or the prosecution

otherwise finally terminated. Hackler v. Miller, 79 Neb. 209, 114 N.W. 274 (1907).

4. Penalty or forfeiture

Plaintiffs' causes of action for refunds of taxes paid in years prior to decision determining illegality of tax were barred by statute of limitations. Wats Mktg. of America v. Boehm, 242 Neb. 252, 494 N.W.2d 527 (1993).

A statute that permits injured party to recover treble damages authorizes the collection of a penalty. Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960).

Action to recover amounts paid under Industrial Loan Act was not one to recover a penalty. Jourdon v. Commonwealth Co., 170 Neb. 919, 104 N.W.2d 681 (1960).

Action against stockholder of a corporation for failure of corporation to publish annually notice of existing indebtedness is penal in nature, and must be brought within one year after cause of action accrued. Hoffman v. Geiger, 134 Neb. 643, 279 N.W. 350 (1938), reversed on rehearing 135 Neb. 349, 281 N.W. 625 (1938).

Action against bank director for participating in or knowingly assenting to an excessive loan is not penal, and is not governed as to statute of limitations by this section. Department of Banking v. McMullen, 134 Neb. 338, 278 N.W. 551 (1938).

Liability of stockholder, under Article XII, section 4, Constitution of Nebraska, is not a penalty, and is not barred in one year under this section. Bourne v. Baer, 107 Neb. 255, 185 N.W. 408 (1921).

Action for statutory penalty is barred if not brought in one year from date of accrual. Sheibley v. Cooper, 79 Neb. 232, 112 N.W. 363 (1907), rehearing denied 79 Neb. 336, 113 N.W. 626 (1907).

5. Malpractice

A single professional relationship will not be separated into various parts for the purpose of applying to one part of that relationship the fraud period of limitations found in section 25-207 and to another part the malpractice period of limitations found in this section. St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co., 244 Neb. 408, 507 N.W.2d 275 (1993).

When an issue of consent to medical treatment is raised, the controlling statute of limitations is that for malpractice actions. Jones v. Malloy, 226 Neb. 559, 412 N.W.2d 837 (1987).

A cause of action for medical malpractice does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the malpractice. Taylor v. Karrer, 196 Neb. 581, 244 N.W.2d 201 (1976).

Special two-year statute of limitations controlled action against doctor based on erroneous blood typing by his employee. Swassing v. Baum, 195 Neb. 651, 240 N.W.2d 24 (1976).

In a malpractice action, the limitation does not begin to run until the patient discovers or with reasonable diligence could have discovered the injury, and a patient has used reasonable diligence where she fails to discover because of the surgeon's repeated assurances of recovery and recommendations for therapy to aid in recovery. Toman v. Creighton Memorial St. Joseph's Hosp., Inc., 191 Neb. 751, 217 N.W.2d 484 (1974).

In a malpractice action against a physician, the statute of limitations does not commence to run until act of malpractice with resulting injury was, or by the use of reasonable diligence could have been, discovered. Acker v. Sorensen, 183 Neb. 866, 165 N.W.2d 74 (1969).

Special statute as to malpractice was controlling over general statute of limitations applicable to actions based on fraud. Stacey v. Pantano, 177 Neb. 694, 131 N.W.2d 163 (1964).

A cause of action against a physician for failure to remove a foreign object left in the body of a patient does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the presence of the foreign object. Spath v. Morrow, 174 Neb. 38, 115 N.W.2d 581 (1962).

Action in a malpractice suit does not commence to run until the treatment ends. Williams v. Elias, 140 Neb. 656, 1 N.W.2d 121 (1941).

6. Miscellaneous

The 1-year discovery exception provided for in this section only applies if the injured party did not know or could not reasonably have discovered the existence of the cause of action within the time period provided for in this section. The 1-year discovery exception provided for in section 25-222 does not apply in actions governed under this section if the injured party knew or could reasonably have discovered the cause of action within the time set forth in this section. Berntsen v. Coopers & Lybrand, 249 Neb. 904, 546 N.W.2d 310 (1996).

The discovery doctrine set out in section 25-222 permitting commencement of the action within 1 year from discovery, if discovery could not reasonably have occurred sooner, applies to the period of limitations set forth in this section. St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co., 244 Neb. 408, 507 N.W.2d 275 (1993).

Action to recover amount paid by city on void contract was not barred under this section. Arthur v. Trindel, 168 Neb. 429, 96 N.W.2d 208 (1959).

Section 25-219 was applicable to federal civil rights claim of former guidance counselor in action against school district on allegations dismissal was due to his race and his exercise of First Amendment rights. Chambers v. Omaha Public School Dist., 536 F.2d 222 (8th Cir. 1976).

25-209 Actions on official or judicial bonds.

An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, or in any case whatever required by statute can only be brought within ten years.

Source: R.S.1867, Code § 14, p. 396; R.S.1913, § 7571; C.S.1922, § 8514; C.S.1929, § 20-209.

1. Official bonds
2. Miscellaneous

1. Official bonds

Action on county treasurer's bond was commenced within time permitted by this section. City of Bellevue v. Western Surety Co., 184 Neb. 678, 171 N.W.2d 772 (1969).

Bond of chairman of Board of Public Works is an official bond within meaning of this section. Neisius v. Henry, 143 Neb. 273, 9 N.W.2d 163 (1943).

In suit against city officer and surety on bond to recover excess salary paid, all amounts paid more than ten years prior

to date of filing suit are barred. Neisius v. Henry, 142 Neb. 29, 5 N.W.2d 291 (1942).

Statute of limitations on action on official bond of clerk of district court is ten years. Thurston County v. Farley, 128 Neb. 756, 260 N.W. 397 (1935).

Actions on official bonds may be brought within ten years after the cause of action accrues. United States Fidelity & Guaranty Co. v. McLaughlin, 76 Neb. 310, 109 N.W. 390 (1906).

Action on official bond is not barred until expiration of ten years from time action accrues. Bantley v. Baker, 61 Neb. 92, 84 N.W. 603 (1900).

Action on official bond of county judge is barred in ten years after cause of action accrued. Chicago, B. & Q. Ry. Co. v. Philpott, 56 Neb. 212, 76 N.W. 550 (1898).

County treasurers are within the general designation ''any other officer,'' and actions upon their bonds are brought within the provisions of this section. Alexander v. Overton, 22 Neb. 227, 34 N.W. 629 (1887).

2. Miscellaneous

The statute of limitations on action on statutorily required grain dealer's bond is 10 years. Stock v. Meissner, 217 Neb. 56, 348 N.W.2d 426 (1984).

Where bond was not applicable on the date the plaintiff's cause of action accrued, this section was inapplicable. Stock v. Meissner, 209 Neb. 636, 309 N.W.2d 86 (1981).

The limitation does not begin to run on a guardian's bond until he has obtained approval of his final account and been discharged by probate court. Sherwood v. Merchants Mut. Bonding Co., 193 Neb. 262, 226 N.W.2d 761 (1975).

Where amended petition introduces new causes of action which are barred by statute of limitations, such new allegations cannot be the basis of a recovery, but this rule does not apply to allegations contained in the original petition which are repeated in the amended petition. Streight v. First Trust Co. of Omaha, 133 Neb. 340, 275 N.W. 278 (1937).

Action accrues on official bond of a county judge when he fails to pay to his successor in office, on the expiration of his term, any money in his possession due to an heir or other person, which has not been paid to the person entitled thereto. Ericsson v. Streitz, 132 Neb. 692, 273 N.W. 17 (1937).

Action on appeal bond is governed by this section and is not barred until after ten years. Crum v. Johnson, 3 Neb. Unof. 826, 92 N.W. 1054 (1902).

25-210 Actions against sureties on guardian's bond.

No action shall be maintained against the sureties in any bond given by a guardian unless it be commenced within four years from the time when the guardian shall have been discharged; *Provided*, if at the time of such discharge the person entitled to bring such action shall be out of the state, or under any legal disability to sue, the action may be commenced at any time within five years after the return of such person to the state, or after such disability shall be removed.

Source: R.S.1867, Code § 32, p. 185; R.S.1913, § 7572; C.S.1922, § 8515; C.S.1929, § 20-210.

The limitation herein does not begin to run until the guardian has obtained approval of his final account and been discharged by probate court. Sherwood v. Merchants Mut. Bonding Co., 193 Neb. 262, 226 N.W.2d 761 (1975).

As to sureties on guardian's bond, statute of limitations begins to run from date guardian was discharged and not from time when cause of action accrued upon final settlement. Medow v. Riggert, 132 Neb. 429, 272 N.W. 238 (1937).

Guardian is ''discharged,'' within meaning of this section, when ward dies. Hughes v. Langdon, 111 Neb. 508, 196 N.W. 915 (1924).

Action on guardian's bond accrues to ward when amount is ascertained by county court on final settlement. Bisbee v. Gleason, 21 Neb. 534, 32 N.W. 578 (1887).

25-211 Actions on contracts by reason of failure or want of consideration.

Actions brought for damages growing out of the failure or want of consideration of contracts, express or implied, or for the recovery of money paid upon contracts, express or implied, the consideration of which has wholly or in part failed, shall be brought within four years.

Source: R.S.1867, Code § 15, p. 396; R.S.1913, § 7573; C.S.1922, § 8516; C.S.1929, § 20-211.

Statute of limitations will commence to run against the obligation evidenced by a warrant not entitled to registration from the date of last payment upon it. Pollock v. Consolidated School District No. 65 of Perkins County, 138 Neb. 315, 293 N.W. 108 (1940).

Statute of limitations on implied obligation to repay money borrowed by issuance of void warrant, where payments have been made thereon, commences to run on date of last payment. Nebraska State Bank Liquidation Association v. Village of Burton, 134 Neb. 623, 279 N.W. 319 (1938).

Contract sued on herein is not barred when commenced within four years from time of death of the father. Macfarland v. Callahan, 102 Neb. 54, 165 N.W. 889 (1917).

Action to recover on an implied assumpsit is barred in four years. Markey v. School Dist. No. 18 of Sheridan County, 58 Neb. 479, 78 N.W. 932 (1899).

25-212 Actions not specified.

An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued.

Source: R.S.1867, Code § 16, p. 396; R.S.1913, § 7574; C.S.1922, § 8517; C.S.1929, § 20-212.

1. Accrual of cause of action
2. Specific actions included
3. Miscellaneous

1. Accrual of cause of action

Generally, a suit to declare a contract void, which if void was void at its inception, must be commenced within four years of the execution of the contract. Lake v. Piper, Jaffray & Hopwood Inc., 219 Neb. 731, 365 N.W.2d 838 (1985).

The point at which a statute of limitations commences to run must be determined from the facts of each case; a cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. Mangan v. Landen, 219 Neb. 643, 365 N.W.2d 453 (1985).

Where there is a continuous running account, statute of limitations commences to run from date of last item. Lewis v. Hiskey, 166 Neb. 402, 89 N.W.2d 132 (1958).

Where demand for the repayment of money paid has been made, the statute of limitations as to when the taxpayer may sue begins to run at the expiration of the ninety-day period in which to make the refund. Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N.W.2d 210 (1944).

Action to recover from county amount paid for void tax sale certificate accrues when tax sale certificate has been declared void by court of competent jurisdiction, and action must be brought within four years thereafter. McDonald v. County of Lincoln, 141 Neb. 741, 4 N.W.2d 903 (1942).

Mandamus to compel performance of continuing duty by public officer is not barred by this section, even though performance of duty may have been compelled more than four years prior to bringing of a suit. State ex rel. Cashman v. Carmean, 138 Neb. 819, 295 N.W. 801 (1941).

Action on official bond of county judge accrues on expiration of his term, when he fails to pay to his successor money in his possession due to an heir or other person. Ericsson v. Streitz, 132 Neb. 692, 273 N.W. 17 (1937).

Limitations in action for alienation of affections begin to run when affections are alienated and husband abandons wife. Von Dorn v. Rubin, 104 Neb. 465, 177 N.W. 653 (1920).

Husband's action for alienation of affection accrues when wife leaves home and severs relationship, and the limitations period is not extended by the fact that the husband does not give up on the possibility of renewal of relationship until later, and thus suffers continuing damages. Mattice v. Messer, 493 F.2d 498 (8th Cir. 1974).

2. Specific actions included

Nonconsent of irrigation company to transfer of water right was barred by statute. Vonburg v. Farmers Irrigation District, 132 Neb. 12, 270 N.W. 835 (1937).

In civil action to recover fees withheld by clerk of district court, statute of limitations is four years. Thurston County v. Farley, 128 Neb. 756, 260 N.W. 397 (1935).

Action for damages for alienation of affections was not barred by statute of limitations. Baltzly v. Gruenig, 127 Neb. 520, 256 N.W. 4 (1934).

Section is applicable to civil actions only. Mercer v. City of Omaha, 76 Neb. 289, 107 N.W. 565 (1906).

Action to obtain a new trial in which a judgment was rendered on the ground of unavoidable casualty and misfortune may be brought within four years. Ritchey v. Seeley, 73 Neb. 164, 102 N.W. 256 (1905).

State demands are not barred. Streitz v. Hartman, 35 Neb. 406, 53 N.W. 215 (1892).

A proceeding by mandamus is barred by the statute of limitations at the expiration of four years from the time the right to the writ accrued. State ex rel. Gage County v. King, 34 Neb. 196, 51 N.W. 754 (1892); State ex rel. Chem. Nat. Bank v. School District No. 9 of Sherman County, 30 Neb. 520, 46 N.W. 613 (1890).

Suit against employer to enforce contract made in 1893 to deliver corporate stock was barred by this and other statutes of limitations, in view of lapse of time, etc. Reed v. Fairmont Creamery Co., 37 F.2d 332 (8th Cir. 1929).

3. Miscellaneous

The defense of the statute of limitations may not be raised by a judgment creditor against a mortgagee. Gurske v. Strate, 165 Neb. 882, 87 N.W.2d 703 (1958).

Court will not require payment of damages barred by statute of limitations, under maxim that he who comes into equity must do equity. Dawson County Irrigation Co. v. Stuart, 142 Neb. 428, 6 N.W.2d 602 (1942).

Actions for relief based on accident and mistake are analogous to actions based on fraud, and are covered by section 25-207. Sweley v. Fox, 135 Neb. 780, 284 N.W. 318 (1939).

Where amended petition introduces new causes of action which are barred by statute of limitations, such new allegations cannot be the basis of a recovery, but this rule does not apply to allegations contained in the original petition which are repealed in the amended petition. Streight v. First Trust Co. of Omaha, 133 Neb. 340, 275 N.W. 278 (1937).

Amendment of petition to change legal theory of action, introducing new cause of action long since barred by statute of limitations, is not allowable. Hensley v. Chicago, St. P., M. & O. R. Co., 126 Neb. 579, 254 N.W. 426 (1934).

Intent of Legislature was to cover every form of action not otherwise provided for. Beall v. McMenemy, 63 Neb. 70, 88 N.W. 134 (1901).

Section 43-666, R.R.S.1943, is not sufficiently analogous to 20 U.S.C. section 1415 for its statute of limitation to apply to actions under that federal statute. However, the statute of limitations under either section 25-212 or 25-219, R.R.S.1943, appears to be more appropriate. Monahan v. State of Neb., 491 F.Supp. 1074 (D. Neb. 1980).

25-213 Tolling of statutes of limitation; when.

Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in Chapter 25, the Political Subdivisions Tort Claims Act, the Nebraska Hospital-Medical Liability Act, the State Contract Claims Act, the State Tort Claims Act, or the State Miscellaneous Claims Act, except for a

penalty or forfeiture, for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by Chapter 25 after such disability is removed. For the recovery of the title or possession of lands, tenements, or hereditaments or for the foreclosure of mortgages thereon, every such person shall be entitled to bring such action within twenty years from the accrual thereof but in no case longer than ten years after the termination of such disability. Absence from the state, death, or other disability shall not operate to extend the period within which actions in rem are to be commenced by and against a nonresident or his or her representative.

Source: R.S.1867, Code § 17, p. 396; R.S.1913, § 7576; C.S.1922, § 8519; Laws 1925, c. 64, § 2, p. 221; C.S.1929, § 20-213; R.S.1943, § 25-213; Laws 1947, c. 243, § 12, p. 766; Laws 1972, LB 1049, § 1; Laws 1974, LB 949, § 2; Laws 1984, LB 692, § 2; Laws 1986, LB 1177, § 5; Laws 1988, LB 864, § 5; Laws 2007, LB339, § 1.

Cross References

Nebraska Hospital-Medical Liability Act, see section 44-2855.
Political Subdivisions Tort Claims Act, see section 13-901.
State Contract Claims Act, see section 81-8,302.
State Miscellaneous Claims Act, see section 81-8,294.
State Tort Claims Act, see section 81-8,235.

1. Minors
2. Mental disabilities
3. Nonresidents
4. Miscellaneous

1. Minors

Subsection (2) of section 25-224 is not tolled by a person's status as a minor pursuant to this section. Budler v. General Motors Corp., 268 Neb. 998, 689 N.W.2d 847 (2004).

One is within the age of 20 for purposes of this section until he or she becomes 21 years old. Brown v. Kindred, 259 Neb. 95, 608 N.W.2d 577 (2000).

Mere fact of imprisonment does not toll the statute of limitations for a medical malpractice action. Gordon v. Connell, 249 Neb. 769, 545 N.W.2d 722 (1996).

One is ''within the age of twenty years'' until he or she becomes 21 years old. Lawson v. Ford Motor Co., 225 Neb. 725, 408 N.W.2d 256 (1987).

Suspension of the statute of limitations in accordance with this section inures to the exclusive and personal benefit of the infant, and not to the benefit of the infant's parent. Macku v. Drackett Products Co., 216 Neb. 176, 343 N.W.2d 58 (1984).

Workmen's Compensation Act makes no exception in favor of minor dependents as to limitation for filing claims, and action brought by minors under this act are governed by its provisions and not by general statute of limitations. Ray v. Sanitary Garbage Co., 134 Neb. 178, 278 N.W. 139 (1938).

Statute is not tolled by minority of heirs where it commenced to run in lifetime of ancestor. McNeill v. Schumaker, 94 Neb. 544, 143 N.W. 805 (1913).

Minor may bring action to recover interest in real estate within ten years after arriving at majority. Albers v. Kozeluh, 68 Neb. 522, 94 N.W. 521 (1903), former judgment adhered to 68 Neb. 529, 97 N.W. 646 (1903).

Time for bringing of action by minor against county for defect in highway under special statute is not extended by this section. Swaney v. Gage County, 64 Neb. 627, 90 N.W. 542 (1902).

This section tolls the running of the time limitation under § 25-222 until an infant reaches the age of majority. Hatfield v. Bishop Clarkson Memorial Hosp., 679 F.2d 1258 (8th Cir. 1982).

2. Mental disabilities

Insanity means such condition of mental derangement which actually prevents the sufferer from understanding and protecting his or her legal rights. Sacchi v. Blodig, 215 Neb. 817, 341 N.W.2d 326 (1983).

In the case of recovery of real estate this section gives an incompetent ten years after disability is removed to bring action. In re Estate of Montgomery, 133 Neb. 153, 274 N.W. 487 (1937).

Statute does not commence to run against the owner of real property confined in an asylum for the insane at the time of a tax lien foreclosure, and who continues to be mentally incompetent after his discharge from the hospital, until he has been sufficiently restored to his mental powers to be able to comprehend that he was owner of the property and able to take some action to protect his rights with reference thereto. Walter v. Union Real Estate Co., 107 Neb. 144, 185 N.W. 323 (1921).

Fact that statute tolls limitation period during insanity does not deny prosecution of action for insane person by guardian during period of insanity. Wirth v. Weigand, 85 Neb. 115, 122 N.W. 714 (1909).

A person with a mental disorder is one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action. Vergara v. Lopez-Vasquez, 1 Neb. App. 1141, 510 N.W.2d 550 (1993).

3. Nonresidents

Absence from state will not extend time in which foreclosure of real estate mortgage may be brought against nonresident. Brainard v. Hall, 137 Neb. 491, 289 N.W. 845 (1940).

Absence from state does not operate to extend the period within which mechanic lien foreclosure shall be commenced. Pickens v. Polk, 42 Neb. 267, 60 N.W. 566 (1894).

Absence from state does not extend time for foreclosure of mortgage. Merriam v. Goodlett, 36 Neb. 384, 54 N.W. 686 (1893).

4. Miscellaneous

Political Subdivisions Tort Claims Act including one-year notice of claim requirement and two-year limitation for bringing action held constitutional. Campbell v. City of Lincoln, 195 Neb. 703, 240 N.W.2d 339 (1976).

This section does not toll the statutes of limitations for the benefit of executors or administrators. Sherwood v. Merchants Mut. Bonding Co., 193 Neb. 262, 226 N.W.2d 761 (1975).

Statute runs against married woman during coverture. Watkins v. Adamson, 113 Neb. 715, 204 N.W. 816 (1925).

Courts of equity have inherent powers to refuse relief after undue and inexcusable delay, independent of statute of limitations. Hawley v. Von Lanken, 75 Neb. 597, 106 N.W. 456 (1906).

Suit to quiet title is action in rem, within this section. Lantry v. Parker, 37 Neb. 353, 55 N.W. 962 (1893).

25-214 Actions against absconding or absent debtor.

If a cause of action accrues against a person while he or she is out of the state or has absconded or concealed himself or herself, the period limited for the commencement of the action shall not begin to run (1) until he or she comes into the state or (2) while he or she is absconded or concealed. If the person departs from the state or absconds or conceals himself or herself after the cause of action accrues, the time of his or her absence or concealment shall not be computed as any part of the period within which the action must be brought.

Source: R.S.1867, Code § 20, p. 396; R.S.1913, § 7577; C.S.1922, § 8520; C.S.1929, § 20-214; R.S.1943, § 25-214; Laws 2006, LB 1115, § 8.

1. Absent debtor
2. Absconding debtor
3. Miscellaneous

1. Absent debtor

The tolling statute does not suspend the statute of limitations when one is absent from the state but nonetheless remains amenable to the service of personal process. Dalition v. Langemeier, 246 Neb. 993, 524 N.W.2d 336 (1994).

Petition in action on domestic judgment which appeared to be barred was sufficient to plead facts regarding defendant's absence from state to toll statute as against general demurrer. Farmers & Merchants Bank of Axtell v. Merryman, 126 Neb. 684, 254 N.W. 428 (1934).

This section is inapplicable to action for death of plaintiff's intestate, where defendant had been absent from state for more than two years. Gengo v. Mardis, 103 Neb. 164, 170 N.W. 841 (1919).

Absence from state does not toll statute where it has been of such a character as to entitle defendant to benefit of statute of another state to which he has removed. Webster v. Davies, 44 Neb. 301, 62 N.W. 484 (1895).

Nonresidence will not prevent running of statute on action to quiet title to real estate. Lantry v. Parker, 37 Neb. 353, 55 N.W. 962 (1893).

Mere temporary absence does not suspend statute. Blodgett v. Utley, 4 Neb. 25 (1875).

Where a person resided in another state, but came to this state each business day where service could have been had on him, he is not absent from the state within the meaning of this section. Webster v. Citizens Bank of Omaha, 2 Neb. Unof., 353, 96 N.W. 118 (1902).

Statute of limitations was not tolled by absence from state of alleged tort-feasor, a California resident, if at all times following accident California resident could be sued in the state by virtue of nonresident motor vehicle statute. Gatliff v. Little Audrey's Transportation Co., Inc., 317 F.Supp. 1117 (D. Neb. 1970).

2. Absconding debtor

Note showing on face that it is outlawed does not render petition demurrable, where plaintiff alleges failure to begin action within five years was due to absconding of defendant. Cummings v. Keating & Co., 103 Neb. 453, 172 N.W. 358 (1919).

Concealment or absconding must be such as prevents bringing of action in this state. Talcott v. Bennett, 49 Neb. 569, 68 N.W. 931 (1896).

3. Miscellaneous

This section was not applicable to an application for modification of alimony under section 42-365 because that section concerns not the commencement of an action, but, rather, upon what an order of modification operates. Hamilton v. Hamilton, 242 Neb. 687, 496 N.W.2d 507 (1993).

Where debtor comes into state openly and stays sufficient period to afford requisite time for service of summons, he has ''come into the state'' even though his coming was temporary. Fort Collins Nat. Bank v. Strachan, 102 Neb. 233, 166 N.W. 553 (1918).

Statute does not run in favor of a foreign corporation while service of summons cannot be had upon it in this state. Ball Engine Co. v. Bennett Co., 98 Neb. 290, 152 N.W. 550 (1915).

Temporary absences cannot be aggregated together to prolong statute. Hedges v. Roach, 16 Neb. 673, 21 N.W. 404 (1884).

Debtor must reside for full statutory time within state before action is barred. Edgerton v. Wachter, 9 Neb. 500, 4 N.W. 85 (1880).

25-215 Repealed. Laws 2006, LB 1115, § 47.

25-216 Part payment; acknowledgment of debt; effect upon accrual.

In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; *Provided*, that the provisions of this section shall not be applicable to real estate mortgages which have become barred under the provisions of section 25-202 as against subsequent encumbrancers and purchasers for value.

Source: R.S.1867, Code § 22, p. 397; R.S.1913, § 7579; C.S.1922, § 8522; C.S.1929, § 20-216; Laws 1941, c. 35, § 2, p. 146; C.S.Supp.,1941, § 20-216.

1. Part payment
2. Acknowledgment of debt
3. Miscellaneous

1. Part payment

Part payment of a debt does not have the effect of tolling the statute of limitations, unless payment is made under circumstances which justify the inference that the debtor recognizes the whole debt as an existing liability. T.S. McShane Co., Inc. v. Dominion Constr. Co., 203 Neb. 318, 278 N.W.2d 596 (1979).

Where there was no proof of actual payment, endorsement of a payment placed on note by claimant's secretary did not operate to toll statute. In re Estate of Anderson, 148 Neb. 436, 27 N.W.2d 632 (1947).

Under oral contract of hire, superseded by written contract, voluntary part payment of salary will operate to toll statute of limitations. Price v. Platte Valley Public Power & Irr. Dist., 139 Neb. 787, 298 N.W. 746 (1941).

Where, after death of maker of note, a bank applies a balance in checking account to the credit of the maker as a payment upon the note, the payment thus made is not voluntary and will not toll the running of the statute. In re McEachen's Estate, 139 Neb. 250, 297 N.W. 153 (1941).

Partial payment of principal or interest on promissory note by one joint maker with knowledge and consent of the other, out of funds in which they are jointly interested, tolls statute as to both. Kienke v. Hudson, 126 Neb. 551, 253 N.W. 687 (1934).

Running of statute of limitations on a contract obligation will be arrested by any voluntary partial payment thereon, made or authorized by debtor. Massachusetts Bonding & Ins. Co. v. Steele, 125 Neb. 7, 248 N.W. 648 (1933).

Payment on a note in bar of the statute must be considered as of the time of actual payment, rather than as of the date of the endorsement thereof on the note. In re Estate of Zehner, 124 Neb. 426, 246 N.W. 863 (1933).

Part payment of debt or interest thereon tolls statute on mortgage securing debt. Bliss v. Redding, 121 Neb. 69, 236 N.W. 181 (1931).

Voluntary part payment will toll statute of limitations, or will revive debt, if same is barred. Blair v. Willman Estate, 105 Neb. 735, 181 N.W. 615 (1921).

Payment of interest on note by principal without authority, knowledge or consent of surety, will not stop running of statute of limitations as to surety. Dwire v. Gentry, 95 Neb. 150, 145 N.W. 350 (1914).

Part payment of a debt may be made in any property agreed upon by the parties. Brockman v. Ostdiek, 79 Neb. 843, 113 N.W. 529 (1907).

Part payment on debt secured by mortgage tolls statute limiting time within which foreclosure may be brought. McLaughlin v. Senne, 78 Neb. 631, 111 N.W. 377 (1907).

Payment of dividend on stock held as collateral, applied on note, tolls statute. Bosler v. McShane, 78 Neb. 91, 113 N.W. 998 (1907).

Part payment operates to revive a contract debt of its own vigor and not as evidence of an acknowledgment or new promise. Ebersole v. Omaha National Bank, 71 Neb. 778, 99 N.W. 664 (1904).

Payment of interest on note tolls statute. Teegarden v. Burton, 62 Neb. 639, 87 N.W. 337 (1901).

Payment made on a debtor's note by the sale of his property on execution, or other legal process, is not such part payment within the meaning of this section. Moffitt v. Carr, 48 Neb. 403, 67 N.W. 150 (1896).

Payment of dividend by the assignee of an insolvent debtor will not operate to toll the statute. Whitney, Clark & Co. v. Chambers, 17 Neb. 90, 22 N.W. 229 (1885).

The receipt and endorsement on a note by the holder of money realized from a collateral left for that purpose will remove the bar of the statute. Sornberger v. Lee, 14 Neb. 193, 15 N.W. 345 (1883).

Payment made by one of the joint promisors of a partnership after dissolution of the partnership and without knowledge of other promisor tolls the statute only as to one actually paying. Mayberry v. Willoughby, 5 Neb. 368 (1877).

Payment to remove bar of statute must be voluntary and not obtained by subterfuge. Kyger v. Ryley, 2 Neb. 20 (1873).

Payment on specific account cannot toll statute on another account. In re Automatic Equipment Mfg. Co., 103 F.Supp. 427 (D. Neb. 1952).

2. Acknowledgment of debt

A mere reference to a promissory note, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an acknowledgment as contemplated by the statute. Kotas v. Sorensen, 216 Neb. 648, 345 N.W.2d 1 (1984).

An acknowledgment of an executor or administrator does not bind him as a party in his personal capacity. Degmetich v. Beranek, 188 Neb. 659, 199 N.W.2d 8 (1972).

Voluntary payment is one that was intentionally and consciously made and accepted. Beacom v. Daley, 164 Neb. 120, 81 N.W.2d 907 (1957).

Execution and delivery of real estate mortgage was an acknowledgment in writing of note. Alexanderson v. Wessman, 158 Neb. 614, 64 N.W.2d 306 (1954).

A promise to pay a debt or other existing liability in a cause founded on a written contract, to prevent the running of the statute of limitations, must be in writing. Meyer v. Linch, 145 Neb. 1, 15 N.W.2d 317 (1944).

Oral promise to pay will not toll running of statute on mortgage foreclosure. Brainard v. Hall, 137 Neb. 491, 289 N.W. 845 (1940).

As against mortgagor, written extension agreement tolls the running of statute, even though not recorded. Hadley v. Corey, 137 Neb. 204, 288 N.W. 826 (1939).

An account stated creates a new cause of action, and written acknowledgment of original items of indebtedness is not required. In re Estate of Black, Robinson v. Wittera, 125 Neb. 75, 249 N.W. 84 (1933).

To remove bar of statute, debtor must unqualifiedly acknowledge an existing liability. France v. Ruby, 93 Neb. 214, 140 N.W. 175 (1913); Nelson v. Becker, 32 Neb. 99, 48 N.W. 962 (1891).

A warrant issued by the proper authorities of a city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness within the meaning of this section. Abrahams v. City of Omaha, 80 Neb. 271, 114 N.W. 161 (1907).

Acknowledgment of indebtedness sufficient to toll statute should be made to creditor or some one authorized to represent him. Wallber v. Caldwell, 79 Neb. 418, 112 N.W. 584 (1907).

A letter in which surety stated that he ''will not longer be held good for the note'' in case it be not promptly collected is sufficient acknowledgment within the meaning of this section. Harms v. Freytag, 59 Neb. 359, 80 N.W. 1039 (1899).

Execution of a deed, if intended as a mortgage only, was not acknowledgment in writing of an existing liability, debt or claim within the provisions of this section. Ashby v. Washburn & Co., 23 Neb. 571, 37 N.W. 267 (1888).

The unilateral crediting of defendant's debt without defendant's consent or knowledge was not a voluntary acknowledgment of the debt sufficient to toll the statute of limitations. Hejco, Inc. v. Arnold, 1 Neb. App. 44, 487 N.W.2d 573 (1992).

3. Miscellaneous

The mere entry of credit by a creditor without consent of his debtor is without effect upon the statute of limitations and the fact that the debtor knows of an unauthorized entry of credit and makes no objection thereto is not alone sufficient to constitute a ratification of credit so as to toll the statute of limitations. T.S. McShane Co., Inc. v. Dominion Constr. Co., 203 Neb. 318, 278 N.W.2d 596 (1979).

This section applies to actions founded on contract and has no application to actions founded on a tort liability. Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N.W.2d 330 (1944).

Oral request to defer settlement under indemnity agreement did not operate to toll running of statute of limitations. Lyhane v. Durtschi, 144 Neb. 256, 13 N.W.2d 130 (1944).

A waiver of ''all notice of any nature whatsoever'' in the suretyship agreement does not operate to supply the surety's consent and authority to the making of partial payments in the future. W. T. Rawleigh Co. v. Smith, 142 Neb. 529, 9 N.W.2d 286 (1943), affirming 142 Neb. 527, 7 N.W.2d 80 (1942).

In determining period of limitation in action to foreclose real estate mortgage given as security for note, this section and section 25-202 should be construed together. Steeves v. Nispel, 132 Neb. 597, 273 N.W. 50 (1937).

Oral agreement to compensate one for past services, not performed as gratuity and not barred by statute, as well as for future services, out of promisor's estate by testamentary provision, is an independent contract to which statute requiring new promise to be in writing does not apply, where promisee performs agreement. Weideman v. Peterson's Estate, 129 Neb. 74, 261 N.W. 150 (1935).

25-217 Action; commencement; defendant not served; effect.

An action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed.

Source: R.S.1867, Code § 19, p. 396; R.S.1913, § 7580; C.S.1922, § 8523; C.S.1929, § 20-217; R.S.1943, § 25-217; Laws 1979, LB 510, § 1; Laws 1986, LB 529, § 21; Laws 2002, LB 876, § 5.

Cross References

For commencement of action, see section 25-501.

1. Issuance and service
2. Effect
3. Amendment
4. Miscellaneous

1. Issuance and service

In the case of substitute service by publication under section 25-519, service is not ''made'' until the third publication, and prior to the third publication, a defendant is ''not served'' under this section. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 268 Neb. 439, 684 N.W.2d 14 (2004).

Where service by publication has been approved, a defendant is not served within 6 months from the date the petition was filed under this section unless the third publication under section 25-519 has occurred within 6 months from the date the petition was filed. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 268 Neb. 439, 684 N.W.2d 14 (2004).

For purposes of determining whether an action is time barred, an action is commenced on the date the petition is filed. Kocsis v. Harrison, 249 Neb. 274, 543 N.W.2d 164 (1996).

One's notice and demand for payment from a dissolved corporation does not constitute commencement of an ''action'' or ''proceeding'' as contemplated by section 21-20,104. Under the provisions of this section, an action is commenced on the date the petition is filed with the court. Licht v. Association Servs., Inc., 236 Neb. 616, 463 N.W.2d 566 (1990).

Criterion of commencement of action for limitation purposes is date summons served on defendant. Schmer v. Gilleland, 185 Neb. 54, 173 N.W.2d 391 (1970).

Filing without issuance of a summons is not commencement of an action. Norris P.P. Dist. v. State ex rel. Jones, 183 Neb. 489, 161 N.W.2d 869 (1968).

An action is commenced at the date of the summons which is served upon the defendant. Gorgen v. County of Nemaha, 174 Neb. 588, 118 N.W.2d 758 (1962).

As to defendant, action is deemed commenced at date of summons which is served on him. Ramirez v. Chicago, B. & Q. R. Co., 116 Neb. 740, 219 N.W. 1 (1928).

Action is begun when petition is filed and summons issued thereon. Mosher v. Huwaldt, 86 Neb. 686, 126 N.W. 143 (1910).

Action is not deemed commenced at date of issuance of summons, unless same is served. Reliance Trust Co. v. Atherton, 67 Neb. 305, 93 N.W. 150 (1903), rehearing denied 67 Neb. 309, 96 N.W. 218 (1903).

Action is commenced at the date of the summons which is served upon the defendant. Calkins v. Miller, 55 Neb. 601, 75 N.W. 1108 (1898); Burlingim v. Cooper, 36 Neb. 73, 53 N.W. 1025 (1893).

Issuance of summons against one, not a necessary party to suit, to foreclose mechanic's lien is not commencement of suit against nonresident. Pickens v. Polk, 42 Neb. 267, 60 N.W. 566 (1894).

This section does not allow Nebraska courts to extend the time for service of process, even in a case in which the wrong defendant was served within the 6-month grace period after filing a petition, because it is a self-executing statute which deprives a lower court of jurisdiction to take any further action in the case once the 6 months has run. Smeal v. Olson, 10 Neb. App. 702, 636 N.W.2d 636 (2001).

An action stood dismissed by operation of law upon the passing of 6 months after the filing of the petition, where the defendants were not served process and their voluntary appearances were entered more than 6 months after the date the petition was filed. Vopalka v. Abraham, 9 Neb. App. 285, 610 N.W.2d 433 (2000).

The phrase ''shall stand dismissed'' means that an action is dismissed if 6 months from the filing of the petition passes without service upon the defendant, without the need for initiating action by the defendant, and without the need for a formal entry of an order of dismissal by the trial court. The dismissal mandated by this section is self-executing. When a lawsuit is dismissed by operation of law for lack of service of process within 6 months of filing, the trial court has no jurisdiction to make orders thereafter and if made, they are a nullity, as are subsequent pleadings. Cotton v. Fruge, 8 Neb. App. 484, 596 N.W.2d 32 (1999).

Service of process not proper and regular, and was therefore quashed. Stoehr v. American Honda Motor Co., Inc., 429 F.Supp. 763 (D. Neb. 1977).

2. Effect

Where original action was timely instituted, amended petition filed after running of statute of limitations, declaring on same cause of action, is not barred. Kennedy v. Potts, 128 Neb. 213, 258 N.W. 471 (1935).

Summons must be issued before bar of statute of limitations is complete. Ballard v. Thompson, 40 Neb. 529, 58 N.W. 1133 (1894).

Summons must be issued before bar of statute is complete, although it may be served afterward. Omaha Loan & Trust Co. v. Ayer, 38 Neb. 891, 57 N.W. 567 (1894).

In action filed in federal court by Nebraska resident against California resident, Nebraska rule that action is deemed commenced at date of summons which is served is applicable. Gatliff v. Little Audrey's Transportation Co., Inc., 317 F.Supp. 1117 (D. Neb. 1970).

3. Amendment

For the purpose of applying the relation-back doctrine to a defendant named for the first time in an amended petition, the period during which the new defendant must be shown to have had the requisite knowledge of the suit includes the statutory period prescribed for the filing of the original petition plus the additional 6-month period in which summons could be served pursuant to this section. Smeal v. Olson, 263 Neb. 900, 644 N.W.2d 550 (2002).

Summons on appeal from compensation award may be amended by district court to correct date of return, notwithstanding objections to jurisdiction. Keil v. Farmers' Irr. Dist., 119 Neb. 503, 229 N.W. 898 (1930).

4. Miscellaneous

The effect of a dismissal without prejudice is the same as if the case had been dismissed pursuant to this section, meaning that another petition may be filed against the same parties upon the same facts as long as it is filed within the applicable statute of limitations. Dworak v. Farmers Ins. Exch., 269 Neb. 386, 693 N.W.2d 522 (2005).

The language of this section providing for dismissal of unserved petitions is self-executing and mandatory. After dismissal of an action by operation of law pursuant to this section, there is no longer an action pending and the district court has no jurisdiction to make further orders except to formalize the dismissal. If orders are made following a dismissal by operation of law under this section, they are a nullity, as are subsequent pleadings. Kovar v. Habrock, 261 Neb. 337, 622 N.W.2d 688 (2001).

The language of this section providing for dismissal of unserved petitions is self-executing and mandatory. A defendant's voluntary appearance does not waive the operation of this section. After dismissal of an action by operation of this section, a trial court has no jurisdiction to make orders thereafter, except to formalize the dismissal. Vopalka v. Abraham, 260 Neb. 737, 619 N.W.2d 594 (2000).

The limitation statutes found within Chapter 25, article 2, apply to counterclaims, and pursuant to this section, whether a counterclaim is barred is determined by the date the related petition was filed, rather than the date the counterclaim was filed. Becker v. Hobbs, 256 Neb. 432, 590 N.W.2d 360 (1999).

Where there is no voluntary appearance and summons is not served, the court lacks personal jurisdiction over a party. Henderson v. Department of Corr. Servs., 256 Neb. 314, 589 N.W.2d 520 (1999).

Excluding September 5, 1969, the last day on which work was done, the last day of the four-year period of limitations was September 5, 1973. George P. Rose Sodding & Grading Co. v. Dennis, 195 Neb. 221, 237 N.W.2d 418 (1976).

If record on appeal does not disclose date when action was commenced, Supreme Court will not take judicial notice thereof. Newberg v. Chicago, B. & Q. R. Co., 120 Neb. 171, 231 N.W. 766 (1930).

In absence of service of summons, date of voluntary appearance is the date the action is deemed commenced. Hotchkiss v. Aukerman, 65 Neb. 177, 90 N.W. 949 (1902).

The language ''shall stand dismissed'' is mandatory and self-executing, which means that an action may be dismissed without the need for initiating action, such as a motion by the defendant, and without the need for a formal entry of an order of dismissal by the trial court. Such dismissals occur by operation of law. McDaneld v. Fischer, 8 Neb. App. 160, 589 N.W.2d 172 (1999).

25-218 Claims by and against the state; when barred.

Every claim and demand against the state shall be forever barred unless action is brought thereon within two years after the claim arose. Every claim

and demand on behalf of the state, except for revenue, or upon official bonds, or for loans or money belonging to the school funds, or loans of school or other trust funds, or to lands or interest in lands thereto belonging, shall be barred by the same lapse of time as is provided by the law in case of like demands between private parties. This section shall not apply to any claim or demand against the state regarding property taxes.

Source: Laws 1877, § 16, p. 24; Laws 1881, c. 32, § 1, p. 211; R.S.1913, § 7581; C.S.1922, § 8524; C.S.1929, § 20-218; R.S.1943, § 25-218; Laws 1991, LB 829, § 3.

The state may raise the bar of the statute of limitations by a motion to dismiss filed with the administrative agency charged with determining the state's liability for payment on a contract claim. L.J. Vontz Constr. Co. v. Department of Roads, 232 Neb. 241, 440 N.W.2d 664 (1989).

This section applies to actions for money damage but not to actions for injunctive relief. Czarnick v. Loup River P.P. Dist., 190 Neb. 521, 209 N.W.2d 595 (1973).

Recovery by county for maintenance of insane patient in state hospital is not a claim for revenue. County of Adams v. Ernst, 158 Neb. 15, 62 N.W.2d 110 (1954).

Suit against state for taking or damaging private property for public use must be commenced two years from the time of taking or damaging. Bordy v. State, 142 Neb. 714, 7 N.W.2d 632 (1943).

All parties whose rights would be affected by modification or reversal of judgment must be made parties on appeal to Supreme Court. Donisthorpe v. Vavra, 134 Neb. 157, 278 N.W. 151 (1938).

Statute does not apply to action by state to recover revenue from county. Torgeson v. Department of Trade and Commerce, 127 Neb. 49, 254 N.W. 740 (1934).

Money levied and collected by county authorities to cover support of insane patients in state hospital, although transferred to county general fund, may be recovered in action by the state, without filing claim; statute of limitations is not applicable. State v. Stanton County, 100 Neb. 747, 161 N.W. 264 (1917).

25-219 Actions upon liability created by federal statute.

All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which actions no period of limitations is provided in such statute shall be commenced within three years next after the cause of action shall have accrued.

Source: Laws 1943, c. 49, § 1, p. 200.

Claim for reimbursement from estate of recipient of old age assistance did not accrue until death of recipient. Boone County Old Age Assistance Board v. Myhre, 149 Neb. 669, 32 N.W.2d 262 (1948).

This section was applicable to federal civil rights claim of former guidance counselor in action against school district on allegations dismissal was due to his race and his exercise of First Amendment rights. Chambers v. Omaha Public School Dist., 536 F.2d 222 (8th Cir. 1976).

Summons issued before time allowed by statute of limitations has expired will give court jurisdiction even though served after time has expired. Sandobal v. Armour & Co., 429 F.2d 249 (8th Cir. 1970).

Section 43-666, R.R.S.1943, is not sufficiently analogous to 20 U.S.C. section 1415 for its statute of limitation to apply to actions under that federal statute. However, the statute of limitations under either section 25-212 or 25-219, R.R.S.1943, appears to be more appropriate. Monahan v. State of Neb., 491 F.Supp. 1074 (D. Neb. 1980).

The statute of limitation for commencement of suits under the federal civil rights act, which guarantees equal rights under the law, is the three-year statute of limitation set by this section. Metcalf v. Omaha Steel Casting Co., 476 F.Supp. 870 (D. Neb. 1979).

25-220 Repealed. Laws 1959, c. 264, § 1.

25-221 Statute of limitations; trial procedure.

In any action in which it is claimed by one or more of the defendants that the action is barred by the statute of limitations any party may move that the issue raised by the statute of limitations be tried separately and determined before any other issues in the case. Issues of fact raised by the statute of limitations shall be tried before a jury unless trial by jury is waived by all parties. Issues of law raised by the statute of limitations shall be determined by the court without a jury. If the issue raised by the statute of limitations is determined by the jury or the court in favor of the plaintiff the remaining issues shall then be tried. If the issue raised by the statute of limitations is determined by the jury or the court in favor of the defendant the action or actions barred by the statute of limitations shall be dismissed.

Source: Laws 1971, LB 430, § 1; Laws 1997, LB 165, § 1.

The plain language of this section states that a jury trial on the statute of limitations issue is required only when issues of fact are raised; issues of law are to be determined by the court without a jury. If there are only conclusions of law asserted on the statute of limitations issue, a separate hearing to address the statute of limitations issue is not required under this section. Blankenau v. Landess, 261 Neb. 906, 626 N.W.2d 588 (2001).

This section provides for preliminary rulings by the court on statute of limitations questions. Gillam v. Firestone Tire & Rubber Co., 241 Neb. 414, 489 N.W.2d 289 (1992).

The special bifurcation of a trial pursuant to this section does not create a separate judgment when the trial court determines the action is not barred by the statute of limitations. Interlocutory orders may be modified at subsequent terms provided the court still has not rendered a final decision in matters still pending. City of Wood River v. Geer-Melkus Constr. Co., 233 Neb. 179, 444 N.W.2d 305 (1989).

An order denying a plea of the statute of limitations after a separate hearing on that issue is not appealable. Wulf v. Farm Bureau Ins. Co., 188 Neb. 258, 196 N.W.2d 164 (1972).

Where claim that action is barred by the statute of limitations is raised by motion to try that issue separately, the court shall determine it before trying other issues in the case. Mattice v. Messer, 493 F.2d 498 (8th Cir. 1974).

25-222 Actions on professional negligence.

Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

Source: Laws 1972, LB 1132, § 1.

1. Constitutionality
2. Computation of time
3. Applicability
4. Miscellaneous

1. Constitutionality

Defining substantive rights is a valid exercise of legislative power, and thus, this section does not violate the open courts provision of the Nebraska Constitution. Schendt v. Dewey, 246 Neb. 573, 520 N.W.2d 541 (1994).

The ten-year period of repose contained in this section is constitutional. Williams v. Kingery Constr. Co., 225 Neb. 235, 404 N.W.2d 32 (1987); Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982).

No constitutional objection lies where seven years intervenes between enactment of period of limitations and bringing of action. Cedars Corp. v. Swoboda, 210 Neb. 180, 313 N.W.2d 276 (1981).

2. Computation of time

A claim for malpractice against a hospital based upon the negligence of its nursing staff accrues when the patient is discharged from the hospital and the continuing treatment doctrine does not toll the statute of limitations for subsequent admissions at the hospital authorized by the patient's affiliated but independent physician. Casey v. Levine, 261 Neb. 1, 621 N.W.2d 482 (2001).

A plaintiff seeking to extend the tolling of the 2-year statute of limitations in a medical malpractice case must prove facts which indicate that the physician continued to treat him or her after the allegedly wrongful act or omission and that the treatment was related to the alleged negligence. Casey v. Levine, 261 Neb. 1, 621 N.W.2d 482 (2001).

Nebraska follows the occurrence rule, under which a professional negligence suit accrues at the time the act or omission in rendering or failing to render professional services takes place. In a professional negligence case, ''discovery of the act or omission'' occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss; it is not damage, which is the loss resulting from the misconduct. A lack of knowledge of the extent of damages is not the equivalent of a lack of discovery of a cause of action as set out in this section. Gering - Ft. Laramie Irr. Dist. v. Baker, 259 Neb. 840, 612 N.W.2d 897 (2000).

In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. Reinke Mfg. Co. v. Hayes, 256 Neb. 442, 590 N.W.2d 380 (1999).

The discovery exception permits an action to be commenced within 1 year from discovery where the cause of action could not have reasonably been discovered during the 2-year limitation period of this section. If facts are discovered that constitute the basis of a cause of action within 2 years from the alleged act of negligence, the discovery exception to the statute of limitations is inapplicable. Reinke Mfg. Co. v. Hayes, 256 Neb. 442, 590 N.W.2d 380 (1999).

If the facts constituting a malpractice claim are not and could not be reasonably discovered within the 2-year limitation period, the claim may be brought within 1 year from the date of discovery or within 1 year from the date the plaintiff acquires facts that would lead to such discovery. World Radio Labs. v. Coopers & Lybrand, 251 Neb. 261, 557 N.W.2d 1 (1996).

The 1-year discovery exception provided for in this section tolls the statute of limitations, permitting an injured party to bring an action beyond the time limitation for bringing the action in those cases in which the injured party did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations. The 1-year discovery exception provided for in this section does not apply in actions governed under section 25-208 if the injured party knew or could reasonably have discovered the cause of action within the time set forth in section 25-208. In actions governed under section 25-208, the 1-year discovery exception provided for in that section only applies if the injured party did not know or could not reasonably have discovered the existence of the cause of action within the time period provided for in that section. Berntsen v. Coopers & Lybrand, 249 Neb. 904, 546 N.W.2d 310 (1996).

Under discovery principle, cause of action for professional negligence accrues and 1-year discovery provision begins to run when there has been discovery of facts constituting basis of cause of action or existence of facts sufficient to put person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to discovery; it is not necessary that plaintiff have knowledge of exact nature or source of problem, but only knowledge that problem existed. If professional malpractice action is not to be considered time barred, plaintiff must either file within 2 years of alleged act or omission or show that its action falls within exceptions of this section as to its discovery of defendant's alleged negligence. Zion Wheel Baptist Church v. Herzog, 249 Neb. 352, 543 N.W.2d 445 (1996).

If an action is not to be considered time barred, plaintiff must either file within 2 years of the alleged act or omission or show that the action falls within the exceptions of this section as to the discovery of defendant's alleged negligence. A cause of action accrues for negligence in professional services when the alleged act or omission in rendering or failure to render professional services takes place. The continuous representation rule, which tolls the running of the statute of limitations, is inapplicable where the claimant discovers the alleged negligence prior to the termination of the professional relationship. Lindsay Mfg. Co. v. Universal Surety Co., 246 Neb. 495, 519 N.W.2d 530 (1994).

The continuous treatment or representation rule is inapplicable where the claimant discovers the alleged negligence prior to the termination of the professional relationship. The 2-year statute of limitations is not tolled where the plaintiff discovers the alleged negligence within 2 years of the allegedly negligent act or omission, and therefore, a professional negligence action is barred unless filed within 2 years of the occurrence of such act or omission. Economy Housing Co. v. Rosenberg, 239 Neb. 267, 475 N.W.2d 899 (1991).

In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. McCook Equity Exch. v. Cooperative Serv. Co., 230 Neb. 758, 433 N.W.2d 509 (1988); Lincoln Grain v. Coopers & Lybrand, 215 Neb. 289, 338 N.W.2d 594 (1983).

Under the discovery principle, a cause of action accrues and the 1-year discovery provision of this section begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed. Board of Regents v. Wilscam Mullins Birge, 230 Neb. 675, 433 N.W.2d 478 (1988).

If action is not to be considered time-barred, plaintiff must either file within two years of alleged act or omission or show that its action falls within the exceptions of this section as to its discovery of defendant's alleged negligence. Kelly Klosure v. Johnson Grant & Co., 229 Neb. 369, 427 N.W.2d 44 (1988).

A cause of action accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the cause of action. Tiwald v. Dewey, 221 Neb. 547, 378 N.W.2d 671 (1985).

A statute of limitations may begin to run before the full extent of damages is sustained. Suzuki v. Holthaus, 221 Neb. 72, 375 N.W.2d 126 (1985).

This section requires that the action for malpractice be commenced within two years after the alleged act or omission and contains a provision for deferred commencement if the cause of action is not discovered and could not be reasonably discovered within such two-year period. Rosnick v. Marks, 218 Neb. 499, 357 N.W.2d 186 (1984).

Ten-year statute of repose runs from time of physician's treatment rather than the date of the termination of the physician-patient relationship. Smith v. Dewey, 214 Neb. 605, 335 N.W.2d 530 (1983).

A cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such a plaintiff may be ignorant of the existence of the cause of action. These matters are determined from the facts of each case. Interholzinger v. Estate of Dent, 214 Neb. 264, 333 N.W.2d 895 (1983).

In considering whether the discovery exception to the professional negligence statute of limitations applies, a court may consider the complexity of the documents and whether representations as to the contents of the documents were made in determining whether the case presents a factual question to be determined by the trier of fact. In-Line Suspension v. Weinberg & Weinberg, 12 Neb. App. 908, 687 N.W.2d 418 (2004).

A suit filed against an abstractor was time barred under this section because it was not filed within 1 year of discovery and because it was filed more than 10 years after the omission upon which the claim was based. Cooper v. Paap, 10 Neb. App. 243, 634 N.W.2d 266 (2001).

Section 25-213 tolls the running of the time limitation under this section until an infant reaches the age of majority. Hatfield v. Bishop Clarkson Memorial Hosp., 679 F.2d 1258 (8th Cir. 1982).

3. Applicability

Causes of action or theories of recovery that are premised on excessive fees concern professional misconduct, and thus, this section applies. Nuss v. Alexander, 269 Neb. 101, 691 N.W.2d 94 (2005).

Agents of broker-dealers in securities are not professionals for purposes of the statute of limitations under this section. Parks v. Merrill, Lynch, 268 Neb. 499, 684 N.W.2d 543 (2004).

The definition of ''profession'' for purposes of the professional negligence statute of limitations under this section is (1) a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, (2) maintaining by force of organization or concerted opinion high standards of achievement and conduct, and (3) committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service. Parks v. Merrill, Lynch, 268 Neb. 499, 684 N.W.2d 543 (2004).

Where a party's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in this section applies. Parks v. Merrill, Lynch, 268 Neb. 499, 684 N.W.2d 543 (2004).

If claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in this section applies. A cause of action for professional negligence accrues when the alleged act or omission in rendering or failing to render professional services takes place. Reinke Mfg. Co. v. Hayes, 256 Neb. 442, 590 N.W.2d 380 (1999).

A profession is no longer defined as an occupation involving specialized knowledge, labor, or skill, which labor and skill is predominantly mental or intellectual, rather than physical or manual; a profession is now defined as a calling requiring

specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service. Jorgensen v. State Nat. Bank & Trust Co., 255 Neb. 241, 583 N.W.2d 331 (1998).

An action against a physician to recover damages for an injury sustained while the physician is adjusting the examination chair is within the professional negligence statute of limitations. Olsen v. Richards, 232 Neb. 298, 440 N.W.2d 463 (1989).

Any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice and comes within the professional or malpractice statute of limitations. Olsen v. Richards, 232 Neb. 298, 440 N.W.2d 463 (1989).

Architects and engineers are professionals for the purposes of this section. Board of Regents v. Wilscam Mullins Birge, 230 Neb. 675, 433 N.W.2d 478 (1988).

The 2-year statute of limitations in this section, applicable to an architect who has the responsibility to design a building and a duty to inspect throughout construction, begins to run when the construction is completed. Board of Regents v. Wilscam Mullins Birge, 230 Neb. 675, 433 N.W.2d 478 (1988).

Engineers are professionals for the purposes of this section, and this section applies to an action against such a professional, even though the professional services rendered by the engineer amount to an improvement to real property. Georgetowne Ltd. Part. v. Geotechnical Servs., 230 Neb. 22, 430 N.W.2d 34 (1988).

Within the meaning of this section, the professional negligence statute of limitations, a profession rendering professional services is defined as a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service. Georgetowne Ltd. Part. v. Geotechnical Servs., 230 Neb. 22, 430 N.W.2d 34 (1988).

Real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence. Tylle v. Zoucha, 226 Neb. 476, 412 N.W.2d 438 (1987).

Where an architect has a professional responsibility to supervise construction and to see that all walls are in fact constructed, his failure to do so is a professional act to which this section applies. Williams v. Kingery Constr. Co., 225 Neb. 235, 404 N.W.2d 32 (1987).

Architects and engineers are professionals for the purposes of this section. Witherspoon v. Sides Constr. Co., 219 Neb. 117, 362 N.W.2d 35 (1985).

The period of repose applicable to an architect who has a duty to inspect throughout construction is contained in this section and begins to run when construction is completed. Witherspoon v. Sides Constr. Co., 219 Neb. 117, 362 N.W.2d 35 (1985).

The period of repose applicable to an engineer who has no duty other than to provide a design to an architect is contained in this section and begins to run when the design is delivered to the architect. Witherspoon v. Sides Constr. Co., 219 Neb. 117, 362 N.W.2d 35 (1985).

Abstractors are professionals for the purposes of this section. Cooper v. Paap, 10 Neb. App. 243, 634 N.W.2d 266 (2001).

4. Miscellaneous

The claim of a conflict of interest is a cause of professional malpractice limited by the 2-year statute of limitations for professional negligence. Egan v. Stoler, 265 Neb. 1, 653 N.W.2d 855 (2002).

The statute of limitations defense is waived if it is not asserted in the pleadings. Welsch v. Graves, 255 Neb. 62, 582 N.W.2d 312 (1998).

Equitable estoppel arises from a failure to disclose material information when a fiduciary or confidential relationship exists between a physician and a patient. Schendt v. Dewey, 252 Neb. 979, 568 N.W.2d 210 (1997).

The doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering malpractice. Equitable estoppel arises from active or affirmative efforts to conceal malpractice. Schendt v. Dewey, 252 Neb. 979, 568 N.W.2d 210 (1997).

When prisoner filed grievance with corrections department and threatened legal action for injury suffered during tooth extraction, injury was discovered under this statute. Gordon v. Connell, 249 Neb. 769, 545 N.W.2d 722 (1996).

Nondiscovery of all damages is not the equivalent of nondiscovery of a cause of action. Seevers v. Potter, 248 Neb. 621, 537 N.W.2d 505 (1995).

A client has knowledge of his attorney's alleged negligence at the time the client signs the contract. Nichols v. Ach, 233 Neb. 634, 447 N.W.2d 220 (1989).

For the statute to begin running, it is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that a problem existed. The plaintiff need not have suffered actual damages, but there must be an invasion of a legally protected interest. Nichols v. Ach, 233 Neb. 634, 447 N.W.2d 220 (1989).

Discovery, as applied to statutes of limitations, refers to the fact that one knows of the existence of an injury or damage and not that he or she has a legal right to seek redress in court. Norfolk Iron & Metal v. Behnke, 230 Neb. 414, 432 N.W.2d 18 (1988).

Discovery, as used in reference to a statute of limitations, means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer. Norfolk Iron & Metal v. Behnke, 230 Neb. 414, 432 N.W.2d 18 (1988).

Nondiscovery of all damages is not the equivalent of nondiscovery of a cause of action as set out in this section relating to the statute of limitations for professional negligence. Norfolk Iron & Metal v. Behnke, 230 Neb. 414, 432 N.W.2d 18 (1988).

The alleged failure to communicate an offer of settlement in a dissolution action cannot be made the basis of a claimed act of professional negligence absent evidence that the proposed settlement was not unconscionable and would therefore likely have been approved by the district court. Smith v. Ganz, 219 Neb. 432, 363 N.W.2d 526 (1985).

A person under a legal disability described in section 25-213 is exempted from the provisions of this section until the legal disability is removed. Sacchi v. Blodig, 215 Neb. 817, 341 N.W.2d 326 (1983).

Death of doctor before two-year statute of limitations expires does not extinguish negligence claim against his estate. Davies v. Reese, 197 Neb. 320, 248 N.W.2d 344 (1977).

If the cause of action for professional negligence is not discovered and could not reasonably be discovered within two years, an action may be commenced within one year from the date of discovery, or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. Taylor v. Karrer, 196 Neb. 581, 244 N.W.2d 201 (1976).

Special two-year statute of limitations controlled action against doctor based on erroneous blood typing by his employee. Swassing v. Baum, 195 Neb. 651, 240 N.W.2d 24 (1976).

Plaintiff had a reasonable time after this act which reduced limitation period was passed and became effective to file its action, and having failed to do so within such time, the action is

barred. Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc., 192 Neb. 431, 222 N.W.2d 125 (1974).

If all of a plaintiff's claims are based upon a single professional relationship, whether pled in tort or contract, the statute of limitations for professional negligence applies and cannot be circumvented by separating the claims into various parts to allow different periods of limitation to apply. Gering - Ft. Laramie Irr. Dist. v. Baker, 8 Neb. App. 1001, 606 N.W.2d 826 (2000).

Federal courts were not precluded from consideration of statutory vagueness by Nebraska decision as to retrospective impact, and motion to dismiss action against architects and engineers for professional negligence appropriately raised statute of limitations defense where plaintiff did not allege facts to invoke exception to it for causes of action which could not reasonably be discovered within two-year limitation period. Horn v. Burns & Roe, 536 F.2d 251 (8th Cir. 1976).

25-223 Action on breach of warranty on improvements to real property.

Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In no event may any action be commenced to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property more than ten years beyond the time of the act giving rise to the cause of action.

Source: Laws 1976, LB 495, § 1.

This section is a special statute of limitations applying to builders and contractors making improvements to real property. Andres v. McNeil Co., 270 Neb. 733, 707 N.W.2d 777 (2005).

The statute of limitations in this section applies only to actions brought against contractors or builders. Murphy v. Speltz-Schultz Lumber Co., 240 Neb. 275, 481 N.W.2d 422 (1992).

Under this section, a cause of action accrues, and the statute of limitations begins to run, when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. Smith v. Butler Manuf. Co., 230 Neb. 734, 433 N.W.2d 493 (1988).

Under the discovery principle, a cause of action accrues and the 2-year discovery provision of this section begins to run when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. It is not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only knowledge that the problem existed. Board of Regents v. Lueder Constr. Co., 230 Neb. 686, 433 N.W.2d 485 (1988).

The 10-year period of repose contained in this section is constitutional. Williams v. Kingery Constr. Co., 225 Neb. 235, 404 N.W.2d 32 (1987).

This section applies to an action in tort for personal injuries caused by the negligent construction of a building. Williams v. Kingery Constr. Co., 225 Neb. 235, 404 N.W.2d 32 (1987).

The period of repose applicable to a general contractor is found in this section and begins to run when construction of the structure is completed. Witherspoon v. Sides Constr. Co., 219 Neb. 117, 362 N.W.2d 35 (1985).

Where the plaintiff knew of a leaky roof problem more than four years before bringing suit, the cause of action was barred. Kearney Clinic Bldg. Corp. v. Weaver, 211 Neb. 499, 319 N.W.2d 95 (1982).

The statute of limitation for an action based on alleged deficiencies in improvements to real property does not run during the time when the plaintiff reasonably could not discover the existence of the cause of action. Grand Island School Dist. #2 v. Celotex Corp., 203 Neb. 559, 279 N.W.2d 603 (1979).

25-224 Actions on product liability.

(1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2)(a) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced as follows:

(i) For products manufactured in Nebraska, within ten years after the date the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption; or

(ii) For products manufactured outside Nebraska, within the time allowed by the applicable statute of repose, if any, of the state or country where the product was manufactured, but in no event less than ten years. If the state or country where the product was manufactured does not have an applicable statute of repose, then the only limitation upon the commencement of an action for product liability shall be as set forth in subsection (1) of this section.

(b) If the changes made to this subsection by Laws 2001, LB 489, are declared invalid or unconstitutional, this subsection as it existed prior to September 1, 2001, shall be deemed in full force and effect and shall apply to all claims in which a final order has not been entered.

(3) The limitations contained in subsection (1), (2), or (5) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

(5) Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.

Source: Laws 1978, LB 665, § 2; Laws 1981, LB 29, § 1; Laws 2001, LB 489, § 1.

1. Constitutionality
2. Computation of time
3. Miscellaneous

1. Constitutionality

Subsection (2) of this section is constitutional. Gillam v. Firestone Tire & Rubber Co., 241 Neb. 414, 489 N.W.2d 289 (1992).

Nebraska's products liability 10-year statute of repose does not violate the Due Process or Equal Protection Clauses of the Nebraska or U.S. Constitutions and does not violate the open courts provision of the Nebraska Constitution. Radke v. H.C. Davis Sons' Mfg. Co., 241 Neb. 21, 486 N.W.2d 204 (1992).

The 10-year period of repose contained in this section is constitutional. Spilker v. City of Lincoln, 238 Neb. 188, 469 N.W.2d 546 (1991).

2. Computation of time

Subsection (2) of this section is not tolled by a person's status as a minor pursuant to section 25-213. Budler v. General Motors Corp., 268 Neb. 998, 689 N.W.2d 847 (2004).

Pursuant to subsection (2) of this section, the statute of repose should be recommenced when a product has been refurbished. To determine whether a product has been refurbished, courts must first determine whether the refurbishing resulted in a ''new product''. To determine whether the product should be considered ''new'', courts must inquire whether the refurbishing has lengthened the product's useful life beyond what was contemplated when the product was first sold. Second, even if the product is considered ''new'', the suit will still be time barred unless the refurbishing was defective and proximately caused the injury. Divis v. Clarklift of Nebraska, Inc., 256 Neb. 384, 590 N.W.2d 696 (1999).

The 10-year statute of repose found in subsection (2) of this section begins to run when the product is first relinquished for use or consumption. Where the injury occurs within the 10-year period, and a claimant commences his or her action after the 10 years have passed, an action accrues but is barred. Where the

injury occurs outside the 10-year period, no substantive cause of action ever accrues, and a claimant's actions are likewise barred. Gillam v. Firestone Tire & Rubber Co., 241 Neb. 414, 489 N.W.2d 289 (1992).

The 1981 amendment to subsections (2) and (5) of this section cannot be retroactively applied to revive causes of action which had been extinguished by the provisions of the 1978 enactment of subsection (2) of this section. Immunity granted by a completed statutory bar is a vested right which cannot be impaired by a subsequent legislative act. Givens v. Anchor Packing, 237 Neb. 565, 466 N.W.2d 771 (1991).

Time periods for bringing suit are extended by section 25-213. Lawson v. Ford Motor Co., 225 Neb. 725, 408 N.W.2d 256 (1987).

The statute of repose applicable to the manufacturer of an allegedly defective product is contained in this section and begins to run when possession of the product is first relinquished for ultimate use or consumption, not when it is first placed into the stream of commerce by the manufacturer. Witherspoon v. Sides Constr. Co., 219 Neb. 117, 362 N.W.2d 35 (1985).

One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statute of limitations as a defense. MacMillen v. A. H. Robins Co., 217 Neb. 338, 348 N.W.2d 869 (1984).

The 4-year statute of limitations begins to run on the date on which the party who holds the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage. Condon v. A. H. Robins Co., 217 Neb. 60, 349 N.W.2d 622 (1984).

Regarding an infant's cause of action for products liability, section 25-213 tolls the statute of limitations contained in subsection (4) of this section. Macku v. Drackett Products Co., 216 Neb. 176, 343 N.W.2d 58 (1984).

3. Miscellaneous

The effect of the 10-year statute of repose in subsection (2) of this section can be to prevent what might otherwise be a cause of action from ever arising. Farber v. Lok-N-Logs, Inc., 270 Neb. 356, 701 N.W.2d 368 (2005).

The language, ''first sold or leased for use or consumption'', contained in subsection (2) of this section refers to when a product is first surrendered or relinquished to the individual or entity. Farber v. Lok-N-Logs, Inc., 270 Neb. 356, 701 N.W.2d 368 (2005).

Upon the passage of the 10-year repose period in subsection (2) of this section, the defendant acquires a substantive right protected by statute. Farber v. Lok-N-Logs, Inc., 270 Neb. 356, 701 N.W.2d 368 (2005).

When a party brings a suit which is characterized as a suit in tort alleging negligence in the performance of a contract, the applicable statute of limitations is that which is applied to actions in tort. Thomas v. Countryside of Hastings, 246 Neb. 907, 524 N.W.2d 311 (1994).

25-225 Repealed. Laws 1986, LB 529, § 58.

25-226 Cause of action against a common carrier; limitation.

A cause of action for a freight damage claim, a rate overcharge, a claim for damages resulting from a delay in transportation, or a claim for a lost shipment against a common carrier shall be barred unless it is filed with a court having jurisdiction of the amount in dispute within two years after the date such action accrues. A cause of action for a rate overcharge accrues on the date the overcharge is paid. A cause of action for a freight damage claim, damages resulting from a delay in transportation, or a shortage in a shipment accrues on the date of delivery or tender of delivery of the freight by the common carrier. A cause of action for a lost shipment accrues on the date the lost shipment was delivered to the common carrier.

Source: Laws 1967, c. 479, § 20, p. 1485; R.S.1943, (1990), § 75-802; Laws 1991, LB 14, § 1.

25-227 Action to enforce obligation to pay certificate of deposit; when.

(1) For purposes of this section:

(a) Account agreement means one or more written instruments that establish when a certificate of deposit is payable;

(b) Certificate of deposit means a deposit or share account at a depository institution that:

(i) Is payable by the depository institution at the expiration of a specified time; and

(ii) May be transferable or nontransferable, negotiable or nonnegotiable, and renewable or nonrenewable;

(c) Depository institution means a state-chartered or federally chartered financial institution located in this state that is authorized to maintain certificates of deposit; and

(d) Maturity date means the time specified in an account agreement when a certificate of deposit is first payable, without taking into account any agreement regarding renewals.

(2) Subject to subsection (3) of this section, an action to enforce the obligation of a depository institution to pay all or part of the balance of a certificate of deposit shall be commenced by the earlier of:

(a) The time that an action to enforce an obligation under subsection (e) of section 3-118, Uniform Commercial Code, must be commenced if the certificate of deposit is subject to such section; or

(b) Seven years after the later of:

(i) The maturity date of the certificate of deposit;

(ii) The due date of the certificate of deposit indicated in the depository institution's last written notice of renewal of the certificate of deposit, if any;

(iii) The date of the last written communication from the depository institution recognizing the depository institution's obligation with respect to the certificate of deposit; or

(iv) The last day of the taxable year for which a person identified in the certificate of deposit last reported interest income earned on the certificate of deposit on a federal or state income tax return.

(3) Notwithstanding subsection (2) of this section, an action to enforce the obligation of a depository institution to pay all or part of the balance of an automatically renewing certificate of deposit in existence on July 1, 2008, shall be commenced by the later of:

(a) Seven years after the later of:

(i) The maturity date of the certificate of deposit;

(ii) The due date of the certificate of deposit indicated in the depository institution's last written notice of renewal of the certificate of deposit, if any;

(iii) The date of the last written communication from the depository institution recognizing the depository institution's obligation to pay the certificate of deposit; or

(iv) The last day of the taxable year for which a person identified in the certificate of deposit last reported interest income earned on the certificate of deposit on a federal or state income tax return; or

(b) One year after July 1, 2008.

(4) This section applies to all certificates of deposit that are in existence on or after July 1, 2008.

Source: Laws 2008, LB151, § 1.
Operative date July 1, 2008.

ARTICLE 3

PARTIES

Section
25-301. Real party in interest.
25-302. Assignee of a thing in action.
25-303. Assignee; defenses and counterclaims available.
25-304. Parties to actions.
25-305. Married woman.
25-306. Wife's right to defend.

25-301 Real party in interest.

Every action shall be prosecuted in the name of the real party in interest except as otherwise provided in section 25-304. An action shall not be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. Joinder or substitution of the real party in interest shall have the same effect as if the action had been commenced by the real party in interest.

Source: R.S.1867, Code § 29, p. 398; R.S.1913, § 7582; C.S.1922, § 8525; C.S.1929, § 20-301; R.S.1943, § 25-301; Laws 1999, LB 48, § 1.

1. Real party in interest
2. Miscellaneous

1. Real party in interest

Under this section, every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304, R.R.S.1943. Redding v. Gibbs, 203 Neb. 727, 280 N.W.2d 53 (1979).

Where insurance company settled and paid insureds' loss in full and they make no demand on defendant feeling that no additional amount is owing them, insurance company would be real party in interest in suit upon assignment to it of insureds' cause of action. Jelinek v. Nebraska Nat. Gas Co., 196 Neb. 488, 243 N.W.2d 778 (1976).

Fact that property passes the same by will as by deed conclusive of issue that neither executor nor other beneficiaries of will have standing to be real party in interest under this section. Scholting v. Alley, 185 Neb. 549, 178 N.W.2d 273 (1970).

Plaintiffs not real parties in interest where conditions precedent to representative or derivative suit on behalf of a public corporation were not met. Evans v. Metropolitan Utilities Dist., 184 Neb. 172, 166 N.W.2d 411 (1969).

Interested parties may appeal to district court from action of county superintendent in dissolving school district. Board of Education v. Winne, 177 Neb. 431, 129 N.W.2d 255 (1964).

Defense of action by real party in interest was proper. Anest v. Chester B. Brown Co., 169 Neb. 330, 99 N.W.2d 615 (1959).

Party in whose name sheep feeding operations were conducted was the real party in interest. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 151 (1957).

Owner of truck was real party in interest to recover for violation of Installment Loan Act. McNish v. General Credit Corp., 164 Neb. 526, 83 N.W.2d 1 (1957).

Real party in interest is the party entitled to the avails of the suit. Dafoe v. Dafoe, 160 Neb. 145, 69 N.W.2d 700 (1955).

Person for whom bond was tendered was real party in interest in action to compel approval of bond. Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N.W.2d 803 (1954).

Where action is brought by party designated by statute for that purpose, it meets the requirement that all actions shall be brought by the real party in interest. Boone County Old Age Assistance Board v. Myhre, 149 Neb. 669, 32 N.W.2d 262 (1948).

An action by assignee of claim under Fair Labor Standards Act is brought by the real party in interest. Archer v. Musick, 147 Neb. 1018, 25 N.W.2d 908 (1947).

Joinder of cause of action by plaintiff in his own right with cause of action assigned for collection is not permitted. Archer v. Musick, 147 Neb. 344, 23 N.W.2d 323 (1946).

Action may be continued by assignee of claim in name of original party. Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N.W.2d 403 (1946).

Every action must be prosecuted in the name of the real party in interest. Uptegrove v. Metropolitan Life Ins. Co. of N.Y., 145 Neb. 51, 15 N.W.2d 220 (1944).

Only beneficiary, or some one suing in his behalf, can maintain suit against trustee to enforce trust or enjoin or obtain redress for breach of trust. In re Estate of Reynolds, 131 Neb. 557, 268 N.W. 480 (1936).

School district was ultimate beneficiary but not necessarily the real party in interest hereunder. State ex rel. Sorensen v. Nemaha County Bank, 124 Neb. 883, 248 N.W. 650 (1933).

Administratrix is proper party hereunder to sue for damages for death of employee; compensation act merely relates to distribution of proceeds. Goeres v. Goeres, 124 Neb. 720, 248 N.W. 75 (1933).

Tax Commissioner exercising constitutional powers, as the real party in interest in absence of express statutory prohibition, is authorized to carry on proceedings in name of state. State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N.W. 616 (1932).

Person injured by negligent acts of policeman in discharge of official duty may sue on policeman's bond, although same runs to city as obligee. Curnyn v. Kinney, 119 Neb. 478, 229 N.W. 894 (1930).

Bank, although in hands of State Banking Superintendent, may sue. First State Bank of Herrick v. Conant, 117 Neb. 562, 221 N.W. 691 (1928).

Husband and wife jointly may sue concerning real estate owned by either. Coon v. O'Brien, 107 Neb. 427, 186 N.W. 340 (1922).

Tenant may sue in action upon contract for joint benefit of landlord and tenant concerning crop. Hurley v. Manchester, 107 Neb. 299, 185 N.W. 974 (1921).

Purchaser from consignee, after transportation has ended, cannot maintain action against carrier for damage in transit without procuring assignment of claim from consignee. Meyer v. Chicago & N.W. Ry. Co., 101 Neb. 756, 164 N.W. 1048 (1917).

Trustee for minor child of insured, designated as beneficiary in policy, is proper plaintiff. Ward v. Bankers Life Co., 99 Neb. 812, 157 N.W. 1017 (1916).

A joint obligee in an appeal bond may maintain an action thereon in his own name when he has purchased the interest of his joint obligee. Harker v. Burbank, 68 Neb. 85, 93 N.W. 949 (1903).

Third person for whose benefit promise is made may maintain action thereon, though not party to consideration. Goos v. Goos, 57 Neb. 294, 77 N.W. 687 (1898); Morrill v. Skinner, 57 Neb. 164, 77 N.W. 375 (1898).

Assignee of chose in action is the proper and only party who can maintain an action thereon. Crum v. Stanley, 55 Neb. 351, 75 N.W. 851 (1898).

Action on replevin bond must be brought by the party who, by the judgment in replevin, is awarded a recovery. Pilger v. Marder, Luse & Co., 55 Neb. 113, 75 N.W. 559 (1898).

Consignee is proper party to sue for failure to deliver goods. Union P. Ry. Co. v. Metcalf, 50 Neb. 452, 69 N.W. 961 (1897).

Real party in interest is the person entitled to the avails of the suit. Kinsella v. Sharp, 47 Neb. 664, 66 N.W. 634 (1896).

Where party with whom subscription contract was made assigned his interest to another, he was not a real party in interest. Gerner v. Church, 43 Neb. 690, 62 N.W. 51 (1895).

A partnership may be plaintiff in action for fraud in purchase of real estate, although title is taken in name of individual partner. Peaks & Co. v. Graves, 25 Neb. 235, 41 N.W. 151 (1888).

Tenants in common may or may not join in action against mere trespasser. Mattis v. Boggs, 19 Neb. 698, 28 N.W. 325 (1886).

A private person, to be a real party in interest, in bringing an action to abate a public nuisance must show special injury to himself. Kittle v. Fremont, 1 Neb. 329 (1871).

Once a party files a bankruptcy petition, all of his property, including choses in action, become property of the bankruptcy estate, and the bankruptcy trustee becomes the real party in interest with respect to such choses in action, until such time as the trustee may abandon the chose in action. Forrest v. Eilenstine, 5 Neb. App. 77, 554 N.W.2d 802 (1996).

Where the State brought an action for mother's medical expenses on behalf of child, the State failed to properly state a claim for such expenses. State on behalf of Dunn v. Wiegand, 2 Neb. App. 580, 512 N.W.2d 419 (1994).

2. Miscellaneous

An agreement to assign all proceeds, if any, of an insurance policy does not operate to divest a plaintiff of the capacity to bring an action. Craig v. Farmers Mut. Ins. Co., 239 Neb. 271, 476 N.W.2d 529 (1991).

A plaintiff's cause of action cannot be split, and having settled with defendant for injuries, he cannot bring action upon claim of insurance company against defendant for money paid plaintiff under a collision policy. Schmidt v. Henke, 192 Neb. 408, 222 N.W.2d 114 (1974).

The Attorney General may bring an action for a declaratory judgment challenging the constitutionality of a statute which the Tax Commissioner proposed to implement and enforce. State ex rel. Meyer v. Peters, 188 Neb. 817, 199 N.W.2d 738 (1972).

An issue that plaintiff is not the real party in interest must be specially pleaded. Neill v. McGinn, 175 Neb. 369, 122 N.W.2d 65 (1963).

This section applies to forcible entry and detainer cases. Gregory v. Pribbeno, 143 Neb. 379, 9 N.W.2d 485 (1943).

This section applies to forcible detainer cases. Towles v. Hamilton, 94 Neb. 588, 143 N.W. 935 (1913).

If plaintiff's name imports a corporation, it is not necessary to allege its corporate capacity in terms. Fletcher v. Co-operative Pub. Co., 58 Neb. 511, 78 N.W. 1070 (1899).

Plaintiff suing on account should do so by Christian name. Small v. Sandall, 48 Neb. 318, 67 N.W. 156 (1896); Fisk v. Gulliford, 1 Neb. Unof. 31, 95 N.W. 494 (1901).

Where pleadings disclose cause of action against defendant personally, super-added words, as ''agent'' or ''ex-executor,'' etc., are mere descriptio personae. Thomas v. Carson, 46 Neb. 765, 65 N.W. 899 (1896).

Where a contract of guaranty is transferred by assignment, assignee may sue in his own name. Weir v. Anthony, 35 Neb. 396, 53 N.W. 206 (1892).

An assignee of a chose in action may sue on it in his own name and right. State Securities Co. v. Federated Mut. Imp. & Hard. Ins. Co., 204 F.Supp. 207 (D. Neb. 1960).

25-302 Assignee of a thing in action.

The assignee of a thing in action may maintain an action thereon in the assignee's own name and behalf, without the name of the assignor.

Source: R.S.1867, Code § 30, p. 398; R.S.1913, § 7583; C.S.1922, § 8526; C.S.1929, § 20-302; R.S.1943, § 25-302; Laws 2006, LB 1115, § 9.

A party who has in fact become the owner of a chose in action by assignment may bring action thereon in his own name without naming the assignor. Archer v. Musick, 147 Neb. 344, 23 N.W.2d 323 (1946).

Assignment of a negotiable instrument may be made on a separate sheet of paper, but transferee is not protected against defenses which might be shown against payee. Plattsmouth State Bank v. Redding, 128 Neb. 268, 258 N.W. 661 (1935).

A claim for earned official salary against county may be assigned, and such assignment is binding on county when county board is advised of such assignment. Woods v. Brown County, 125 Neb. 692, 251 N.W. 839 (1933).

One furnishing labor or supplies to highway contractor may sue in his own name on surety bond as made for his benefit. West v. Detroit Fidelity & Surety Co., 118 Neb. 544, 225 N.W. 673 (1929).

Assignee may maintain action in own name to recover funds due from school district to building contractor. Stansberry Lumber Co. v. School Dist. of McCook, 94 Neb. 24, 142 N.W. 302 (1913).

An attorney to whom claims are unconditionally assigned may sue in his own name. Huddleson v. Polk, 70 Neb. 483, 97 N.W. 624 (1903).

Assignee of nonnegotiable promissory note may maintain an action thereon in his own name. Barry v. Wachosky, 57 Neb. 534, 77 N.W. 1080 (1899).

The assignee of a chose in action is the proper and only party who can maintain a suit thereon. Crum v. Stanley, 55 Neb. 351, 75 N.W. 851 (1898); Mills v. Murry, 1 Neb. 327 (1871).

A contract of guaranty is assignable, and the assignee may maintain an action thereon in his own name. Weir v. Anthony, 35 Neb. 396, 53 N.W. 206 (1892).

A mechanic's lien is assignable, and the assignee can maintain an action to foreclose the lien in his own name. Rogers v. Omaha Hotel Co., 4 Neb. 54 (1875).

25-303 Assignee; defenses and counterclaims available.

An action by the assignee of a thing in action shall be without prejudice to any counterclaim or defense existing between the original parties; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith, and upon good consideration before due.

Source: R.S.1867, Code § 31, p. 398; R.S.1913, § 7584; C.S.1922, § 8527; C.S.1929, § 20-303.

The fundamental test to be applied in ascertaining whether the plaintiff is the real party in interest is whether or not the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. Archer v. Musick, 147 Neb. 1018, 25 N.W.2d 908 (1947).

Defenses arising against the assignor, after notice of the assignment, cannot be set off against the claim of the assignee. Cronkleton v. Hastings Theatre and Realty Corp., 134 Neb. 168, 278 N.W. 144 (1938).

Purchaser of village warrants takes same subject to any equities existing against holder. Union Nat. Bank of Fremont v. Village of Beemer, 123 Neb. 778, 244 N.W. 303 (1932).

Account cannot be assigned free from right of set-off. Olsen v. Marquis, 88 Neb. 610, 130 N.W. 267 (1911).

Future earnings or profits under an existing contract are assignable. First Nat. Bank of Madison v. School Dist. No. 1, 77 Neb. 570, 110 N.W. 349 (1906).

Where promissory note was purchased after maturity, it was subject to any set-off or other defense against prior holder. Wilbur v. Jeep, 37 Neb. 604, 56 N.W. 198 (1893).

In action on certificate of deposit transferred after due, maker may set off any cross-demand against original payee which existed at time of transfer. First Nat. Bank of Rapid City v. Security Nat. Bank of Sioux City, 34 Neb. 71, 51 N.W. 305 (1892).

An endorsement of a promissory note not for value, but for the purpose of collection, does not cut off defenses of maker defendant. Roberts v. Snow, 27 Neb. 425, 43 N.W. 241 (1889).

A promissory note assigned by a separate writing rather than by endorsement is not transferred within the meaning of this section and the maker's defense of usury is available against the assignee. Doll v. Hollenbeck, 19 Neb. 639, 28 N.W. 286 (1886).

The purchaser of a note after maturity takes it subject to any set-off good between the original parties. Davis v. Neligh, 7 Neb. 78 (1878).

25-304 Parties to actions.

An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining the person for whose benefit it is prosecuted. Officers may sue and be sued in such

name as is authorized by law and official bonds may be sued upon the same way. Assignees of choses in action assigned for the purpose of collection may sue on any claim assigned in writing.

Source: R.S.1867, Code § 32, p. 398; Laws 1913, c. 166, § 1, p. 509; R.S.1913, § 7585; C.S.1922, § 8528; C.S.1929, § 20-304; R.S. 1943, § 25-304; Laws 2003, LB 19, § 1.

1. Assignees
2. Executors, administrators, and guardians
3. Trustees
4. Officers
5. Contracts made for benefit of another
6. Miscellaneous

1. Assignees

An assignee of a chose in action to whom the legal title has been assigned for the purpose of collection is a proper party plaintiff and may maintain an action as the real party in interest. Archer v. Musick, 147 Neb. 1018, 25 N.W.2d 908 (1947).

An assignee of a chose in action assigned for collection is a proper party plaintiff but is not the real party in interest as to the cause of action. Archer v. Musick, 147 Neb. 344, 23 N.W.2d 323 (1946).

Action is properly brought by assignee of creditor. Seybolt v. Waters, 109 Neb. 99, 189 N.W. 980 (1922).

2. Executors, administrators, and guardians

Plaintiff, describing himself as guardian, presumed to sue in representative capacity. Bennett v. Bennett, 65 Neb. 432, 91 N.W. 409 (1902), affirmed on rehearing 65 Neb. 441, 96 N.W. 994 (1903).

Federal court had jurisdiction on ground of diversity of citizenship by Kansas resident, even though plaintiff had been appointed administratrix by Nebraska court. Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962).

3. Trustees

When certain devisees under will appoint a trustee who brings action in their behalf, they are all bound thereby. Glissmann v. McDonald, 128 Neb. 693, 260 N.W. 182 (1935).

Trustee for bondholders is entitled to maintain appeal. Roebling's Sons Co. v. Nebraska Elec. Co., 106 Neb. 255, 183 N.W. 546 (1921).

Trustee for minor son of insured, so designated as beneficiary in policy, may bring action thereon. Ward v. Bankers Life Co., 99 Neb. 812, 157 N.W. 1017 (1916).

Where trustee refuses to carry out terms of trust, parties beneficially interested may maintain action to enforce trust and obtain benefit thereunder. Goble v. Swobe, 64 Neb. 838, 90 N.W. 919 (1902).

Trustee of express trust, who is obligee on injunction bond, may maintain action thereon in own name. Gyger v. Courtney, 59 Neb. 555, 81 N.W. 437 (1900).

Consignor of goods is not trustee of an express trust. Union Pacific Ry. Co. v. Metcalf & Wood, 50 Neb. 452, 69 N.W. 961 (1897).

County is proper party to bring an action analogous to that of trustee for all funds, except those of the county proper, where county treasurer is in default. Thorne v. Adams County, 22 Neb. 825, 36 N.W. 515 (1888).

4. Officers

School district treasurer or successor may maintain action for recovery of district's money deposited in bank. State ex rel. Sorensen v. Nemaha County Bank, 124 Neb. 883, 248 N.W. 650 (1933).

Tax Commissioner exercising constitutional powers as the real party in interest, in absence of express statutory prohibition, is authorized to carry on proceedings in the name of the state. State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N.W. 616 (1932).

Action may be brought in name of bank as plaintiff, although it is in hands of State Bank Superintendent. First State Bank of Herrick v. Conant, 117 Neb. 562, 221 N.W. 691 (1928).

State Board may bring action where authorized by statute. State ex rel. Board of Transportation v. Missouri P. Ry. Co., 29 Neb. 550, 45 N.W. 785 (1890).

5. Contracts made for benefit of another

Action may be brought by person in whose name a contract was made for benefit of another. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 151 (1957).

Party in whose name contract is made for benefit of another may bring action without joining such other person. Coe v. Nebraska B. & I. Co., 110 Neb. 322, 193 N.W. 708 (1923).

This section constitutes exception to statutory rule that all parties united in interest must join as plaintiffs. Owner of fractional interest in real estate is proper plaintiff in action upon contract executed in his name for benefit of all interests. O'Shea v. North American Hotel Co., 109 Neb. 317, 191 N.W. 321 (1922).

Person holding legal title, although property is in fact owned by another, may maintain action in own name. Chamberlain v. Woolsey, 66 Neb. 149, 95 N.W. 38 (1903).

Party, holding legal title to chose in action for the benefit of another, may sue in own name. Meeker v. Waldron, 62 Neb. 689, 87 N.W. 539 (1901).

Where legal title was taken in name of plaintiff, suit was authorized by her for wrongful sale of land. Alexander v. Overton, 36 Neb. 503, 54 N.W. 825 (1893).

Where contract is made for benefit of another, action can be maintained in name of contracting party. Ley v. Miller, 28 Neb. 822, 45 N.W. 174 (1890).

Where a promissory note is made to an agent in his own name as promisee, he may maintain an action thereon without joining the person beneficially interested in the note. Stoll v. Sheldon, 13 Neb. 207, 13 N.W. 201 (1882).

6. Miscellaneous

An agreement requiring the purchase of construction fund warrants, regardless of the holder of the warrants, may be enforced by the party that made the agreement and is authorized to make the demand for purchase. Chiles, Heider & Co. v. Pawnee Meadows, 217 Neb. 315, 350 N.W.2d 1 (1984).

Under this section, Nebraska has not recognized ''consent'' as being an exception to the requirement under section 25-301, R.R.S.1943, that an action be prosecuted by the real party in interest. Redding v. Gibbs, 203 Neb. 727, 280 N.W.2d 53 (1979).

The Attorney General may bring an action for a declaratory judgment challenging the constitutionality of a statute which the Tax Commissioner proposes to implement and enforce. State ex rel. Meyer v. Peters, 188 Neb. 817, 199 N.W.2d 738 (1972).

Tenant who had settled with landowner for landowner's share of loss was entitled to recover the entire damages caused to crops by defendant. Ristine v. Geigy Agricultural Chemicals, 188 Neb. 550, 198 N.W.2d 199 (1972).

Party in whose name contract was made could bring action for violation of Installment Loan Act. McNish v. Grand Island Finance Co., 164 Neb. 543, 83 N.W.2d 13 (1957); McNish v. General Credit Corp., 164 Neb. 526, 83 N.W.2d 1 (1957).

Attorney General may bring action of injunction under Installment Loan Act without joining borrowers as parties. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

Person for whom bond was tendered did not fall within exceptions. Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N.W.2d 803 (1954).

The real party in interest is the person entitled to the avails of the suit. Uptegrove v. Metropolitan Life Ins. Co. of N. Y., 145 Neb. 51, 15 N.W.2d 220 (1944).

Defendant interposing counterclaim was not real party in interest where loss, if any, would fall on owner of bonds not joined as defendant in the action. Continental Nat. Bank of Lincoln v. Wilkinson, 124 Neb. 675, 247 N.W. 604 (1933).

25-305 Married woman.

A woman may while married sue and be sued in the same manner as if she were unmarried.

Source: Laws 1871, § 3, p. 68; R.S.1913, § 7586; C.S.1922, § 8529; C.S.1929, § 20-305.

Common-law doctrine of interspousal tort immunity is abrogated; husband or wife is not immune from tort liability to the other solely by the reason of that relationship. This case overrules Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927). Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979).

Action by wife against husband for personal injuries is not authorized. Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927).

Statute of limitations runs against women during coverture. Murphy v. Evans City Steam Laundry Co., 52 Neb. 593, 72 N.W. 960 (1897).

Married woman may maintain action for personal injuries in her own home. City of Chadron v. Glover, 43 Neb. 732, 62 N.W. 62 (1895).

Wife may maintain action against husband for use and occupation of her real estate. Skinner v. Skinner, 38 Neb. 756, 57 N.W. 534 (1894).

Married woman, served with process, was bound by court's decree in registration proceedings under Torrens Act. Jones v. York County, 26 F.2d 623 (8th Cir. 1928).

Wife may maintain action for loss of consortium. Cooney v. Moomaw, 109 F.Supp. 448 (D. Neb. 1953).

25-306 Wife's right to defend.

If a husband and wife be sued together, the wife may defend for her own right; and if the husband neglect to defend, she may defend for his right also.

Source: R.S.1867, Code § 35, p. 398; R.S.1913, § 7587; C.S.1922, § 8530; C.S.1929, § 20-306.

25-307 Suit by infant, guardian, or next friend; exception; substitution by court.

Except as provided by the Nebraska Probate Code, the action of an infant shall be commenced, maintained, and prosecuted by his or her guardian or next friend. Such actions may be dismissed with or without prejudice by the guardian or next friend only with approval of the court. When the action is commenced by his or her next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant, or any person, as the next friend. Any action taken pursuant to this section shall be binding upon the infant.

Source: R.S.1867, Code § 36, p. 398; R.S.1913, § 7588; C.S.1922, § 8531; C.S.1929, § 20-307; R.S.1943, § 25-307; Laws 1975, LB 480, § 1; Laws 1975, LB 481, § 10; Laws 2006, LB 1115, § 10.

Cross References

Nebraska Probate Code, see section 30-2201.

1. Guardian or next friend
2. Miscellaneous

1. Guardian or next friend.

Trial court has power, for cause, to substitute next friend in place of guardian. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

Next friend may be incompetent to testify to transaction with deceased person. Fincham v. Mueller, 166 Neb. 376, 89 N.W.2d 137 (1958).

Minor should be represented by guardian ad litem or a next friend. Cass v. Pense, 155 Neb. 792, 54 N.W.2d 68 (1952).

Where infants have been disinherited or deprived of valuable property rights by will, near relative or other person interested in their welfare may institute proceedings as next friend, to contest will, negotiate for compromise, and execute contract of settlement for infants' benefit, and such contract, if approved by court, is binding on infants and all parties thereto. In re Shierman's Estate, 129 Neb. 230, 261 N.W. 155 (1935).

Under authority hereof, guardian or next friend might sue to protect rights of minor cestui que trust as against testamentary trustee. In re Frerichs' Estate, 120 Neb. 462, 233 N.W. 456 (1930).

Intervention by infants, through next friend, in probate proceedings is authorized hereunder; appointment of guardian ad litem is not required. In re Bayer's Estate, 116 Neb. 670, 218 N.W. 746 (1928).

This section is not in derogation of right of next friend to maintain action on behalf of one incapable of conducting his own affairs through age or weakness. Stephan v. Prairie Life Ins. Co., 113 Neb. 469, 203 N.W. 626 (1925).

Infants have a right to sue by guardian or next friend to recover damages for injuries due to tortious acts. Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903).

Next friend may bring suit for an insane party. Wager v. Wagoner, 53 Neb. 511, 73 N.W. 937 (1898).

Where seventeen-year-old minor brought suit by next friend, as authorized by law, for injunction against enforcement of statute requiring parents' consent for abortion, motion for appointment of guardian ad litem was denied. Doe v. Exon, 416 F.Supp. 716 (D. Neb. 1976).

2. Miscellaneous

Owner of life estate in portion of larger tract may maintain partition against cotenant holding fee simple. Nitz v. Widman, 106 Neb. 736, 184 N.W. 172 (1921).

One for whom a conservator has been appointed possesses the power to sue in his own name. Rogers v. Bates, 431 F.2d 16 (8th Cir. 1970).

25-308 Action by guardian, conservator, or next friend; liability for costs; security; witness.

The guardian, conservator, or next friend is liable for the costs of the action brought by the guardian, conservator, or next friend, and when he or she is insolvent, the court may require security for the costs of the action. The guardian, conservator, or next friend may be a witness in an action brought by the guardian, conservator, or next friend.

Source: R.S.1867, Code § 37, p. 399; R.S.1913, § 7589; C.S.1922, § 8532; C.S.1929, § 20-308; R.S.1943, § 25-308; Laws 1975, LB 481, § 11; Laws 2006, LB 1115, § 11.

Costs cannot be taxed against guardian ad litem in a case brought by another against a minor or incompetent. White v. Ogier, 175 Neb. 883, 125 N.W.2d 68 (1963).

A guardian or next friend is liable for the costs of an action brought by him. Peterson v. Skiles, 173 Neb. 470, 113 N.W.2d 628 (1962).

Liability for costs may cause next friend to be incompetent to testify as to transaction with deceased person. Fincham v. Mueller, 166 Neb. 376, 89 N.W.2d 137 (1958).

An action of an infant must be brought by his guardian or next friend, who alone is liable for costs, and the infant is not liable to a judgment therefor. Kleffel v. Bullock, 8 Neb. 336 (1879).

25-309 Suit against infant; guardian for suit; when appointed; exception.

Except as provided by the Nebraska Probate Code, the defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge. The appointment cannot be made until after service of the summons in the action as directed by this code.

Source: R.S.1867, Code § 38, p. 399; R.S.1913, § 7590; C.S.1922, § 8533; C.S.1929, § 20-309; R.S.1943, § 25-309; Laws 1975, LB 481, § 12.

Cross References

Nebraska Probate Code, see section 30-2201.

The defense of an infant must be made by a guardian for the suit. Omey v. Stauffer, 174 Neb. 247, 117 N.W.2d 481 (1962).

The defense of a minor must be made by a guardian ad litem. Peterson v. Skiles, 173 Neb. 470, 113 N.W.2d 628 (1962).

Appointment of guardian ad litem should not be made until after service of process in the action. Marsh v. Marsh, 173 Neb. 282, 113 N.W.2d 323 (1962).

Appointment of guardian ad litem was proper. Cass v. Pense, 155 Neb. 792, 54 N.W.2d 68 (1952).

Failure of court to appoint guardian ad litem for minor, under circumstances disclosed, was not prejudicial error. Kuhlman v. Schacht, 130 Neb. 511, 265 N.W. 549 (1936).

This section refers to the defense of infants, rather than to affirmative action on their behalf. In re Bayer's Estate, 116 Neb. 670, 218 N.W. 746 (1928).

Where partition suit is brought by father against minor children under fourteen, service on minors and plaintiff as father and guardian is sufficient to confer jurisdiction to appoint guardian ad litem. Beadle v. Beadle, 102 Neb. 73, 165 N.W. 953 (1917).

Guardian should resist payment of illegal attorney fees out of estate of ward. Ress v. Shepherd, 84 Neb. 268, 120 N.W. 1132 (1909).

Where minor acquires title to subject matter of action while it is pending, failure to appoint guardian ad litem will not invalidate judgment. Shelby v. St. James Orphan Asylum, 66 Neb. 40, 92 N.W. 155 (1902).

Failure to appoint guardian ad litem was merely error; it does not render void the judgment entered. Manfull v. Graham, 55 Neb. 645, 76 N.W. 19 (1898).

25-310 Suit against infant; guardian; how appointed.

The appointment may be made upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the return of the summons. If he be under the age of fourteen or neglect so to apply, the appointment may be made upon the application of any friend of the infant, or on that of plaintiff in the action.

Source: R.S.1867, Code § 39, p. 399; R.S.1913, § 7591; C.S.1922, § 8534; C.S.1929, § 20-310.

Minor over fourteen has the right to apply for appointment of guardian, and objection that no guardian was appointed comes too late after verdict. Kuhlman v. Schacht, 130 Neb. 511, 265 N.W. 549 (1936).

Where partition suit is brought by father against minor children under fourteen years of age, service on minors and plaintiff as father and guardian is sufficient to confer jurisdiction on court to appoint guardian ad litem. Beadle v. Beadle, 102 Neb. 73, 165 N.W. 953 (1917).

25-311 Joinder of plaintiffs.

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Source: R.S.1867, Code § 40, p. 399; R.S.1913, § 7592; C.S.1922, § 8535; C.S.1929, § 20-311; R.S.1943, § 25-311; Laws 1998, LB 234, § 1.

1. Joinder
2. Miscellaneous

1. Joinder

Multiple plaintiffs may join in one suit to enjoin a nuisance so long as the alleged nuisance interferes with the rights of each plaintiff joined; however, multiple plaintiffs seeking monetary damages for an alleged nuisance would be misjoined where any one plaintiff has no interest in the monetary relief demanded by each of the other plaintiffs. Goeke v. National Farms, Inc., 245 Neb. 262, 512 N.W.2d 626 (1994).

Mortgagees of cattle were proper party plaintiffs with owner in suit on indemnity bond of livestock commission company. Oss v. Hartford Accident & Indemnity Co., 130 Neb. 311, 264 N.W. 897 (1936).

To authorize joinder of parties as defendants, they must be under joint liability or claiming some right in subject matter of action. Stull Bros. v. Powell, 70 Neb. 152, 97 N.W. 249 (1903).

Successive mortgagees, merely as such, and even though possession has not been had on any of the mortgages, may join in replevying the property. Trompen v. Yates, 66 Neb. 525, 92 N.W. 647 (1902).

City may join as party plaintiff in tax foreclosure proceedings by county, but is not required to do so. County of Lancaster v. Rush, 35 Neb. 119, 52 N.W. 837 (1892).

Two parties having separate and distinct claims to the possession of the same property may unite such claims and in their joint or combined names maintain an action of replevin therefor. Earle v. Burch, 21 Neb. 702, 33 N.W. 254 (1887).

Tenants in common may join in an action for the possession of real estate held by one without title. Mattis v. Boggs, 19 Neb. 698, 28 N.W. 325 (1886).

An attorney who has perfected his lien upon money due from defendant in a pending action has such an interest therein to be made a coplaintiff. Reynolds v. Reynolds, 10 Neb. 574, 7 N.W. 322 (1880).

2. Miscellaneous

Interested parties may appeal to district court from action of county superintendent in dissolving school district. Board of Education v. Winne, 177 Neb. 431, 129 N.W.2d 255 (1964).

Objection that plaintiff has no legal capacity to sue must be made, if at all, by party to suit. Miller v. Willis, 15 Neb. 13, 16 N.W. 840 (1883).

In an action brought upon a judgment against a principal debtor, in behalf of a surety who has paid off and satisfied the same and taken an assignment thereof, the original plaintiffs are not proper parties. Eaton v. Lambert, 1 Neb. 339 (1871).

25-312 Defendants; how designated; misnomer; when immaterial.

(1) In all actions upon bills of exchange or promissory notes, or other written instruments, and in all actions described in subsection (2) of this section, it is sufficient to designate any defendant by the name or part of name by which he or she is designated in the instrument upon which action is brought, or by which he or she appears of record to have some interest, right, title, estate in or lien upon the property involved in such action or proceeding, and for all the purposes of such action or proceeding such name shall be considered the real name of such defendant.

(2) This section applies to (a) actions brought under section 25-401, 25-402, or 25-403 and (b) actions which relate to, or the subject of which is, real or personal property in this state, if the defendant has or claims a lien or interest, actual or contingent, in such property, or the relief demanded consists wholly or partially in excluding the defendant from any interest in such property, and such defendant is a nonresident of the state or is a foreign corporation.

Source: R.S.1867, Code § 23, p. 397; R.S.1913, § 7593; Laws 1921, c. 220, § 34, p. 795; C.S.1922, § 8536; C.S.1929, § 20-312; R.S. 1943, § 25-312; Laws 1997, LB 1, § 1.

Action upon promissory note may be brought against maker in name by which he signed note hereunder. Bresee v. Snyder, 94 Neb. 384, 143 N.W. 219 (1913).

A cause of action collateral to the instrument, and not based thereon, is not within the purview of this section. Gillian v. McDowall, 66 Neb. 814, 92 N.W. 991 (1902).

Where note and chattel mortgage are assigned to purchaser by his initials, he comes within exception and may sue and foreclose by action without giving full name. Richardson v. Opelt, 60 Neb. 180, 82 N.W. 377 (1900).

Prescribed mode of procedure must be closely followed. Church v. Callihan, 49 Neb. 542, 68 N.W. 932 (1896).

Misnomer in action may be taken advantage of any time before judgment. Small v. Sandall, 48 Neb. 318, 67 N.W. 156 (1896).

Where plaintiff is designated in the pleadings and process by initials, court may allow amendment to insert full name. Real v. Honey, 39 Neb. 516, 58 N.W. 136 (1894).

25-312.01 Dissolved corporation; suit authorized.

Any dissolved corporation may be sued by its corporate name upon any cause of action accrued against such corporation or which but for such dissolution would have accrued, with the same effect as if it had not been dissolved.

Source: Laws 1983, LB 447, § 15.

25-313 Company, partnership, or unincorporated association; designation.

Any company or association of persons formed for the purpose of (1) carrying on any trade or business, (2) holding any species of property in this state, or (3) representing employees in collective bargaining with employers, and not incorporated, may sue and be sued by such usual name as such company, partnership or association may have assumed to itself or be known by. It shall not be necessary in such case to set forth in the process or pleadings or to prove at the trial the names of the persons composing such company.

Source: R.S.1867, Code § 24, p. 397; R.S.1913, § 7594; C.S.1922, § 8537; C.S.1929, § 20-313; R.S.1943, § 25-313; Laws 1947, c. 82, § 1, p. 256.

1. Carrying on trade or business
2. Holding property
3. Labor unions
4. Miscellaneous

1. Carrying on trade or business

Pleading must show that partnership was formed for carrying on trade or business or for holding property in this state. McJunkin v. Placek & Fitl, 80 Neb. 373, 114 N.W. 411 (1907).

Unincorporated company, organized and doing business in another state, cannot sue here in firm name. Weisz & Mall Co. v. Davey, 28 Neb. 566, 44 N.W. 470 (1890).

Alleging that company is actually carrying on business in state is sufficient. Jansen & Co. v. Mundt, 20 Neb. 320, 30 N.W. 53 (1886).

Allegation that partnership is organized and doing business in State of Nebraska is sufficient to authorize carrying on of action in firm name. Chamberlain Banking House v. Noyes, Norman & Co., 3 Neb. Unof. 550, 92 N.W. 175 (1902); Biddle v. Spatz & Miner, 1 Neb. Unof. 175, 95 N.W. 354 (1901).

In suit to enjoin violation of federal statute by members of partnership, federal district court for Missouri, wherein members resided, had jurisdiction although place of partnership's business was in Nebraska. Sutherland v. United States, 74 F.2d 89 (8th Cir. 1934).

Partnership may sue in firm name on cause of action which accrued in the course of the partnership business. Shoaff v. Gage, 168 F.Supp. 161 (D. Neb. 1958).

2. Holding property

Allegation that company is formed to carry on some trade or business or to hold some species of property in this state and that it is not incorporated is essential to maintenance of action. Burlington & Missouri River Railroad Company in Nebraska v. Dick & Son, 7 Neb. 242 (1878).

3. Labor unions

Prior to 1947 amendment, where unincorporated association was not formed to carry on some trade or business, or to hold some species of property in this state, service of process could not be properly made on such association in this state. Hurley v. Brotherhood of Railroad Trainmen, 147 Neb. 781, 25 N.W.2d 29 (1946).

4. Miscellaneous

An unincorporated association may represent employees in collective bargaining but must comply with section 25-314, R.R.S.1943, before it can bring an action in court. Nebraska Council of Educational Leaders v. Nebraska Dept. of Education, 189 Neb. 811, 205 N.W.2d 537 (1973).

Where name of plaintiff and right to sue are improperly stated, the defect is waived if not objected to. Champlin Bros. v. Sperling, 84 Neb. 633, 121 N.W. 976 (1909).

Partnership may sue or be sued in firm name. Stelling v. Peddicord, 78 Neb. 779, 111 N.W. 793 (1907).

This section is special in character, and prescribed course of procedure must be closely followed. Meyer v. Omaha Furniture & Carpet Co., 76 Neb. 405, 107 N.W. 767 (1906).

When the original action is against a partnership and during its pendency an amended petition is filed against the individual members, that is an abandonment or a discontinuance of the action against the firm. Wigton & Whitham v. Smith, 57 Neb. 299, 77 N.W. 772 (1899).

Section is to be strictly construed. Church v. Callihan, 49 Neb. 542, 68 N.W. 932 (1896).

If the plaintiff's petition sets out fully the names of the parties suing and then recites "late partners under the firm name . . ." the action is not brought within the provisions of this section. Smith v. Gregg, 9 Neb. 212, 2 N.W. 459 (1879).

So long as the defendant can be identified as the one against whom the judgment was rendered, he is as much bound by the judgment, and those claiming under the judgment are as much entitled to its benefits, to all intents and purposes, as if the defendant had been sued by his right name. Toulousaine de Distrib. v. Tri-State Seed & Grain, 2 Neb. App. 937, 520 N.W.2d 210 (1994).

Even though stock yard companies were separate legal entities, doctrine of primary jurisdiction was not applicable to oust federal court of jurisdiction. McCleneghan v. Union Stock Yards Co., 298 F.2d 659 (8th Cir. 1962).

Disbarment proceedings did not operate to deprive lawyer of equal protection of the law under this section. Niklaus v. Simmons, 196 F.Supp. 691 (D. Neb. 1961).

25-314 Transferred to section 25-530.08.

25-314.01 Repealed. Laws 1983, LB 447, § 104.

25-315 Partnership or unincorporated association; security for costs.

In cases where a company shall sue in its partnership name, such company shall procure the writ to be endorsed by a responsible surety, who is a resident of the county, for costs, or otherwise give security for costs.

Source: R.S.1867, Code § 26, p. 397; R.S.1913, § 7596; C.S.1922, § 8539; C.S.1929, § 20-315.

In action against partners individually, upon a judgment obtained against firm, petition must allege partnership property is insufficient to satisfy judgment. Leach v. Milburn Wagon Co., 14 Neb. 106, 15 N.W. 232 (1883); Ruth v. Lowrey & Upton, 10 Neb. 260, 4 N.W. 977 (1880).

Security should be given before delivery of summons for service. Haskins v. Citizens Bank, 12 Neb. 39, 10 N.W. 466 (1881).

Security for costs is an essential prerequisite to maintenance of action. Burlington & M. R. R. Co. v. Dick & Son, 7 Neb. 242 (1878).

25-316 Company, partnership, or unincorporated association; member's individual property; how subjected to satisfaction of judgment.

If the plaintiff, in any judgment so rendered against any company or partnership, seeks to charge the individual property of the persons composing such company or firm, it shall be lawful for the plaintiff to file a bill in equity against

the several members thereof, setting forth his or her judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt and an award of execution against all such persons or any of them as may appear to have been members of such company, association, or firm.

Source: R.S.1867, Code § 27, p. 397; R.S.1913, § 7597; C.S.1922, § 8540; C.S.1929, § 20-316; R.S.1943, § 25-316; Laws 2006, LB 1115, § 12.

As a condition precedent to bringing an action against individual partners to satisfy the debts of a partnership, this section contemplates that there must be a prior judgment against the partnership. Security State Bank v. McCoy, 219 Neb. 132, 361 N.W.2d 514 (1985).

The right of action preserved by this section is assignable in like manner and with like effect as other choses in action. Wood v. Carter, 67 Neb. 133, 93 N.W. 158 (1903).

A member of an unincorporated religious society not founded for the purpose of gain or pecuniary profit is not individually liable for its debts, unless he authorized the incurring of the obligation or subsequently ratified the same. First Nat. Bank of Plattsmouth v. Rector, 59 Neb. 77, 80 N.W. 269 (1899).

To entitle plaintiff to recover from individual partner, it was necessary to allege and prove that the partnership property was insufficient to satisfy the judgment. Ruth v. Lowrey & Upton, 10 Neb. 260, 4 N.W. 977 (1880).

A fundamental condition precedent to the bringing of a bill in equity pursuant to this section against individual partners is a prior judgment against the partnership. Under the doctrine of res judicata, an order by a bankruptcy court allowing an administrative expense claim is a prior judgment within the meaning of this section. Metco, Inc. v. Huffman, 2 Neb. App. 506, 511 N.W.2d 780 (1994).

25-317 Repealed. Laws 1998, LB 234, § 12.

25-318 Necessary joinder; involuntary joinder; procedure.

Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he or she may be made a defendant, the reason being stated in the complaint.

Source: R.S.1867, Code § 42, p. 399; R.S.1913, § 7599; C.S.1922, § 8542; C.S.1929, § 20-318; R.S.1943, § 25-318; Laws 2002, LB 876, § 6.

1. Joinder
2. Miscellaneous

1. Joinder

Joint obligees must sue jointly in actions ex contractu. Hecker v. Ravenna Bank, 237 Neb. 810, 468 N.W.2d 88 (1991).

This section states general rule as to joinder, to which there are statutory exceptions. O'Shea v. North Am. Hotel Co., 109 Neb. 317, 191 N.W. 321 (1922).

Liability of defendants was joint and other parties interested with them should have been joined. Wolfenbarger v. Britt, 105 Neb. 773, 181 N.W. 932 (1921).

Voluntary release of one of two joint makers of promissory note will release the other; demurrer for misjoinder. Banking House of A. Castetter v. Rose, 78 Neb. 693, 111 N.W. 590 (1907).

In action on appeal bond running to joint obligees, failure by one obligee to join co-obligee as party justified dismissal of action. Harker v. Burbank, 68 Neb. 85, 93 N.W. 949 (1903).

Alleging that a person is joined as defendant because he refused to join as plaintiff is sufficient. Union P. Ry. Co. v. Vincent, 58 Neb. 171, 78 N.W. 457 (1899).

Parties jointly liable must be joined as defendants. Bowen v. Crow, 16 Neb. 556, 20 N.W. 850 (1884); Fox v. Abbott, 12 Neb. 328, 11 N.W. 303 (1882).

Widow may bring action alone or jointly with her children for damage against all persons jointly and severally who furnish liquor causing damage. Kerkow v. Bauer, 15 Neb. 150, 18 N.W. 27 (1883); Roose v. Perkins, 9 Neb. 304, 2 N.W. 715 (1879).

2. Miscellaneous

Assuming that plaintiff and guardian ad litem for incompetent defendant were united in interest, taxation of fee for guardian ad litem against plaintiff was unauthorized. Johnson v. Munsell, 170 Neb. 749, 104 N.W.2d 314 (1960).

This section is applicable to appellate proceedings. Donisthorpe v. Vavra, 134 Neb. 157, 278 N.W. 151 (1938).

Where assignment to plaintiff was of undivided interest in claim, subject to contingencies, plaintiff did not make separate case against defendant, in view of this section. Federal Land Bank of Omaha v. United States Nat. Bank, 13 F.2d 36 (8th Cir. 1926).

25-319 Class actions; representation.

When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Source: R.S.1867, Code § 43, p. 399; R.S.1913, § 7600; C.S.1922, § 8543; C.S.1929, § 20-319.

1. Class action proper
2. Class action improper
3. Miscellaneous

1. Class action proper

Class action was proper for recovery of erroneous deductions from salaries of policemen and firemen for pension purposes. Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975).

Class suit to determine rights to appropriation of water was authorized. Hickman v. Loup River P. P. Dist., 173 Neb. 428, 113 N.W.2d 617 (1972).

Class action may apply to proceedings for school district reorganization. Keedy v. Reid, 165 Neb. 519, 86 N.W.2d 370 (1957).

Class action to enjoin collection of void tax is authorized. Gamboni v. County of Otoe, 159 Neb. 417, 67 N.W.2d 489 (1954).

Class action was properly brought to determine disposition of assets of religious corporation. In re Estate of Harrington, 151 Neb. 81, 36 N.W.2d 577 (1949).

Plaintiffs are entitled to sue for themselves and all other members of fraternal insurance corporation similarly situated. Folts v. Globe Life Ins. Co., 117 Neb. 723, 223 N.W. 797 (1929).

2. Class action improper

The general rule is that an action to recover taxes illegally assessed cannot be maintained as a class action. In re 1983-84 County Tax Levy, 220 Neb. 897, 374 N.W.2d 235 (1985).

When there is potential for conflicting interests within a class, in that some members of the class own property in both sending and receiving school districts, a suit against the receiving school districts may not be maintained as a class action. In re 1983-84 County Tax Levy, 220 Neb. 897, 374 N.W.2d 235 (1985).

A former policyholder who has terminated his insurance policy is not the proper representative for a class consisting of policyholders where there are actual and potential conflicts between the interests of the former and present policyholders. It is appropriate to dispose of the class aspect of such a case upon motion for summary judgment. Sarratt v. Lincoln Benefit Life Co., 212 Neb. 436, 323 N.W.2d 81 (1982).

Generally, a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed, but each taxpayer must bring action on his own behalf. Riha Farms, Inc. v. County of Sarpy, 212 Neb. 385, 322 N.W.2d 797 (1982).

A party having an interest adverse to the interests of those sought to be represented may not sue as representative of a class. Blankenship v. Omaha P. P. Dist., 195 Neb. 170, 237 N.W.2d 86 (1976).

Class action cannot be maintained by persons having interests adverse to those of parties purported to be represented. Evans v. Metropolitan Utilities Dist., 185 Neb. 464, 176 N.W.2d 679 (1970).

Suit by assignee of claims under Fair Labor Standards Act is not a class action within the purview of this section. Archer v. Musick, 147 Neb. 1018, 25 N.W.2d 908 (1947).

3. Miscellaneous

In order to justify class status treatment, there must exist both a question of common or general interest and numerous parties so as to make it impracticable to bring all the parties before the court. Hoiengs v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994).

Where a class action is attempted, considerable discretion is vested with the trial court in determining if a class action is proper, even if the class technically fulfills statutory requirements. Berkshire & Andersen v. Douglas County Board of Equalization, 200 Neb. 113, 262 N.W.2d 449 (1978).

It was not necessary, in special proceedings to confirm validity of reclamation district, to make all landowners parties. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Where a number of persons contribute to the erection of a church edifice, it is not necessary for all persons who contributed to join in an action to restrain a sale or transfer thereof. Avery v. Baker, 27 Neb. 388, 43 N.W. 174 (1889).

25-320 Permissive joinder of defendants.

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Source: R.S.1867, Code § 44, p. 399; R.S.1913, § 7601; C.S.1922, § 8544; C.S.1929, § 20-320; R.S.1943, § 25-320; Laws 1998, LB 234, § 2.

The maker and guarantor of a note are not liable upon the same obligation, so as to be sued together. Ayres v. West, 86 Neb. 297, 125 N.W. 583 (1910); Mowery v. Mast, 9 Neb. 445, 4 N.W. 69 (1880).

Parties who are severally liable upon a written contract may be impleaded in one action thereon. Champlin Bros. v. Sperling, 84 Neb. 633, 121 N.W. 976 (1909).

Any or all of persons severally liable on promissory note may be included in action at option of plaintiff. Palmer v. McFarlane, 73 Neb. 178, 102 N.W. 256 (1905).

Where written guarantee constitutes endorsement also, maker and endorsers may be sued jointly in action on note. Weitz v. Wolfe, 28 Neb. 500, 44 N.W. 485 (1890).

Maker and several endorsers may be sued together in one action. Pearson v. Kansas Mfg. Co., 14 Neb. 211, 15 N.W. 346 (1883).

Joinder of several defendants under state statute, notwithstanding several liability, does not create joint liability so as to preclude removal to federal court by nonresident defendant. Des Moines Elevator & Grain Co. v. Underwriters' Grain Assn., 63 F.2d 103 (8th Cir. 1933).

Statute does not prevent removal to federal court of action on note; statute does not make obligations, which are several, joint. Stewart v. Nebraska Tire & Rubber Co., 39 F.2d 309 (8th Cir. 1930), affirming Stewart v. Heisler, 32 F.2d 519 (N.D. Iowa 1929).

25-321 Unknown defendants; how designated.

When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name, or any name and description, followed by the words, ''real name unknown''. In any such case the person intended shall thereupon be regarded as a defendant in such action or proceeding and as sufficiently identified therein for all purposes, including service of summons or constructive service when authorized and as prescribed in Chapter 25. In any action wherein it is alleged in the complaint or other pleading that there are persons who have or that there are persons who claim or appear to have some interest in, right or title to, or lien upon any real or personal property within this state involved in such action, and that the ownership of, interest in, rights or title to, or lien upon such property of such persons, does not appear of record, in or by their respective names, in the county wherein such property is situated, and that the plaintiff or person in whose behalf such allegations are made, after diligent investigation and inquiry, is unable to ascertain and does not know the names or whereabouts if in this state, or the residence of such persons, such action may proceed against all such persons designated as ''all persons having or claiming any interest in'' such property which shall be accurately and definitely described, followed by the words, ''real names unknown''.

Source: R.S.1867, Code § 148, p. 416; R.S.1913, § 7602; Laws 1915, c. 142, § 1, p. 310; Laws 1917, c. 138, § 1, p. 325; Laws 1921, c. 226, § 1, p. 815; C.S.1922, § 8545; C.S.1929, § 20-321; R.S. 1943, § 25-321; Laws 1983, LB 447, § 17; Laws 2002, LB 876, § 7.

1. Designation of defendants
2. Service
3. Miscellaneous

1. Designation of defendants

In suit to quiet title against all persons having or claiming interest in designated lands, a default decree is conclusive against all persons not in possession or record holders thereof. State ex rel. Conkey v. Ryan, 136 Neb. 334, 285 N.W. 923 (1939).

Legal name of defendant includes his first Christian name, and surname or patronymic; affidavit and published summons must contain these, not initials. Nelson v. Sughrue, 93 Neb. 480, 140 N.W. 800 (1913); Butler v. Smith, 84 Neb. 78, 120 N.W. 1106 (1909); Herbage v. McKee, 82 Neb. 354, 117 N.W. 706 (1908); Stull v. Masilonka, 74 Neb. 309, 104 N.W. 188 (1905), rehearing denied, 74 Neb. 322, 108 N.W. 166 (1906); Gillian v. McDowall, 66 Neb. 814, 92 N.W. 991 (1902); Enewold v. Olsen, 39 Neb. 59, 57 N.W. 765 (1894).

In constructive notice in suit to foreclose mortgage, legal name includes first Christian name and surname. McCabe v. Equitable Land Co., 88 Neb. 453, 129 N.W. 1018 (1911); Butler v. Smith, 84 Neb. 78, 120 N.W. 1106 (1909).

2. Service

Service by publication did not bind parties in actual possession of land. Thomas v. Flynn, 169 Neb. 458, 100 N.W.2d 37 (1959).

Where statute has been followed, service by publication is conclusive against all persons except those in actual possession. Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).

Parties in actual possession of easement were not subject to service under this section. Jurgensen v. Ainscow, 155 Neb. 701, 53 N.W.2d 196 (1952).

Where there is no service, or insufficient service, judgment against the person is void. Henze v. Mitchell, 93 Neb. 278, 140 N.W. 149 (1913).

A court acquires jurisdiction over defendant by personal service of process, even though he be defectively described therein. Wm. Krotter & Co. v. Norton, 84 Neb. 137, 120 N.W. 923 (1909).

Where defendant sued by his initials only files answer, it is waiver of defect in service. Scarborough v. Myrick, 47 Neb. 794, 66 N.W. 867 (1896).

Applies to given name and surname; where either is unknown, there must be actual personal service. Enewold v. Olsen, 39 Neb. 59, 57 N.W. 765 (1894).

3. Miscellaneous

Statement must be made in verification to petition or affidavit that plaintiff could not discover true name. Stratton v. McDermott, 89 Neb. 622, 131 N.W. 949 (1911).

To be ignorant of either the given name or a surname of a person is to be ignorant of a person's name within this section. McNamara v. Gunderson, 89 Neb. 112, 131 N.W. 183 (1911).

25-322 Substitution of parties; death; disability; transfer of interest.

An action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survives or continues. In the case of the death or other disability of a party, the

court may allow the action to continue by or against his or her representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action.

Source: R.S.1867, Code § 45, p. 399; R.S.1913, § 7603; C.S.1922, § 8546; C.S.1929, § 20-322; R.S.1943, § 25-322; Laws 2006, LB 1115, § 13.

1. Survival of cause of action
2. Transfer of interest
3. Miscellaneous

1. Survival of cause of action

Divorce suit does not survive death of party before decree becomes final. Williams v. Williams, 146 Neb. 383, 19 N.W.2d 630 (1945).

Cause of action for widow's allowance does not survive; hence cannot be revived. In re Samson's Estate, 142 Neb. 556, 7 N.W.2d 60 (1942).

Foreclosure action brought by trustees did not abate on death of one trustee. Kennedy v. Potts, 128 Neb. 213, 258 N.W. 471 (1935).

When plaintiff dies from injuries for which he brought suit, administrator is entitled to recover for benefit of estate what plaintiff would have been entitled to if he had survived. Murray v. Omaha Transfer Co., 95 Neb. 175, 145 N.W. 360 (1914), on rehearing, 98 Neb. 482, 153 N.W. 488 (1915).

Where action proceeds to decree after death of plaintiff without substitution of personal representative, decree is not open to collateral attack. Wardrobe v. Leonard, 78 Neb. 531, 111 N.W. 134 (1907).

Where party becomes incapacitated after commencement of action, it is duty of court to protect his interests. Simmons v. Kelsey, 72 Neb. 534, 101 N.W. 1 (1904).

An action on a single contract debt, for which a man's heirs as such are not liable, cannot be continued against such heirs. Buck v. Hogeboom, 63 Neb. 672, 88 N.W. 857 (1902).

Substitution of heir at law for administrator is not equivalent to bringing new action, within meaning of statute of limitations. Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N.W. 949 (1901).

Pending action for personal injury does not abate by death of plaintiff. Webster v. City of Hastings, 59 Neb. 563, 81 N.W. 510 (1900).

Action does not abate by the removal or discharge of an administrator as plaintiff during its pendency. Edney v. Baum, 2 Neb. Unof. 173, 96 N.W. 167 (1901).

2. Transfer of interest

The transfer of interest after an action is commenced does not prevent the action from being continued to final termination in the name of the original plaintiff. Eli's, Inc. v. Lemen, 256 Neb. 515, 591 N.W.2d 543 (1999).

Where there was a transfer of interest, action could be continued in name of original party defendant. Anest v. Chester B. Brown Co., 169 Neb. 330, 99 N.W.2d 615 (1959).

Transfer of interest after action has been commenced does not prevent action from being continued to final termination in name of original party. Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N.W.2d 403 (1946).

Transfer of interest pending appeal is not ground for dismissal of appeal. State ex rel. Sorensen v. Lincoln Hail Ins. Co., 133 Neb. 496, 276 N.W. 169 (1937).

One who purchases choses in action during the pendency of a suit thereon may carry on the suit in the name of the original plaintiff, and may maintain an action in the name of the original plaintiff and obligee in a redelivery bond given to secure the return of property attached in the suit. Commercial Nat. Bank of Kearney v. Faser, 99 Neb. 105, 155 N.W. 601 (1915).

Where suit was properly commenced by mortgagees, it was properly prosecuted to final decree in their names notwithstanding transfer of interest pending litigation. Burns v. Hockett, 91 Neb. 546, 136 N.W. 348 (1912).

Substitution of one party plaintiff for another in a pending action is a continuation of the original rather than the commencement of a new action. State Bank of Gothenburg v. Carroll, 81 Neb. 484, 116 N.W. 276 (1908).

Stay filed before transfer of interest may be availed of by transferee. Jenkins Land & Live Stock Co. v. Attwood, 80 Neb. 806, 115 N.W. 305 (1908).

Substitution of parties does not modify the issues, and evidence taken before such transfer should be considered in the same manner as if there had been no change in parties. Munger v. Yeiser, 80 Neb. 285, 114 N.W. 166 (1907).

Action commenced by receiver may be continued in his name notwithstanding sale of his interest. Schaberg v. McDonald, 60 Neb. 493, 83 N.W. 737 (1900).

Substitution of parties on transfer of interest does not release surety on appeal bond. Howell v. Alma Milling Co., 36 Neb. 80, 54 N.W. 126 (1893).

3. Miscellaneous

When sole plaintiff in foreclosure proceedings dies, no further proceedings can be had until action is revived. Vybiral v. Schildhauer, 144 Neb. 114, 12 N.W.2d 660 (1944).

Permitting assignee to intervene and become, in fact, a party plaintiff was not prejudicial, in view of this section. Rea v. Pierson, 114 Neb. 173, 206 N.W. 760 (1925).

This section applies to the prosecution of a claim against an estate in probate proceedings. Harman v. Harman, 62 Neb. 452, 87 N.W. 177 (1901).

Right of revivor under this section rests in discretion of trial court and is governed by equitable principles. Hayden v. Huff, 62 Neb. 375, 87 N.W. 184 (1901).

This section is not applicable to plaintiff in an action of replevin. Flanders v. Lyon & Healy, 51 Neb. 102, 70 N.W. 524 (1897).

It is proper practice to revive an action to file supplemental pleadings and issue summons. Rakes v. Brown, 34 Neb. 304, 51 N.W. 848 (1892).

25-323 Necessary parties; brought into suit; procedure.

The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights;

but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

Any person whose negligence was or may have been a proximate cause of an accident or occurrence alleged by the plaintiff, other than parties who have been released by the plaintiff and are not subject to suit pursuant to section 25-21,185.11, may be brought into the suit by any party in the manner provided in section 25-331 or 25-705.

Source: R.S.1867, Code § 46, p. 400; R.S.1913, § 7604; C.S.1922, § 8547; C.S.1929, § 20-323; R.S.1943, § 25-323; Laws 1995, LB 411, § 1; Laws 2002, LB 876, § 8.

1. Necessary parties
2. Unnecessary parties
3. Miscellaneous

1. Necessary parties

The presumed father of a child conceived and born during the marriage to the child's mother is an indispensable party to a suit initiated by the putative biological father to establish his paternity and obtain custody of the child. Helter v. Williamson, 239 Neb. 741, 478 N.W.2d 6 (1991).

The Code of Civil Procedure declares if a determination of the controversy cannot be had without the presence of the parties, the court must order them to be brought into the litigation. Koch v. Koch, 226 Neb. 305, 411 N.W.2d 319 (1987).

Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a formal decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Johnson v. Mays, 216 Neb. 890, 346 N.W.2d 401 (1984).

In an action involving the disbursement of county funds, the county has a great, if not exclusive, interest, and is a necessary party to the action. Shepoka v. Knopik, 197 Neb. 651, 250 N.W.2d 619 (1977).

Lienholders were necessary parties but their claims having been paid subsequently, the refusal to order them added was error without prejudice. LaPuzza v. Prom Town House Motor Inn, Inc., 191 Neb. 687, 217 N.W.2d 472 (1974).

Where validity of tax levy for nonresident high school tuition is attacked, all receiving high school districts are necessary parties. Werth v. Buffalo County Board of Equalization, 187 Neb. 119, 188 N.W.2d 442 (1971).

When determination of a controversy cannot be had without the presence of new parties to the suit, the court should order them brought in. Whitaker v. Gering Irr. Dist., 183 Neb. 290, 160 N.W.2d 186 (1968).

In case to determine title of United States to public land, where United States is not a party to the action, no judgment or decree which could be entered could be binding in any manner on United States. Summerville v. Scotts Bluff County, 182 Neb. 311, 154 N.W.2d 517 (1967).

Where a determination of a controversy cannot be had without the presence of a new party, the court may order the new party brought into the suit. Midwest Laundry Equipment Corp. v. Berg, 174 Neb. 747, 119 N.W.2d 509 (1963).

Beneficiaries of trust could be ordered by the court to be brought into the case as parties. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

State was proper party to suit to reform deed. Rumbel v. Ress, 167 Neb. 359, 92 N.W.2d 904 (1958).

Court should bring in new parties when controversy cannot be determined without their presence. Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N.W.2d 630 (1956).

In declaratory judgment proceeding, court should order all necessary parties brought in or refuse to enter judgment. Redick v. Peony Park, 151 Neb. 442, 37 N.W.2d 801 (1949).

The court is only required to order new parties brought in when a determination of the controversy cannot be had without their presence. Dent v. City of North Platte, 148 Neb. 718, 28 N.W.2d 562 (1947).

When the determination of a controversy cannot be had without the presence of new parties to the suit, the court should order them brought in. Cunningham v. Brewer, 144 Neb. 218, 16 N.W.2d 533 (1944).

Court, on own motion, is authorized to make a necessary party defendant in equity suit. Toop v. Palmer, 108 Neb. 850, 189 N.W. 394 (1922).

Court must order necessary new parties brought in. Phoenix Mutual Life Ins. Co. v. City of Lincoln, 87 Neb. 626, 127 N.W. 1069 (1910).

Section does not prevent court ordering in necessary parties at any time. Brown v. Brown, 71 Neb. 200, 98 N.W. 718 (1904).

Supreme Court may remand equity case to have necessary parties brought in. Smith v. Shaffer, 29 Neb. 656, 45 N.W. 936 (1890).

Court will not decide rights of absent parties. Koenig v. Chicago, B. & Q. R. Co., 27 Neb. 699, 43 N.W. 423 (1889).

2. Unnecessary parties

The stepfather of a child born out of wedlock is not an indispensable party in a filiation proceeding against the putative biological father for support. State on behalf of J.R. v. Mendoza, 240 Neb. 149, 481 N.W.2d 165 (1992).

Department of Environmental Control and county zoning officials are not indispensable parties in a suit against a licensee for a solid waste disposal area where the suit is to enjoin against alleged violation of a county zoning ordinance. Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc., 208 Neb. 110, 302 N.W.2d 379 (1981).

Court may determine rights between parties before it when it can be done without prejudice to rights of others or by saving their rights. Bailey v. McCoy, 187 Neb. 618, 193 N.W.2d 270 (1971).

Lessee was not necessary party to complete determination of quo warranto suit between state and lessor. State ex rel. Johnson v. Conservative Savings & Loan Assn., 143 Neb. 805, 11 N.W.2d 89 (1943).

Controversy could be determined without joinder of party who had sold interest in contract of purchase. Pollard v. Larson, 115 Neb. 136, 211 N.W. 998 (1927).

In action for personal injuries, one who may be liable to defendant as indemnitor need not be made additional defendant. Kaplan v. City of Omaha, 100 Neb. 567, 160 N.W. 960 (1916).

3. Miscellaneous

Fact that someone other than defendant operator owned property involved does not necessarily make the owner an indispensable party in action to abate nuisance. City of Omaha v. Danner, 186 Neb. 701, 185 N.W.2d 869 (1971).

In mortgage foreclosure proceeding, court may determine controversy between parties as to ownership of land covered by the mortgage. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N.W.2d 545 (1943).

Cited in action in nature of creditor's bill to set aside certain conveyances. Robinson v. Williams, 136 Neb. 253, 285 N.W. 574 (1939).

Purchaser of choses in action during pendency of suit may proceed in name of original plaintiff. Commercial Nat. Bank of Kearney v. Faser, 99 Neb. 105, 155 N.W. 601 (1915).

Failure to dismiss for misjoinder of plaintiffs in equity is not prejudicial; court may decide rights between parties severally. Hamilton v. Allen, 86 Neb. 401, 125 N.W. 610 (1910).

Plaintiff cannot complain because court did not order in party who might intervene. Gamble v. Wilson, 33 Neb. 270, 50 N.W. 3 (1891).

Claim for damages for breach of warranty can be determined in replevin action. Smith v. Kinney, 32 Neb. 162, 49 N.W. 341 (1891).

25-324 Actions for recovery of real or personal property; interest in property; intervention.

When, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done.

Source: R.S.1867, Code § 47, p. 400; R.S.1913, § 7605; C.S.1922, § 8548; C.S.1929, § 20-324.

A bidder at judicial sale, whose bid has been accepted, may appeal from an order setting the sale aside. Dawson County v. Whaley, 134 Neb. 509, 279 N.W. 164 (1938).

Mere fact that party claims to be owner of attached property does not give him right to intervene in the attachment and thus have question of his ownership determined in attachment suit. Geis v. Geis, 125 Neb. 394, 250 N.W. 252 (1933).

A mere contingent liability to answer to defendant is not sufficient ground for intervention. Omaha Southern Ry. Co. v. Beeson, 36 Neb. 361, 54 N.W. 557 (1893).

Must claim some interest in subject of action; title to land attached, in action against maker of note, is insufficient. Kimbro v. Clark, 17 Neb. 403, 22 N.W. 788 (1885).

25-325 Interpleader by order of court upon affidavit of defendant.

Upon the affidavit of a defendant, before answer in an action upon contract or for the recovery of personal property, that some third party, without collusion with the defendant, has or makes a claim to the subject of the action, and that the defendant is ready to pay or dispose of the same as the court may direct, the court may make an order for the safekeeping, or for the payment, or deposit in court, or delivery of the subject of the action, to such person as it may direct, and an order requiring such third party to appear in a reasonable time and maintain or relinquish his or her claim against the defendant. If such third party, being served with a copy of the order by the sheriff or such other person as the court may direct, fails to appear, the court may declare such third party barred of all claim in respect to the subject of the action against the defendant therein. If such third party appears, he or she shall be allowed to make himself or herself the defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon compliance by the defendant with the order of the court for the payment, deposit, or delivery thereof.

Source: R.S.1867, Code § 48, p. 400; R.S.1913, § 7606; C.S.1922, § 8549; C.S.1929, § 20-325; R.S.1943, § 25-325; Laws 2006, LB 1115, § 14.

1. Payment into court
2. Interpleader
3. Miscellaneous

1. Payment into court

Stakeholder should pay or offer to pay fund into court so that disposition thereof may be made effective. Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N.W.2d 630 (1956).

Where one owing debt claimed by several persons files application in district court making respective claimants parties, brings money into court, and prays for determination of ownership, proceeding is interpleader under statute. Citizens Nat.

Bank of Wisner v. McNamara, 120 Neb. 252, 231 N.W. 781 (1930).

This section protects depository or escrow holder, who interpleads in good faith, from vexation and expense of litigation. Farming Corp. v. Bridgeport Bank, 113 Neb. 323, 202 N.W. 911 (1925).

Where not otherwise ordered, failure to bring money into court subjects defendant to interest. Elkhorn Valley Lodge No. 57, I.O.O.F. v. Hudson, 59 Neb. 672, 81 N.W. 859 (1900).

2. Interpleader

A defendant may interplead in a declaratory judgment proceeding. United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961).

One who precipitated litigation cannot maintain interpleader. Strasser v. Commercial Nat. Bank, 157 Neb. 570, 60 N.W.2d 672 (1953).

A bill of interpleader is an equitable remedy whereby a disinterested stockholder in possession of a fund or other property claimed by each of rival claimants may require them to litigate the issue of ownership without embroiling him. Provident Savings & Loan Assn. v. Booth, 138 Neb. 424. 293 N.W. 293 (1940).

Remedy provided by this section is a substitute for the equity remedy, although somewhat broader. Hartford Life & Annuity Ins. Co. v. Cummings, 50 Neb. 236, 69 N.W. 782 (1897).

Bailee may not interplead bailor and third party. Schellenberg v. Fremont, E. & M. V. R. Co., 45 Neb. 487, 63 N.W. 859 (1895).

3. Miscellaneous

In an interpleader suit between two assignees of claim against county, party who first filed notice with county was entitled to fund. Greeley County v. First Nat. Bank of Cozad, 126 Neb. 872, 254 N.W. 502 (1934).

Purchaser may protect himself from double payment by interpleading real owner and vendor. Jaques v. Dawes, 3 Neb. Unof. 752, 92 N.W. 570 (1902).

25-326 Interpleader; when sheriff or other officer defendant.

The provisions of section 25-325 shall be applicable to an action brought against a sheriff, or other officer, for the recovery of personal property taken by him or her under execution or for the proceeds of such property so taken and sold by him or her. The defendant in such action shall be entitled to the benefit of those provisions against the party in whose favor the execution issued, upon exhibiting to the court the process under which the defendant acted, with his or her affidavit that the property or its proceeds was taken under such process.

Source: R.S.1867, Code § 49, p. 400; R.S.1913, § 7607; C.S.1922, § 8550; C.S.1929, § 20-326; R.S.1943, § 25-326; Laws 2006, LB 1115, § 15.

25-327 Substitution; plaintiff in execution for sheriff or other officer.

In an action against a sheriff or other officer for the recovery of property taken under an execution, and replevied by the plaintiff in such action, the court may, upon application of the defendant and of the party in whose favor the execution issued, permit the latter to be substituted as the defendant, security for the costs being given.

Source: R.S.1867, Code § 50, p. 400; R.S.1913, § 7608; C.S.1922, § 8551; C.S.1929, § 20-327.

When garnishee answers that he has money belonging to judgment debtor, one may intervene who claims money and who is not a party to proceedings, and contest right of plaintiff. Farrington v. Fleming Comm. Co., 94 Neb. 108, 142 N.W. 297 (1913).

Court cannot order substitution after final judgment. Hicklin v. Nebraska City National Bank, 8 Neb. 463, 1 N.W. 135 (1879).

25-328 Intervention; right; procedure.

Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

Source: Laws 1887, c. 100, § 2, p. 655; R.S.1913, § 7609; C.S.1922, § 8552; C.S.1929, § 20-328; R.S.1943, § 25-328; Laws 2002, LB 876, § 9.

1. Right of intervention
2. Procedure

1. Right of intervention

A direct and legal interest is an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. Douglas Cty. Sch. Dist. 0001 v. Johanns, 269 Neb. 664, 694 N.W.2d 668 (2005).

As a prerequisite to intervention under this section, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action. A noncustodial parent whose parental rights have not been terminated and who has been involved in his or her minor child's life has a direct and legal interest in such minor child's name-change proceeding. In re Change of Name of Davenport, 263 Neb. 614, 641 N.W.2d 379 (2002).

A foster parent does not have an interest in the placement of an adjudicated child sufficient to warrant intervention in juvenile proceedings as a matter of right, but is entitled to notice and an opportunity to participate in all court reviews pertaining to a child in foster care placement. In re Interest of Destiny S., 263 Neb. 255, 639 N.W.2d 400 (2002).

This section requires only that an intervenor have a direct and legal interest in the matter in litigation, and no exception is made for a party already adequately represented. Ruzicka v. Ruzicka, 262 Neb. 824, 635 N.W.2d 528 (2001).

Mere possibility of benefit upon liquidation of a charity held not sufficient interest to support intervention as a matter of right. Colman v. Colman Foundation, Inc., 199 Neb. 263, 258 N.W.2d 128 (1977).

No third party has right to intervene in a criminal case and appeal of news media from restrictive order is dismissed. State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975).

Anyone having an interest in the result of pending litigation may intervene as a matter of right. Geer-Melkus Constr. Co., Inc. v. Hall County Museum Board, 186 Neb. 615, 185 N.W.2d 671 (1971).

Uninsured motorist's insurance carrier generally has right to intervene in litigation between insured and uninsured tortfeasor. Heisner v. Jones, 184 Neb. 602, 169 N.W.2d 606 (1969).

A party having an interest in a suit to establish a trust may intervene before trial begins. Workman v. Workman, 174 Neb. 471, 118 N.W.2d 764 (1962).

To be filed as a matter of right, a petition in intervention must be filed before trial. Kirchner v. Gast, 169 Neb. 404, 100 N.W.2d 65 (1959).

Taxpayers are not qualified to intervene in matters of public interest prosecuted or defended in good faith for a governmental subdivision by its proper officials. Noble v. City of Lincoln, 158 Neb. 457, 63 N.W.2d 475 (1954).

Landowners damaged by construction of ditch had right to intervene. Lackaff v. Bogue, 158 Neb. 174, 62 N.W.2d 889 (1954).

One having an interest in the result of pending litigation may intervene as a matter of right. Gilbert v. First Nat. Bank of Minatare, 154 Neb. 404, 48 N.W.2d 401 (1951).

Ordinarily there is no right of intervention by third parties in an action for divorce. Harris v. Harris, 151 Neb. 191, 36 N.W.2d 849 (1949).

To authorize intervention, interest in litigation must be direct and immediate. Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N.W.2d 150 (1948).

A senior appropriator of water has an absolute right to intervene to protect his interest in injunction suit by junior appropriator against officials charged with administration of irrigation laws. Platte Valley Irr. Dist. v. Tilley, 142 Neb. 122, 5 N.W.2d 252 (1942).

One having an interest in the result of pending litigation may intervene as a matter of right. Allen v. City of Omaha, 136 Neb. 620, 286 N.W. 916 (1939).

Creditors have a right to intervene in suit to recover stockholder's liability. Hoffman v. Geiger, 134 Neb. 643, 279 N.W. 350 (1938).

Party seeking to intervene must have such a direct and immediate interest in matter in litigation that he will either lose or gain by direct operation and legal effect of the judgment which may be rendered in the action. Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N.W. 482 (1936).

To authorize party to intervene, he must have an interest of such a direct and immediate character that he will either gain or lose by the direct legal operation of and effect of the judgment. City of Omaha v. Douglas County, 125 Neb. 640, 251 N.W. 262 (1933).

Mere fact that party claims to be owner of attached property does not give him right to intervene in the attachment and thus have question of his ownership determined in attachment suit. Geis v. Geis, 125 Neb. 394, 250 N.W. 252 (1933).

Taxpayer's suit to have deposit of school district declared preferred claim, where classified by bank receiver as general claim only, and where district officers neglect or refuse to prosecute claim further, was proper hereunder. State ex rel. Sorensen v. American Bank of Mitchell, 121 Neb. 862, 238 N.W. 753 (1931).

State may intervene to resist demands of those claiming estate of decedent. In re O'Connor's Estate, 117 Neb. 636, 222 N.W. 57 (1928).

Section should be liberally construed; but where intervener's pleading failed to show any interest in controversy, he has no standing; mere assertion is not sufficient. Parker v. City of Grand Island, 115 Neb. 892, 215 N.W. 127 (1927).

Where interested person is not made party, ordinarily he may intervene as matter of right. Webb v. Patterson, 114 Neb. 346, 207 N.W. 522 (1926).

Intervention under this section is matter of right, but equity courts may also allow intervention after trial has begun. Engdahl v. Laverty, 110 Neb. 672, 194 N.W. 862 (1923).

Any person claiming interest may intervene, as matter of right, in probate proceedings. In re Estate of Keller, 101 Neb. 115, 162 N.W. 511 (1917).

Parties not owners of real estate in proposed drainage district are not entitled to intervene in proceedings. Latham v. Chicago, B. & Q. R. Co., 100 Neb. 173, 158 N.W. 923 (1916).

All interested in estate are parties to probate proceedings whether named or not. In re Estate of Sweeney, 94 Neb. 834, 144 N.W. 902 (1913).

Mortgagor who conveyed by warranty deed may intervene to plead usury in action to foreclose. Pitman v. Ireland, 64 Neb. 675, 90 N.W. 540 (1902).

The shareholders may intervene in pending suits for the purpose of protecting their own interests, where the officers of a corporation fail and refuse to protect and conserve the corporate property. State ex rel. Bugbee v. Holmes, 60 Neb. 39, 82 N.W. 109 (1900).

Creditor may not ordinarily intervene in action by receivers against stockholders of bank. Brown v. Brink, 57 Neb. 606, 78 N.W. 280 (1899).

Receiver of corporation may intervene to defend action. Andrews v. Steele City Bank, 57 Neb. 173, 77 N.W. 342 (1898).

Subsequent attaching creditor may intervene to have priority of levies decided. Deere, Wells & Co. v. Eagle Mfg. Co., 49 Neb. 385, 68 N.W. 504 (1896).

A mere contingent liability to answer over to the defendant, without any privity with the plaintiff, is not sufficient interest in

the controversy to entitle a third person to intervene. Omaha Southern Ry. Co. v. Beeson, 36 Neb. 361, 54 N.W. 557 (1893).

Assignee chosen by creditors should intervene where assigned property is attached. Commercial Nat. Bank v. Nebraska State Bank, 33 Neb. 292, 50 N.W. 157 (1891).

Assignee of note may intervene in replevin of goods by mortgagee. Harman v. Barhydt, 20 Neb. 625, 31 N.W. 488 (1886).

The interest required as a prerequisite to intervention under this section is a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. In re Interest of Jamie P., 12 Neb. App. 261, 670 N.W.2d 814 (2003).

Although a party may not intervene after judgment as a matter of right, a court of equity may allow intervention after judgment. However, intervention should not be allowed after judgment where the party seeking to intervene had an opportunity to intervene at an earlier time, yet delayed in doing so. Association of Commonwealth Claimants v. Hake, 2 Neb. App. 123, 507 N.W.2d 665 (1993).

2. Procedure

A party cannot appeal from an order or judgment which was made with his consent, directly or through his counsel, or upon that party's application. Reindertson v. Long, 198 Neb. 397, 253 N.W.2d 40 (1977).

Right to intervene may be exercised at any time before trial commences. Pribil v. French, 179 Neb. 602, 139 N.W.2d 356 (1966).

A petition in intervention may be filed as a matter of right before trial. Lincoln Bonding & Ins. Co. v. Barrett, 179 Neb. 367, 138 N.W.2d 462 (1965).

Existence of statutory right of intervention before trial does not prevent a court of equity from allowing intervention after judgment. State ex rel. City of Grand Island v. Tillman, 174 Neb. 23, 115 N.W.2d 796 (1962).

Striking of petition of intervention of landlord in suit by tenant against elevator company was erroneous. Anest v. Chester B. Brown Co., 169 Neb. 330, 99 N.W.2d 615 (1959).

Petition in intervention must state such facts as, if conceded to be true, will entitle applicant to some relief. Ash v. City of Omaha, 152 Neb. 393, 41 N.W.2d 386 (1950).

The right of a party to intervene in an action is absolute, provided he exhibits a pleading containing allegations which demonstrate a right in the subject matter being litigated. Wightman v. City of Wayne, 146 Neb. 944, 22 N.W.2d 294 (1946).

Party may intervene in tax foreclosure proceedings and make increased bid before confirmation of judicial sale. County of Nance v. Thomas, 146 Neb. 640, 20 N.W.2d 925 (1945).

An intervener who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N.W.2d 683 (1945).

Trial court may, in its discretion, permit intervention after commencement of trial. Conkey v. Knudsen, 143 Neb. 5, 8 N.W.2d 538 (1943).

An intervener must take the suit as he finds it, is bound by previous proceedings in the case, and cannot complain of the form of the action or of informalities or defects in the proceedings between the original parties. Drainage Dist. No. 1 of Lincoln County v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N.W. 582 (1941).

The courts recognize two methods by which intervention may be accomplished; one statutory, the other as a matter of equitable discretion where necessary to administer complete relief between all parties. Department of Banking v. Stenger, 132 Neb. 576, 272 N.W. 403 (1937).

Court of equity may, in exercise of its discretion and furtherance of justice, allow intervention after judgment to protect inherent rights in the foreclosure of real estate mortgage. Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co., 126 Neb. 744, 254 N.W. 507 (1934).

Leave to intervene should be denied where proposed intervener has no interest in subject matter different from any other taxpayer and where there is no charge that State Treasurer is not defending action in good faith. State ex rel. Randall v. Hall, 125 Neb. 236, 249 N.W. 756 (1933).

To intervene as matter of right under this section, petition must be filed before trial. State v. Farmers State Bank of Decatur, 103 Neb. 194, 170 N.W. 901 (1919).

Petition of intervener, who has become party to action, cannot be dismissed until determination on merits. Montgomery v. Dresher, 97 Neb. 112, 149 N.W. 314 (1914).

Party may intervene after void judgment is entered; time for appeal dates from dismissal of petition of intervention. Shold v. Van Treeck, 82 Neb. 99, 117 N.W. 113 (1908).

Intervener's right must be affected by direct legal operation of judgment; he may not contest grounds of attachment. Danker v. Jacobs, 79 Neb. 435, 112 N.W. 579 (1907).

Section does not prevent court ordering in necessary parties. Brown v. Brown, 71 Neb. 200, 98 N.W. 718 (1904).

Party may intervene in election contest before dismissal. Moore v. Waddington, 69 Neb. 615, 96 N.W. 279 (1903).

Attorney may intervene in proceedings to revive judgment and enforce lien; petition is notice of lien. Greek v. McDaniel, 68 Neb. 569, 94 N.W. 518 (1903).

May become party to suit without leave of court. Spalding v. Murphy, 63 Neb. 401, 88 N.W. 489 (1901).

Person claiming title to subject matter may intervene any time before trial. McConniff v. Van Dusen, 57 Neb. 49, 77 N.W. 348 (1898).

Objection to intervention of stranger may be waived. Chadron Banking Co. v. Mahoney, 43 Neb. 214, 61 N.W. 594 (1895).

Where application to intervene is not filed before trial, proposed interveners are not entitled thereto as matter of right. Draver v. Greenshields & Everest Co., 29 F.2d 552 (8th Cir. 1928).

Bankruptcy trustee is entitled to sue in federal court to set aside foreclosure on ground of fraud, where adjudication in bankruptcy came too late to permit intervention in foreclosure suit. Stefan v. Raabe, 1 F.2d 129 (8th Cir. 1924).

25-329 Intervention; judgment; costs.

The court shall determine upon the intervention at the same time that the action is decided, and if the claim of the intervenor is not sustained, the intervenor shall pay all costs of the intervention.

Source: Laws 1887, c. 100, § 2, p. 655; R.S.1913, § 7610; C.S.1922, § 8553; C.S.1929, § 20-329; R.S.1943, § 25-329; Laws 2006, LB 1115, § 16.

District court may rule on sufficiency of petition of intervention before trial. Kirchner v. Gast, 169 Neb. 404, 100 N.W.2d 65 (1959).

Costs are taxed to interveners and relators where they are unsuccessful in a mandamus case. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N.W.2d 683 (1945).

Determination whether intervener has an actual interest in the subject of the controversy is a necessary preliminary question for the trial court's decision and is determinable when the action is finally decided. Drainage Dist. No. 1 of Lincoln County v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N.W. 582 (1941).

Intervention was unknown at common law and is creature of statute. Geis v. Geis, 125 Neb. 394, 250 N.W. 252 (1933).

Section should be liberally construed, but intervener must plead and prove actual interest or be regarded as mere interloper. Parker v. City of Grand Island, 115 Neb. 892, 215 N.W. 127 (1927).

A person may intervene as matter of right before trial. In re Estate of Keller, 101 Neb. 115, 162 N.W. 511 (1917).

Petition of intervener cannot be dismissed until determination on merits. Montgomery v. Dresher, 97 Neb. 112, 149 N.W. 314 (1914).

Petition may be dismissed without prejudice. Lincoln Upholstering Co. v. Baker, 82 Neb. 592, 118 N.W. 321 (1908).

25-330 Intervention; complaint; other pleadings.

The intervention shall be by complaint, which shall set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same rules as other pleadings provided for in Chapter 25. If such complaint is filed during term, the court shall direct the time in which answers thereto shall be filed.

Source: Laws 1887, c. 100, § 4, p. 656; R.S.1913, § 7611; C.S.1922, § 8554; C.S.1929, § 20-330; R.S.1943, § 25-330; Laws 2002, LB 876, § 10.

One of the purposes of requiring a petition by a third party to a litigation to intervene is that the petition will frame the issues and interests regarding the intervening party. In re Interest of Kiana T., 262 Neb. 60, 628 N.W.2d 242 (2001).

An intervener must plead some interest in the subject matter of the litigation; a mere denial of plaintiff's right is not sufficient to give him standing in court. Drainage Dist. No. 1 of Lincoln County v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N.W. 582 (1941).

Statute should be liberally construed but must be substantially followed and applicant must bring himself within its provisions. Geis v. Geis, 125 Neb. 394, 250 N.W. 252 (1933).

Section should be liberally construed, but intervener must plead and prove actual interest or be regarded as mere interloper. Parker v. City of Grand Island, 115 Neb. 892, 215 N.W. 127 (1927).

May intervene as matter of right before trial. In re Estate of Keller, 101 Neb. 115, 162 N.W. 511 (1917).

An intervener whose petition does not state facts sufficient to constitute a cause of action, and who does not pray for any judgment which the court has jurisdiction to render, should be dismissed from the action. Iodence v. Peters, 64 Neb. 425, 89 N.W. 1041 (1902).

Where filed without leave, court may decide question of intervention with main issue. State ex rel. Bugbee v. Holmes, 59 Neb. 503, 81 N.W. 512 (1900).

25-331 Third-party action; procedure.

(1) At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than ten days after filing the original answer. Otherwise the third-party plaintiff must obtain leave of the trial court on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall have all the rights of a defendant including the rights authorized by this section. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant shall have all the rights of a defendant including the rights authorized by this section. The court on its own motion, or motion of any party, may move to strike the third-party claim, or for its severance or separate trial if

the third-party claim should delay trial, might tend to confuse a jury, or in any way jeopardize the rights of the plaintiff. A third-party defendant or subsequent defendants may proceed under this section.

(2) When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

Source: Laws 1967, c. 144, § 1, p. 441; Laws 2002, LB 876, § 11.

A motion to sever a third-party claim is addressed to the discretion of the trial court, and an order granting or denying such motion is reviewed by an appellate court for an abuse of discretion. Hradecky v. State, 264 Neb. 771, 652 N.W.2d 277 (2002).

This section requires leave of the trial court before filing a third-party complaint, and whether to grant such leave is entrusted to the discretion of the trial court. A third-party claim under this section may be asserted when a third-party's liability is in some way dependent upon the outcome of the main claim or when the third party is secondarily liable to the defendant. Denial of leave to join a third-party defendant is not a final, appealable order because it does not determine the action and prevent a judgment. The term ''defendant'' in section 25-21,185.10 includes a third-party defendant brought into an action pursuant to this section. Slaymaker v. Breyer, 258 Neb. 942, 607 N.W.2d 506 (2000).

A third-party claim under this section may be asserted when a third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant. Dammann v. Litty, 234 Neb. 664, 452 N.W.2d 522 (1990).

The granting of leave to file a third-party complaint under this section is within the discretion of the trial court. Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5, 231 Neb. 744, 438 N.W.2d 124 (1989).

A third-party action should be dismissed if the evidence adduced at trial establishes that the third party could not be liable to the defendant for all or part of the plaintiff's claim against him. Life Investors Ins. Co. v. Citizens Nat. Bank of Wisner, 223 Neb. 663, 392 N.W.2d 771 (1986).

At any time after the commencement of the action, a defendant, as a third-party plaintiff, may cause a summons to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. A third-party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant. AgriStor Credit Corp. v. Radtke, 218 Neb. 386, 356 N.W.2d 856 (1984).

A third-party claim may be asserted under this section when a third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant. Church of the Holy Spirit v. Bevco, Inc., 215 Neb. 299, 338 N.W.2d 601 (1983).

The granting of leave to file a third party complaint is a matter entirely within the discretion of the trial court. Northwestern Bell Tel. Co. v. Woodmen of the World Life Ins. Soc., 189 Neb. 30, 199 N.W.2d 729 (1972).

ARTICLE 4

COMMENCEMENT OF ACTIONS; VENUE

(a) GENERAL PROVISIONS

Section

(b) MODEL UNIFORM CHOICE OF FORUM ACT

Section
25-414. Choice of forum; jurisdiction; conditions.
25-415. Choice of forum in another state; action pending in this state; procedure.
25-416. Sections, how construed.
25-417. Act, how cited.

(a) GENERAL PROVISIONS

25-401 Local actions involving real estate.

All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate or some part thereof is situated, but such actions may be brought against corporations owning or operating any line of railroad in the state in any county where service of summons can be had, and all actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in section 25-402: (1) For the recovery of real property or of an estate or interest therein; (2) for the partition of real property; and (3) for the sale of real property under a mortgage lien or other encumbrance or charge.

Source: R.S.1867, Code § 51, p. 401; Laws 1889, c. 29, § 1, p. 376; Laws 1911, c. 167, § 1, p. 543; R.S.1913, § 7612; C.S.1922, § 8555; C.S.1929, § 20-401.

Cross References

For provisions on designation of defendants, see section 25-312.

1. Trespass
2. Foreclosure
3. Damages
4. General

1. Trespass

Jurisdiction of action to enjoin trespass on land is vested in district court for county in which land is situated. Fenster v. Isley, 143 Neb. 888, 11 N.W.2d 822 (1943).

Action for damages for trespass upon real estate can be brought alone in county where lands are located. Jacobson v. Lynn, 54 Neb. 794, 75 N.W. 243 (1898).

2. Foreclosure

Action to foreclose a real estate mortgage must be brought in county where land lies. Boehmer v. Heimen, 138 Neb. 376, 293 N.W. 237 (1940).

In foreclosure of real estate mortgage, a court having jurisdiction over subject matter, under its broad equity powers, may determine the rights of all persons claiming any interest therein, when properly before it. Department of Banking v. Stenger, 132 Neb. 576, 272 N.W. 403 (1939).

Action to foreclose real estate mortgage may be brought only in district court sitting in county where mortgaged realty, or some part thereof, is situated. Prudential Ins. Co. v. Bliss, 123 Neb. 578, 243 N.W. 842 (1932).

Action to establish equitable mortgage on real estate is properly brought in county where land is located. Miles v. Martin, 103 Neb. 261, 171 N.W. 907 (1919).

Action to foreclose mortgage can only be brought in county where land is situated. Eayrs v. Nason, 54 Neb. 143, 74 N.W. 408 (1898).

3. Damages

Drainage district may be sued to recover damages for injury to real estate in county where real estate or some part thereof is situated. Cooper v. Sanitary Dist. No. 1 of Lancaster County, 146 Neb. 412, 19 N.W.2d 619 (1945).

Action for damages for injury to realty may be brought only in county where realty is situated. Triplett v. Western Public Service Co., 128 Neb. 835, 260 N.W. 387 (1935).

Action for damage to land by drainage ditch must be brought in county where land is located. Dryden v. Peru Bottom Drain. Dist., 99 Neb. 837, 158 N.W. 54 (1916).

Action for injury to land from overflow by negligent construction of bridge is transitory. Omaha & R. V. Ry. Co. v. Brown, 29 Neb. 492, 46 N.W. 39 (1890).

4. General

The district court for the county wherein real estate is situated is not without jurisdiction to hear and determine actions to quiet title to, or partition same. Page v. Buchfinck, 196 Neb. 135, 242 N.W.2d 610 (1976).

District court has jurisdiction to entertain action to quiet title even though construction of will is required. Hahn v. Verret, 143 Neb. 820, 11 N.W.2d 551 (1943).

Venue of action to establish that title to land held by plaintiff is held by him in trust, and that the terms of the trust require a sale thereof before an accounting can be had, is the county in which the land lies. Stuckey v. Stuckey, 143 Neb. 610, 10 N.W.2d 458 (1943).

Mandamus action is properly brought to compel an irrigation district to build a bridge across one of its canals in county where land is, even though irrigation district is situated and has its principal office or place of business in another county. State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 140 Neb. 471, 300 N.W. 379 (1941).

Where one of two courts having concurrent jurisdiction takes cognizance of a case and thereafter loses jurisdiction over the res, the other is no longer deprived of its right to assume jurisdiction over it. Lincoln Joint Stock Land Bank v. Fuller, 132 Neb. 677, 273 N.W. 14 (1937).

Accounting suit was properly brought even though it involved real estate situated in another county. Lincoln Safe Deposit Co. v. Yeast, 117 Neb. 344, 220 N.W. 573 (1928).

Action to contest city bond election and enjoin bonds must be brought in county where election is held. Russell v. City of Indianola, 105 Neb. 207, 179 N.W. 927 (1920).

Action to quiet title must be brought in county where land lies. Rakow v. Tate, 93 Neb. 198, 140 N.W. 162 (1913).

Interest includes any right, title or estate in, or lien on land. Johnson v. Samuelson, 82 Neb. 201, 117 N.W. 470 (1908).

Action by wife to appropriate land of nonresident husband for alimony may be brought where land is. Rhoades v. Rhoades, 78 Neb. 495, 111 N.W. 122 (1907).

Action of ejectment may be brought against nonresident and service obtained by publication. Lantry v. Parker, 37 Neb. 353, 55 N.W. 962 (1893).

If action affects title or possession of real estate, action should be brought in county where land lies. Pacific Ry. Co. v. Perkins, 36 Neb. 456, 54 N.W. 845 (1893).

Service by publication may be had in actions brought under this section where any or all of the defendants reside out of the state. Brown v. Rice, 30 Neb. 236, 46 N.W. 489 (1890).

This section does not prevent action being brought against railroad in county where it has property or credits, under other provisions of this article. Atchison, T. & S. F. Ry. Co. v. Drayton, 292 F. 15 (8th Cir. 1923).

25-402 Local actions involving real estate located in more than one county.

If the real property, the subject of the action, be an entire tract, and situated in two or more counties, or if it consists of separate tracts situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover the possession thereof. And if the property be an entire tract, situated in two or more counties, an action to recover the possession thereof may be brought in either of such counties; but if it consists of separate tracts in different counties, the possession of such tracts must be recovered by separate actions brought in the counties where they are situated.

Source: R.S.1867, Code § 52, p. 401; R.S.1913, § 7613; C.S.1922, § 8556; C.S.1929, § 20-402.

Cross References

For provisions on designation of defendants, see section 25-312.

The district court for the county wherein real estate is situated is not without jurisdiction to hear and determine actions to quiet title to, or partition same. Page v. Buchfinck, 196 Neb. 135, 242 N.W.2d 610 (1976).

Where none of the defendants have or claim any interest adverse to plaintiff in the property situated in the county in which the action is brought, the court has no jurisdiction over land of such defendants in another county. Lippincott v. Wolski, 147 Neb. 930, 25 N.W.2d 747 (1947).

An action to foreclose a mortgage on the entire tract may be brought in any county in which any part thereof is situated. State Bank of Nebraska v. Green & Redick, 11 Neb. 303, 9 N.W. 36 (1881).

Section is discussed. Atchison, T. & S. F. Ry. Co. v. Drayton, 292 F. 15 (8th Cir. 1923).

25-403 Action for specific performance of land contract.

An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants or any of them reside; but if all the defendants are nonresidents of the state, it may be brought in the county where the real estate or some part thereof is situated.

Source: R.S.1867, Code § 53, p. 401; R.S.1913, § 7614; C.S.1922, § 8557; C.S.1929, § 20-403.

Cross References

For provisions on designation of defendants, see section 25-312.

Action for specific performance was properly brought where defendants resided. Smith v. Hornkohl, 166 Neb. 702, 90 N.W.2d 347 (1958).

The word ''may'' in this statute does not mean ''must,'' and suit for specific performance may be brought in any county where parties are properly before the court. Department of Banking v. Stenger, 132 Neb. 576, 272 N.W. 403 (1937).

Specific performance is transitory; may be brought in any county where necessary parties properly before court. Pollard v. Larson, 115 Neb. 136, 211 N.W. 998 (1927).

Action to cancel contract for purchase of corporate stock is transitory; although part of relief asked relates to mortgages, action need not be brought in county where mortgaged land is located. Scow v. Bankers Fire Ins. Co., 109 Neb. 241, 190 N.W. 858 (1922).

Defendant residing where action is brought must be necessary party. Behr v. Willard, 11 Neb. 601, 10 N.W. 525 (1881).

Section is discussed. Atchison, T. & S. F. Ry. Co. v. Drayton, 292 F. 15 (8th Cir. 1923).

25-403.01 Actions; venue; transfer; payment of expenses.

Any action, other than the actions mentioned in sections 25-401 to 25-403, may be brought (1) in the county where any defendant resides, (2) in the county where the cause of action arose, (3) in the county where the transaction or some part of the transaction occurred out of which the cause of action arose, or (4) if all defendants are nonresidents of this state, in any county. When an action has been commenced in any other county, the court in which the action has been commenced shall have jurisdiction over the action, but upon timely motion by a defendant, the court shall transfer the action to the proper court in a county in which such action might have been properly commenced. The court in the county to which the action is transferred, in its discretion, may order the plaintiff or the plaintiff's attorney to pay to the defendant all reasonable expenses, including attorney's fees, incurred by the defendant because of the improper venue or in proceedings to transfer the action.

Source: Laws 1986, LB 529, § 23.

25-403.02 Venue; residency; determination.

For purposes of venue, the following definitions shall apply:

(1) Any private corporation organized under the laws of this state and any foreign corporation authorized to transact business in this state is a resident of any county in which it has its registered office or other office or is doing business. A foreign corporation not authorized to transact business in this state is not a resident of this state;

(2) A partnership sued in its firm name is a resident of any county in which any partner resides or in which the partnership has an office or is doing business. If all partners are nonresidents of this state and the partnership does not have an office or do business in this state, the partnership is not a resident of this state;

(3) A voluntary unincorporated association sued in its own name is a resident of any county in which the association has an office or in which any officer of the association resides. If it has no office in this state and no officer resides in this state, the voluntary unincorporated association is not a resident of this state; and

(4) A limited liability company organized under the laws of this state and any foreign limited liability company authorized to transact business in this state is a resident of any county in which it has its registered office or other office or is doing business. A foreign limited liability company not authorized to transact business in this state is not a resident of this state.

Source: Laws 1986, LB 529, § 24; Laws 1993, LB 121, § 166.

25-404 Repealed. Laws 1986, LB 529, § 58.

25-405 Repealed. Laws 1986, LB 529, § 58.

25-406 Repealed. Laws 1986, LB 529, § 58.

25-407 Repealed. Laws 1986, LB 529, § 58.

25-408 Repealed. Laws 1986, LB 529, § 58.

25-409 Repealed. Laws 1986, LB 529, § 58.

25-410 Transfer of actions.

For the convenience of the parties and witnesses or in the interest of justice, a district court of any county may transfer any civil action to the district court of any other county in this state.

Source: R.S.1867, Code § 61, p. 402; G.S.1873, c. 57, § 61, p. 532; R.S.1913, § 7621; C.S.1922, § 8564; C.S.1929, § 20-410; R.S. 1943, § 25-410; Laws 1971, LB 576, § 8.

Cross References

For disqualification of judge, see sections 24-723.01, 24-739, and 24-740.

1. Abuse of discretion
2. Bias or prejudice
3. Authority to transfer actions

1. Abuse of discretion

Where record does not show abuse of discretion, a ruling on motion to transfer hereunder will not be disturbed. Johnsen v. Parks, 189 Neb. 712, 204 N.W.2d 804 (1973).

Failure to grant change of venue in equity case was immaterial on appeal, since case was for trial de novo in reviewing court. Lippincott v. Lippincott, 144 Neb. 486, 13 N.W.2d 721 (1944).

Where only showing made in support of motion for change of venue is affidavit which was not offered in evidence and was not incorporated in bill of exceptions, error cannot be predicated on appeal from order overruling motion. Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N.W. 742 (1939).

Supreme Court will not disturb ruling of lower court on motion for change of venue unless abuse of discretion is shown. Markel v. Glassmeyer, 132 Neb. 716, 273 N.W. 33 (1937).

Ruling should not be disturbed on appeal unless discretion is abused. Boyd v. Chicago, B. & Q. R. R. Co., 97 Neb. 238, 149 N.W. 818 (1914).

Unless abuse of discretion is shown, ruling on motion should not be disturbed. Hinton v. Atchison & Nebraska R. R. Co., 83 Neb. 835, 120 N.W. 431 (1909).

2. Bias or prejudice

Where fair and impartial trial cannot be had, court must change; if fair trial cannot be had in adjoining county, change should be made to other county in district. Gandy v. Bissell's Estate, 81 Neb. 102, 115 N.W. 571 (1908).

Ruling will not be reversed unless prejudice is shown by clear and convincing evidence. State v. Smith, 77 Neb. 824, 110 N.W. 557 (1906).

Judge is not disqualified to sit in contempt case to try violation of own order. Back v. State, 75 Neb. 603, 106 N.W. 787 (1906).

Court on own motion cannot transfer case for trial to another county. Lefferts v. Bell, 57 Neb. 248, 77 N.W. 680 (1898).

This section does not authorize district court, on its own motion, to order a change of venue. Fisk v. Thorpe, 51 Neb. 1, 70 N.W. 498 (1897).

Bias or prejudice of judge preventing fair and impartial trial is ground for change. Le Hane v. State, 48 Neb. 105, 66 N.W. 1017 (1896).

When it appears that a fair and impartial trial cannot be had where suit is pending, change of venue should be granted. Omaha S. Ry. Co. v. Todd, 39 Neb. 818, 58 N.W. 289 (1894).

3. Authority to transfer actions

A court which never acquires jurisdiction permitting it to act has no authority to transfer venue. Jackson v. Jensen, 225 Neb. 671, 407 N.W.2d 758 (1987).

25-411 Change of venue; procedure; effect; expenses.

When an order is made transferring a cause for trial, as provided in section 25-410, the clerk of the court must transmit the pleadings and papers therein to the clerk of the court to which it is transferred; and in every such case, all expenses of such trial which would be chargeable to the county in which the suit originated had the cause been tried therein, as determined by the district judge of the county to which said cause has been transferred, shall be a charge upon the county in which the suit was commenced. The court to which an action is transferred shall have and exercise over the same the like jurisdiction as if it had been originally commenced therein.

Source: G.S.1873, c. 57, § 3, p. 712; R.S.1913, § 7622; C.S.1922, § 8565; C.S.1929, § 20-411; Laws 1935, c. 43, § 1, p. 162; C.S.Supp.,1941, § 20-411.

25-412 Change of venue in local actions involving real estate; transfer and entry of judgment.

When an action affecting the title or possession of real estate has been brought in or transferred to any court of a county, other than the county in which the real estate or some portion of it is situated, the clerk of such court must, after final judgment therein, certify such judgment under his seal of office, and transmit the same to the corresponding court of the county in which the real estate affected by the action is situated. The clerk receiving such copy must file, docket and record such judgment in the records of the court, briefly designating it as a judgment transferred from ..... court (naming the proper court).

Source: G.S.1873, c. 57, § 4, p. 712; R.S.1913, § 7623; C.S.1922, § 8566; C.S.1929, § 20-412.

25-412.01 Criminal cases; counties of 4,000 inhabitants or less; inadequate facilities; change of venue.

Any criminal case pending in either the county court or the district court in any county having a population of four thousand or less and not having adequate facilities for the trial of jury cases acceptable to the county and district judges may be tried in any adjoining county with the same effect as if tried in the county where the offense was committed.

Source: Laws 1975, LB 97, § 1; R.S.1943, (1985), § 24-901.

25-412.02 Civil cases; counties of 4,000 inhabitants or less; inadequate facilities; change of venue.

Any civil case pending in either the county court, the Nebraska Workers' Compensation Court, or the district court in any county having a population of four thousand or less and not having adequate facilities for the trial of jury or other contested cases may be tried in any adjoining county with the same effect as if tried in the county in which the case was filed or venued.

Source: Laws 1975, LB 97, § 2; Laws 1986, LB 811, § 13; R.S.Supp.,1988, § 24-902.

25-412.03 County board; agreements for criminal and civil trials.

The county board of any county described in section 25-412.01 or 25-412.02 may enter into an agreement under the Interlocal Cooperation Act with the county board of another county or other counties for the trial of all contested criminal and civil cases, whether or not a jury trial has been requested. Any case subject to any such agreement shall be subject to the applicable provisions of law relating to changes of venue except as provided in section 25-412.04.

Source: Laws 1975, LB 97, § 3; R.S.1943, (1985), § 24-903.

Cross References

Interlocal Cooperation Act, see section 13-801.

25-412.04 Criminal and civil trials; agreements for change of venue; jury; selection.

The jury for any case to be tried pursuant to an agreement entered into under section 25-412.03 shall be selected from the county in which the case was first filed. The jury shall be elected in the manner prescribed in Chapter 25, article

16. The summons shall direct attendance before the court by which the case is to be tried and the return thereof shall be made to the same court.

Source: Laws 1975, LB 97, § 4; R.S.1943, (1985), § 24-904.

(b) MODEL UNIFORM CHOICE OF FORUM ACT

25-413 State, defined.

As used in sections 25-413 to 25-417, unless the context otherwise requires, state shall mean any foreign nation, and any state, district, commonwealth, territory or insular possession of the United States.

Source: Laws 1969, c. 179, § 1, p. 769.

25-414 Choice of forum; jurisdiction; conditions.

(1) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if (a) the court has power under the law of this state to entertain the action; (b) this state is a reasonably convenient place for the trial of the action; (c) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (d) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by certified mail directed to his last-known address.

(2) This section does not apply to cognovit clauses, to arbitration clauses, or to the appointment of an agent for the service of process pursuant to statute or court order.

Source: Laws 1969, c. 179, § 2, p. 769.

This section applies where the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice of forum agreement. Ameritas Invest. Corp. v. McKinney, 269 Neb. 564, 694 N.W.2d 191 (2005).

This section raises a jurisdictional barrier to the enforcement of a contractual choice of forum clause that does not meet the requirements of the Model Uniform Choice of Forum Act. Ameritas Invest. Corp. v. McKinney, 269 Neb. 564, 694 N.W.2d 191 (2005).

This section was intended to prevent a court from exercising jurisdiction where that exercise would result in injustice or in substantial inconvenience to the parties. Ameritas Invest. Corp. v. McKinney, 269 Neb. 564, 694 N.W.2d 191 (2005).

Although employee's contract specifically made Nebraska the exclusive venue for legal proceedings, employee did not breach venue clause of contract by bringing suit in another state, since Nebraska was not a reasonably convenient place for the action. Woodmen of the World Life Ins. Soc. v. Puccio, 1 Neb. App. 478, 499 N.W.2d 85 (1993).

Subsection (1) of this section is an inherent part of every contract made in Nebraska. Woodmen of the World Life Ins. Soc. v. Puccio, 1 Neb. App. 478, 499 N.W.2d 85 (1993).

25-415 Choice of forum in another state; action pending in this state; procedure.

If the parties have agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless (1) the court is required by statute to entertain the action; (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (3) the other state would be a substantially less convenient place for the trial of the action than this state; (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (5) it would for some other reason be unfair or unreasonable to enforce the agreement.

Source: Laws 1969, c. 179, § 3, p. 769.

A forum selection clause which specifically references this section is not contrary to public policy and does not deny courts their inherent authority to consider appropriate matters presented to them. A trial court may refuse to dismiss an action where the facts are consistent with this section's limitations. Woodmen of the World Life Ins. Soc. v. Yelich, 250 Neb. 345, 549 N.W.2d 172 (1996).

A forum selection clause in an insurance contract between a surety and a contractor is enacted in accordance with the statute, and therefor valid, enforceable, and not contrary to public policy. Haakinson & Beaty Co. v. Inland Ins. Co., 216 Neb. 426, 344 N.W.2d 454 (1984).

25-416 Sections, how construed.

Sections 25-413 to 25-417 shall be so construed as to effectuate their general purpose to make uniform the law of those states which enact them.

Source: Laws 1969, c. 179, § 4, p. 770.

25-417 Act, how cited.

Sections 25-413 to 25-417 may be cited as the Model Uniform Choice of Forum Act.

Source: Laws 1969, c. 179, § 5, p. 770.

ARTICLE 5

COMMENCEMENT OF ACTIONS; PROCESS

Cross References

Endorsement of writs and orders by sheriff, see sections 23-1701.03 to 23-1701.06.
Immunity of defendant from service when extradited from another state, see section 29-753.
Issuance of writs, orders, and process, duties of clerks of courts, see sections 25-2204 to 25-2214.01.
Legal notices:
How published, see section 25-2228.
Week, defined, see section 25-2227.
Legal rate for publication, see section 33-141 et seq.
Service of process, see section 25-2201 et seq.
Sureties, affidavit and justification, see section 25-2222 et seq.
Time, how computed, see section 25-2221.

(a) PETITION AND SUMMONS

(b) SERVICE AND RETURN OF SUMMONS

(a) PETITION AND SUMMONS

25-501 Actions; how commenced.

A civil action must be commenced by filing a complaint in the office of the clerk of a proper court.

Source: R.S.1867, Code § 62, p. 403; Laws 1869, § 2, p. 63; Laws 1871, § 1, p. 111; R.S.1913, § 7624; C.S.1922, § 8567; C.S.1929, § 20-501; R.S.1943, § 25-501; Laws 1971, LB 576, § 9; Laws 1979, LB 510, § 2; Laws 2002, LB 876, § 12.

Cross References

When action is deemed commenced, see section 25-217.
orkers' Compensation Court, petition, filing, contents, see section 48-173.

When disbarred attorney commenced action, dismissal was proper. Niklaus v. Abel Construction Co., 164 Neb. 842, 83 N.W.2d 904 (1957).

A writ of replevin which is quashed or dismissed does not give the court jurisdiction to continue with the action. Tiedtke v. Whalen, 133 Neb. 301, 275 N.W. 79 (1937).

It is not essential that action be denominated either in law or in equity; if facts pleaded constitute cause of action or defense, courts will award relief. Rhoads v. Columbia Fire Underwriters Agency, 128 Neb. 710, 260 N.W. 174 (1935).

Cited in case involving amendment of summons on appeal from compensation award. Keil v. Farmers Irr. Dist., 119 Neb. 503, 229 N.W. 898 (1930).

Action is deemed commenced as to defendant, at date of summons which is served upon him. Ramirez v. Chicago, B. & Q. R. R. Co., 116 Neb. 740, 219 N.W. 1 (1928).

One not served with process in an action, who does not appear in person, or by attorney, is not bound by judgment rendered therein. Lipps v. Panko, 93 Neb. 469, 140 N.W. 761 (1913).

New summons is unnecessary on amendment of petition if same causes of action are preserved. Schuyler Nat. Bank v. Bollong, 28 Neb. 684, 45 N.W. 164 (1890).

25-502 Repealed. Laws 1983, LB 447, § 104.

25-502.01 Praecipe for summons.

The plaintiff shall file with the clerk of the court a praecipe for summons stating the name and address of each party to be served and the manner of service for each party. Upon written request of the plaintiff, separate or additional summonses shall be issued.

Source: Laws 1983, LB 447, § 19; Laws 1984, LB 845, § 20.

25-503 Repealed. Laws 1983, LB 447, § 104.

25-503.01 Summons.

(1) The summons shall be directed to the defendant or defendants, and contain the names of the parties and the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff. It shall notify defendant that in order to defend the lawsuit an appropriate written response shall be filed with the court within thirty days after service, and that upon failure to do so the court may enter judgment for the relief demanded in the complaint.

(2) A judgment by default shall not be different in kind from that demanded in the complaint. If only special damages are demanded a judgment by default shall not exceed the amount demanded in the complaint.

Source: Laws 1983, LB 447, § 20; Laws 2002, LB 876, § 13.

Cross References

Workers' compensation cases, court issues summons, see sections 48-174 and 48-190.

25-504 Repealed. Laws 1983, LB 447, § 104.

25-504.01 Summons and complaint; service.

A copy of the complaint shall be served with the summons, except when service is by publication. The plaintiff shall deliver to the clerk sufficient copies of the complaint at the time it is filed.

Source: Laws 1983, LB 447, § 21; Laws 2002, LB 876, § 14.

(b) SERVICE AND RETURN OF SUMMONS

25-505 Repealed. Laws 1983, LB 447, § 104.

25-505.01 Service of summons; methods.

(1) Unless otherwise limited by statute or by the court, a plaintiff may elect to have service made by any of the following methods:

(a) Personal service which shall be made by leaving the summons with the individual to be served;

(b) Residence service which shall be made by leaving the summons at the usual place of residence of the individual to be served, with some person of suitable age and discretion residing therein; or

(c) Certified mail service which shall be made by (i) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and (ii) filing with the court proof of service with the signed receipt attached.

(2) Failure to make service by the method elected by the plaintiff does not affect the validity of the service.

Source: Laws 1983, LB 447, § 22; Laws 1984, LB 845, § 21.

Cross References

Workers' compensation cases, manner of service, see sections 48-174, 48-175, 48-175.01, and 48-190.

Plaintiff may elect to have service made by any of the methods specified in the statute. West Town Homeowners Assn. v. Schneider, 221 Neb. 674, 380 N.W.2d 265 (1986).

Personal service at work rather than at home, despite the designation on the praecipe of where service should be effected, is nonetheless valid service. Hatcher v. McShane, 12 Neb. App. 239, 670 N.W.2d 638 (2003).

25-506 Repealed. Laws 1983, LB 447, § 104.

25-506.01 Process; by whom served.

(1) Unless the plaintiff has elected service by certified mail, the summons shall be served by the sheriff of the county where service is made, by a person authorized by section 25-507 or otherwise authorized by law, or by a person, corporation, partnership, or limited liability company not a party to the action specially appointed by the court for that purpose.

(2) Service by certified mail shall be made by plaintiff or plaintiff's attorney.

Source: Laws 1983, LB 447, § 23; Laws 1994, LB 1224, § 36; Laws 1999, LB 319, § 1.

Cross References

Workers' compensation cases, manner of service, see sections 48-174, 48-175, 48-175.01, and 48-190.

25-507 Process server; requirements; bond; cost.

(1) In any county which does not have a person contracted as a constable pursuant to section 25-2229, any person twenty-one years of age or older or a corporation, partnership, or limited liability company that satisfies the requirements of subsection (2) of this section shall have the same power as a sheriff to execute any service of process or order.

(2) Any person or entity may exercise the powers provided in subsection (1) of this section if such person or entity (a) is not a party to the action, (b) is not related to a party to the action, (c) does not have an interest in the action, (d) is not a public official employed by the county where service is made whose duties include service of process, and (e) furnishes a good and sufficient corporate surety bond in the sum of fifteen thousand dollars, such bond being conditioned upon such person or entity faithfully and truly performing the duties of process server.

(3) Evidence of the corporate surety bond shall be provided to the clerk of each court in which such person or entity executes service of process or orders. Such person or entity is not required to furnish more than one bond to execute service of process or orders in any state court in the State of Nebraska. When service of process is made by such person or entity authorized by this section, proof of such service of process shall be shown by an affidavit.

(4) The cost of service of process is taxable as a court cost, and when service of process is made by such person or entity other than a sheriff the cost taxable as a court cost is the lesser of the actual amount incurred for service of process or orders or the statutory fee set for sheriffs in section 33-117.

Source: Laws 1999, LB 319, § 2.

25-507.01 Summons; proof of service; return date.

(1) Within twenty days after the date of issue, the person serving the summons, other than by certified mail, shall make proof of service to the court stating the time, place, including the address if applicable, name of the person with whom the summons was left, and method of service, or return the unserved summons to the court with a statement of the reason for the failure to serve.

(2) When service is by certified mail, the plaintiff or plaintiff's attorney shall file proof of service within ten days after return of the signed receipt.

(3) Failure to make proof of service or delay in doing so does not affect the validity of the service.

Source: Laws 1983, LB 447, § 24.

Cross References

Workers' compensation cases, manner and time of service, see sections 48-174, 48-175, 48-175.01, and 48-190.

25-508 Repealed. Laws 1983, LB 447, § 104.

25-508.01 Service on individual.

(1) An individual party, other than a person under the age of fourteen years, may be served by personal, residence, or certified mail service.

(2) A party under the age of fourteen years may be served by personal, residence, or certified mail service upon an adult person with whom the minor resides and who is the minor's parent, guardian, or person having care of the minor. If none of these can be found, a party under the age of fourteen years may be served by personal service.

(3) If the person to be served is an incapacitated person for whom a conservator or guardian has been appointed or is confined in any institution, notice of the service shall be given to the conservator, guardian, or superintendent or similar official of the institution. Failure to give such notice does not affect the validity of the service on the incapacitated person.

Source: Laws 1983, LB 447, § 25.

Although subsection (3) of this section requires that where summons is served on an incapacitated person, notice of such service shall be given to the guardian, it also provides that failure to give such notice will not affect the validity of the service. In re Interest of A.M.K., 227 Neb. 888, 420 N.W.2d 718 (1988).

25-509 Repealed. Laws 1983, LB 447, § 104.

25-509.01 Service on corporation.

A corporation may be served by personal, residence, or certified mail service upon any officer, director, managing agent, or registered agent, or by leaving the process at the corporation's registered office with a person employed therein, or by certified mail service to the corporation's registered office.

Source: Laws 1983, LB 447, § 26.

Cross References

For process and service on foreign insurance corporation, see sections 44-135, 44-2009 to 44-2013, and 44-5507.
Registered office of corporation, see sections 21-1934, 21-19,152, 21-2031, and 21-20,174.

25-510 Repealed. Laws 1983, LB 447, § 104.

25-510.01 Repealed. Laws 1983, LB 447, § 104.

25-510.02 Service on state or political subdivision.

(1) The State of Nebraska, any state agency as defined in section 81-8,210, and any employee of the state as defined in section 81-8,210 sued in an official capacity may be served by leaving the summons at the office of the Attorney General with the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail service addressed to the office of the Attorney General.

(2) Any county, city, or village of this state may be served by personal, residence, or certified mail service upon the chief executive officer, or clerk.

(3) Any political subdivision of this state, as defined in subdivision (1) of section 13-903, other than a county, city, or village, may be served by personal, residence, or certified mail service upon the chief executive officer, clerk, secretary, or other official whose duty it is to maintain the official records, or any member of the governing board or body, or by certified mail service to the principal office of the political subdivision.

Source: Laws 1983, LB 447, § 27.

When this section applies, a summons must be served on the Attorney General in order to institute judicial review under the Administrative Procedure Act, sections 84-901 through 84-920. Concordia Teachers College v. Neb. Dept. of Labor, 252 Neb. 504, 563 N.W.2d 345 (1997).

This section provides the acceptable methods of service of summons upon the Attorney General, but although some discretion is granted as to the mode of service, no discretion is granted as to the entity to be served. Nebraska Methodist Health Sys. v. Dept. of Health, 249 Neb. 405, 543 N.W.2d 466 (1996).

When this section applies, in order to institute judicial review under the Administrative Procedure Act, service must be had on the Attorney General. Becker v. Nebraska Acct. & Disclosure Comm., 249 Neb. 28, 541 N.W.2d 36 (1995).

In cases in which this section applies, a summons must be served on the Attorney General in order to institute judicial review under the Administrative Procedure Act. Glass v. Nebraska Dept. of Motor Vehicles, 248 Neb. 501, 536 N.W.2d 344 (1995).

Pursuant to subsection (1), when a party commences an action against the State, that party's service must be served in one of the four following ways to be effective: (1) By leaving summons at the Attorney General's office with the Attorney General, (2) by leaving summons at the Attorney General's office with a deputy attorney general, (3) by leaving summons at the Attorney General's office with someone designated in writing by the Attorney General to receive summons, or (4) by sending summons by certified mail addressed to the Attorney General's office. Twiss v. Trautwein, 247 Neb. 535, 529 N.W.2d 24 (1995).

Pursuant to this section, the Attorney General must be served on behalf of the committee and that service may be accomplished by one of the methods for which provision is made in subsection (1). Ray v. Nebraska Crime Victim's Reparations Comm., 1 Neb. App. 130, 487 N.W.2d 590 (1992).

25-511 Repealed. Laws 1983, LB 447, § 104.

25-511.01 Repealed. Laws 1983, LB 447, § 104.

25-511.02 Service on dissolved corporation.

A dissolved corporation may be served by personal, residence, or certified mail service upon any appointed receiver. If there is no receiver, a dissolved corporation may be served by personal, residence, or certified mail service upon any person who at the time of dissolution was an officer, director, managing agent, or registered agent, or upon any officer or director designated in the last annual report filed with the Secretary of State.

Source: Laws 1983, LB 447, § 28.

25-512 Repealed. Laws 1983, LB 447, § 104.

25-512.01 Service on partnership.

A partnership or limited partnership may be served by personal, residence, or certified mail service upon any partner except a limited partner, or by certified mail service at its usual place of business, or the process may be left at its usual place of business with an employee of the partnership or limited partnership.

Source: Laws 1983, LB 447, § 29.

Cross References

Registration and agent for service of process of foreign limited partnerships, see section 67-281.

25-513 Repealed. Laws 1983, LB 447, § 104.

25-513.01 Service on unincorporated association.

An unincorporated association may be served by personal, residence, or certified mail service upon an officer or managing agent, or by certified mail service to the association at its usual place of business, or by leaving the process at its usual place of business with an employee of the unincorporated association.

Source: Laws 1983, LB 447, § 30.

25-514 Repealed. Laws 1983, LB 447, § 104.

25-514.01 Service on agent.

Any party may be served by personal, residence, or certified mail service upon an agent authorized by appointment or by law to receive service of process.

Source: Laws 1983, LB 447, § 31.

25-515 Repealed. Laws 1983, LB 447, § 104.

25-516 Repealed. Laws 1983, LB 447, § 104.

25-516.01 Service; voluntary appearance; defenses.

(1) The voluntary appearance of the party is equivalent to service.

(2) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process may be asserted only under the procedure provided in the pleading rules adopted by the Supreme Court. If any of those defenses are asserted either by motion or in a responsive pleading and the court overrules the defense, an objection that the court erred in its ruling will be waived and not preserved for appellate review if the party asserting the defense either (a) thereafter files a demand for affirmative relief by way of counterclaim, cross-claim, or third-party claim or (b) fails to dismiss a demand for such affirmative relief that was previously filed. If any of those defenses are asserted either by motion or in a responsive pleading and the court overrules the defense, an objection that the court erred in its ruling on any issue, except the objection that the party is not amenable to process issued by a court of this state, will be waived and not preserved for appellate review if the party asserting the defense thereafter participates in proceedings on any issue other than those defenses.

Source: Laws 1983, LB 447, § 32; Laws 2002, LB 876, § 15.

A voluntary appearance of a party is equivalent to service and, in effect, is another mode of service. Nebraska Methodist Health Sys. v. Dept. of Health, 249 Neb. 405, 543 N.W.2d 466 (1996).

An action stood dismissed by operation of law upon the passing of 6 months after the filing of the petition, where the defendants were not served process and their voluntary appearances were entered more than 6 months after the date the petition was filed. Vopalka v. Abraham, 9 Neb. App. 285, 610 N.W.2d 433 (2000).

(c) CONSTRUCTIVE SERVICE

25-517 Repealed. Laws 1983, LB 447, § 104.

25-517.01 Repealed. Laws 1983, LB 447, § 104.

25-517.02 Substitute and constructive service.

Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last-known address, (2) by publication, or (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.

Source: Laws 1983, LB 447, § 33.

Cross References

Actions against unknown defendants, see section 25-321.
Actions to quiet title, see section 25-21,112 et seq.

Substituted service based upon a false and misleading affidavit may be nullified. Where a parent was not given proper statutory notification of an adoption proceeding, the county court lacked jurisdiction to grant the adoption decree and the adoption was set aside. In re Adoption of Leslie P., 8 Neb. App. 954, 604 N.W.2d 853 (2000).

25-518 Repealed. Laws 1983, LB 447, § 104.

25-518.01 Service by publication.

Service may be made by publication (1) when such service is elsewhere provided for by statute or (2) when ordered by the court.

Source: Laws 1983, LB 447, § 34.

25-519 Service by publication; how made; contents.

The publication shall be made once in each week for three successive weeks in some newspaper printed in the county where the complaint is filed if there is any printed in such county and, if there is not, in some newspaper printed in this state of general circulation in that county. It shall contain a summary statement of the claim for relief of the complaint, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.

Source: R.S.1867, Code § 79, p. 405; R.S.1913, § 7642; C.S.1922, § 8585; C.S.1929, § 20-519; R.S.1943, § 25-519; Laws 1971, LB 47, § 1; Laws 1996, LB 299, § 19; Laws 2002, LB 876, § 16.

Cross References

For publication of legal notices, see sections 25-2227, 25-2228, 33-141, and 33-142.

1. How made
2. Contents
3. Miscellaneous

1. How made

In the case of substitute service by publication under this section, service is not ''made'' until the third publication, and prior to the third publication, a defendant is ''not served'' under section 25-217. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 268 Neb. 439, 684 N.W.2d 14 (2004).

Where service by publication has been approved, a defendant is not served within 6 months from the date the petition was filed under section 25-217 unless the third publication under this section has occurred within 6 months from the date the petition was filed. State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co., 268 Neb. 439, 684 N.W.2d 14 (2004).

Publication seven times in semi-weekly newspaper was not sufficient in foreclosure of tax lien. Davis v. American Inv. & Trust Co., 94 Neb. 427, 143 N.W. 464 (1913).

Publications need not be on same day of week; ''week'' defined. Burr v. Finch, 91 Neb. 417, 136 N.W. 72 (1912).

Notice must be published in all regular issues during week. Smith v. Potter, 90 Neb. 298, 133 N.W. 437 (1911); Claypool v. Robb, 90 Neb. 193, 133 N.W. 178 (1911).

Notice takes place of summons; publication requiring defendant to answer on second Monday is irregular and may be set aside on motion. Calkins v. Miller, 55 Neb. 601, 75 N.W. 1108 (1898).

Four weekly publications are sufficient. Taylor v. Coots, 32 Neb. 30, 48 N.W. 964 (1891); Fouts v. Mann, 15 Neb. 172, 18 N.W. 64 (1883).

Notice requiring defendant to answer in forenoon is valid; but has whole day to answer. Armstrong v. Middlestadt, 22 Neb. 711, 36 N.W. 151 (1888).

Notice once each week for four successive weeks is completed upon distribution of last publication. Davis v. Huston, 15 Neb. 28, 16 N.W. 820 (1883).

2. Contents

Publication notice must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons to be served when they are required to answer. Coffin v. Maitland, 146 Neb. 477, 20 N.W.2d 310 (1945).

Plaintiff's cause of action is not required to be set out in notice. Smith v. Potter, 92 Neb. 39, 137 N.W. 854 (1912).

Notice stating that action was for ''partition'' of lands was sufficient without reciting ''partition or sale.'' McCormick v. Paddock, 20 Neb. 486, 30 N.W. 602 (1886).

Notice in attachment containing general description of property attached is not void. Grebe v. Jones, 15 Neb. 312, 18 N.W. 81 (1883).

3. Miscellaneous

Notice to nonresident herein complied with this section. Armstrong v. Bates, 94 Neb. 462, 143 N.W. 477 (1913).

25-520 Service by publication; when complete; how proved; affidavit of publication.

Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in section 25-519; and such service shall be proved by the affidavit of the printer or his foreman or principal clerk, or other person knowing the same.

Source: R.S.1867, Code § 80, p. 406; R.S.1913, § 7643; C.S.1922, § 8586; C.S.1929, § 20-520.

In tax foreclosure case, section is strictly construed. Armstrong v. Griffith, 94 Neb. 515, 143 N.W. 461 (1913).

Service is complete upon distribution of paper containing its fourth successive weekly insertion. Claypool v. Robb, 90 Neb. 193, 133 N.W. 178 (1911).

Any one having actual knowledge of facts may make affidavit. Taylor v. Coots, 32 Neb. 30, 48 N.W. 964 (1891).

Court may permit amendment of affidavit to conform to facts. Britton v. Larson, 23 Neb. 806, 37 N.W. 681 (1888).

25-520.01 Service by publication; mailing of published notice; requirements; waiver; when mailing not required.

In any action or proceeding of any kind or nature, as defined in section 25-520.02, where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice. Such affidavit of mailing of notice shall further be required to state that such party and his attorney, after diligent investigation and inquiry, were unable to ascertain and do not know the post office address of any other party appearing to have a direct legal interest in such action or proceeding other than those to whom notice has been mailed in writing. It shall not be necessary to serve the notice prescribed by this section upon any competent person, fiduciary, partnership, or corporation, who has waived notice in writing, entered a voluntary appearance, or has been personally served with summons or notice in such proceeding.

Source: Laws 1957, c. 80, § 1, p. 325; Laws 1959, c. 97, § 1, p. 416.

1. Notice not required
2. Miscellaneous

1. Notice not required

First cousins of testator were not prima facie heirs-at-law, and hence were not required to be notified by mail of pending probate of will. Estate of Colman v. Redford, 179 Neb. 270, 137 N.W.2d 822 (1965).

Notice by mail is not required to be given to the holder of a claim for unliquidated damages. Farmers Co-op. Mercantile Co. v. Sidner, 175 Neb. 94, 120 N.W.2d 537 (1963).

Notice by mail was not required to be given to property owner of intention by municipality to pass resolution of necessity for constructing sewer system. Jones v. Village of Farnam, 174 Neb. 704, 119 N.W.2d 157 (1963).

Notice was not required to be sent to all owners of land within school district of proceedings to change boundaries thereof. Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N.W.2d 599 (1960).

A decedent's potential liability for an automobile accident, without establishment of liability and amount of damages, does not constitute a direct legal interest in the estate such that notice by mail must be sent to the potential creditor. Mach v. Schmer, 4 Neb. App. 819, 550 N.W.2d 385 (1996).

2. Miscellaneous

The requirements of this section apply to a publication of notice given under section 25-1529 governing sales on execution. KLH Retirement Planning v. Okwumuo, 263 Neb. 760, 642 N.W.2d 801 (2002).

County court which obtained jurisdiction of res of estate upon filing of petition retains jurisdiction until service of notice is perfected or until matter is abandoned. Fischer v. Lingle, 195 Neb. 108, 237 N.W.2d 110 (1975).

A mortgagor in a foreclosure proceeding is not entitled to personal service of the published notice of sale. Hollstein v. Adams, 187 Neb. 781, 194 N.W.2d 216 (1972).

Copy of notice, mailed hereunder, that a will and codicil are being offered for probate is sufficient to put party upon inquiry as to documents offered. Flint v. Panter, 187 Neb. 615, 193 N.W.2d 279 (1970).

This section does not apply to notice of dissolution of corporation. Christensen v. Boss, 179 Neb. 429, 138 N.W.2d 716 (1965).

25-520.02 Action or proceeding, defined.

The term action or proceeding means all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement.

Source: Laws 1957, c. 80, § 2, p. 326.

The act, of which this section is a part, is not amendatory, but is new and independent legislation. Farmers Co-op. Mercantile Co. v. Sidner, 175 Neb. 94, 120 N.W.2d 537 (1963).

Resolution of necessity for constructing a sewer system was not within purview of this section. Jones v. Village of Farnam, 174 Neb. 704, 119 N.W.2d 157 (1963).

Statute does not contemplate personal notice must be given to a class on matters of general public concern. Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N.W.2d 599 (1960).

25-520.03 Sections, how construed.

Sections 25-520.01 to 25-520.03 are intended by the Legislature to be cumulative and supplemental to existing legislation. They are deemed to be a matter of general statewide concern. Such sections apply to all parties authorized by law to give notice by publication, including the State of Nebraska, its governmental subdivisions, and all public and municipal corporations.

Source: Laws 1957, c. 80, § 3, p. 326.

The act, of which this section is a part, is not amendatory, but is new and independent legislation. Farmers Co-op. Mercantile Co. v. Sidner, 175 Neb. 94, 120 N.W.2d 537 (1963).

25-520.04 Repealed. Laws 1986, LB 735, § 1.

25-521 Repealed. Laws 1983, LB 447, § 104.

25-522 Service by publication; designation of newspaper.

It shall be the lawful right of any plaintiff or petitioner in any suit, action or proceeding, pending or prosecuted in any of the courts of this state, in which it is necessary to publish in a newspaper any notice or copy of an order, growing out of, or connected with, such action or proceeding, either by himself or his attorney of record, to designate in what newspaper such notice or copy of order shall be published; and it shall be the duty of the judges of the district court, county judges, or any other officer charged with the duty of ordering, directing or superintending the publication of any of such notices, or copies of orders, to strictly comply with such designations when made in accordance with the provisions of this section.

Source: Laws 1909, c. 94, § 1, p. 399; R.S.1913, § 7645; C.S.1922, § 8588; C.S.1929, § 20-522.

25-523 Legal newspaper, defined; prior publications legalized.

No newspaper shall be considered a legal newspaper for the publication of legal and other official notices unless the same shall have a bona fide circulation of at least three hundred paid subscriptions weekly, and shall have been published within the county for fifty-two successive weeks prior to the publication of such notice, and be printed, either in whole or in part, in an office maintained at the place of publication; *Provided*, that nothing in this section shall invalidate the publication in a newspaper which has suspended publication or been printed outside of the county, on account of fire, flood or other unavoidable accident, for not to exceed ten weeks, in the year last preceding the first publication of a legal notice, advertising or publication; *provided further*, that all publications made prior to May 22, 1941, in a newspaper which has, on account of flood, fire or other unavoidable accident, suspended publication or been printed in an office outside of the county, are hereby legalized; *provided further*, that all newspapers, otherwise complying herewith, which have, on account of flood, fire or other unavoidable accident, suspended publication or been printed in an office outside of the county, for not to exceed ten weeks in

any year, are hereby legalized; *and provided further,* that the publication of legal or other official notices in the English language in foreign language newspapers published within the county for fifty-two successive weeks prior to the publication of such a notice, and printed either in whole or in part in an office maintained at the place of publication, shall also be legal.

Source: Laws 1915, c. 221, § 1, p. 490; Laws 1919, c. 133, § 1, p. 309; C.S.1922, § 8589; C.S.1929, § 20-523; Laws 1935, c. 40, § 1, p. 157; Laws 1941, c. 31, § 1, p. 139; C.S.Supp.,1941, § 20-523; Laws 1943, c. 44, § 1(1), p. 189; R.S.1943, § 25-523; Laws 1972, LB 661, § 17.

Mechanical act of printing legal newspaper may be performed outside county of place of publication. Wymore Arbor State, Inc. v. Korinek, 182 Neb. 557, 156 N.W.2d 24 (1968).

Particular requirements of this section need not be recited in printer's proof of publication. Seymour v. Lawson, 111 Neb. 770, 197 N.W. 623 (1926).

25-524 Repealed. Laws 1983, LB 447, § 104.

25-525 Judgment on constructive service; how opened; procedure.

A party against whom a judgment or order has been rendered without other service than by publication in a newspaper may, at any time within five years after the date of entry of the judgment or order, have the same opened to allow the applicant to appear in court and make a defense. Before the judgment or order is opened, the applicant shall give notice to the adverse party of the intention to make such application and shall file a full answer to the petition or complaint, pay all costs, if the court requires them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action the applicant had no actual notice thereof in time to appear in court and make a defense. The title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, has passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall the proceedings affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter-affidavits, to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make a defense.

Source: R.S.1867, Code § 82, p. 406; R.S.1913, § 7646; C.S.1922, § 8590; C.S.1929, § 20-525; R.S.1943, § 25-525; Laws 2000, LB 921, § 3; Laws 2002, LB 876, § 17.

1. Sufficiency of application
2. Notice to plaintiff
3. Title to conveyed property
4. Miscellaneous

1. Sufficiency of application

Before party can have judgment opened, it must appear that he had no actual notice of the pendency of the action in time to make defense. McNally v. McNally, 152 Neb. 845, 43 N.W.2d 170 (1950).

Verified petition filed by parties seeking to open up judgment under this section was equivalent to affidavit and answer required thereunder. Nelson v. Nelson, 113 Neb. 453, 203 N.W. 640 (1925).

Application was sufficient to authorize vacation of judgment. Eno v. Lampshire, 108 Neb. 265, 187 N.W. 782 (1922).

Ordinarily only party can make affidavit, but may be made by attorney where party is nonresident. Cass v. Nitsch, 81 Neb. 228, 115 N.W. 753 (1908).

On application, defendant cannot contest sufficiency of original petition; ''full answer'' means meritorious answer. Oakes v. Ziemer, 62 Neb. 603, 87 N.W. 350 (1901).

To permit a defendant to open up decree, full answer to the merits must be presented. Oakes v. Ziemer, 61 Neb. 6, 84 N.W. 409 (1900).

Defendant must show he did not have actual notice of suit in time to make defense; adverse party may present counteraffidavits. Stover v. Hough, 47 Neb. 789, 66 N.W. 825 (1896).

Party seeking to have judgment opened up must allege and prove bona fides. McGregor v. Eastern B. & L. Assn., 5 Neb. Unof. 563, 99 N.W. 509 (1904).

Motion to vacate judgment after term must tender valid defense which court will adjudge prima facie valid. Waters v. Raker, 1 Neb. Unof. 830, 96 N.W. 78 (1901).

2. Notice to plaintiff

Appearance by party to resist motion to vacate waives notice. Scarborough v. Myrick, 47 Neb. 794, 66 N.W. 867 (1896).

Proceeding is continuation of original action; service of notice on plaintiff's attorney is sufficient. Merriam v. Gordon, 17 Neb. 325, 22 N.W. 563 (1885).

3. Title to conveyed property

Good faith purchaser of land at judicial sale is protected in event judgment reversed under this section. Pauley v. Knouse, 109 Neb. 716, 192 N.W. 195 (1923); Warren v. Dick, 17 Neb. 241, 22 N.W. 462 (1885).

Title of purchaser cannot be litigated in action, except perhaps where bad faith is charged. Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N.W. 1073 (1898).

A purchaser of land under a judgment subsequently opened is not a purchaser pendente lite. Scudder v. Sargent, 15 Neb. 102, 17 N.W. 369 (1883).

4. Miscellaneous

One seeking to open up a judgment secured by constructive service must act within five years and must, by a preponderance of the evidence, show that he had no notice prior to judgment and he must file a meritorious answer. Wittwer v. Dorland, 198 Neb. 361, 253 N.W.2d 26 (1977).

This section has no relation to filing of claims against estate. Supp v. Allard, 162 Neb. 563, 76 N.W.2d 459 (1956).

This section has no reference to a void judgment. Hassett v. Durbin, 132 Neb. 315, 271 N.W. 867 (1937).

Action to redeem from tax foreclosure was commenced in time hereunder. Walter v. Union R. E. Co., 107 Neb. 144, 185 N.W. 323 (1921).

Section is not applicable to proceedings before drainage district board. Richardson County ex rel. Sheehan v. Drainage Dist., 96 Neb. 169, 147 N.W. 205 (1914).

Relief may be granted after five years if proper petitions are presented before expiration of time. Affidavits are amendable. Rine v. Rine, 91 Neb. 248, 135 N.W. 1051 (1912).

Section does not relate to void judgments. Herman v. Barth, 85 Neb. 722, 124 N.W. 135 (1910); Hayes County v. Wileman, 82 Neb. 669, 118 N.W. 478 (1908).

Owner of land sold under scavenger tax law is not entitled to benefits of this section as matter of right. State v. Several Parcels of Land, 75 Neb. 538, 106 N.W. 663 (1906).

Defendant who conveyed his interest by quitclaim deed cannot move to vacate judgment. Browne v. Palmer, 66 Neb. 287, 92 N.W. 315 (1902).

Acknowledgment on summons is actual personal service; judgment cannot be opened. Cheney v. Harding, 21 Neb. 65, 31 N.W. 255 (1887).

Affidavit by an attorney who has personal knowledge of the want of "actual notice" will be sufficient to open the judgment in absence of counteraffidavits. In re Reed v. Estate of Thompson, 19 Neb. 397, 27 N.W. 391 (1886).

Opening judgment upon complying with the requirements of the statute is a matter of right. Brown v. Conger, 10 Neb. 236, 4 N.W. 1009 (1880).

25-526 Repealed. Laws 1983, LB 447, § 104.

25-527 Procedure when defendants not all served.

Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: (1) If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; (2) if the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.

Source: R.S.1867, Code § 84, p. 407; R.S.1913, § 7648; C.S.1922, § 8592; C.S.1929, § 20-527.

Action being for joint and several liability, it could proceed as to the defendants served, under this section. Bourne v. Baer, 107 Neb. 255, 185 N.W. 408 (1921).

Section is applicable to proceedings to revive joint judgment. Thornhill v. Hargreaves, 76 Neb. 582, 107 N.W. 847 (1906); Clark v. Commercial Nat. Bank of Columbus, 68 Neb. 764, 94 N.W. 958 (1903).

Where principal on injunction bond could not be found in county, it was proper to proceed against surety alone. Gyger v. Courtney, 59 Neb. 555, 81 N.W. 437 (1900).

Obligors on joint bond must be joined; may proceed against those served. Perkins County v. Miller, 55 Neb. 141, 75 N.W. 577 (1898); Young v. Joseph Bros. & Davidson, 5 Neb. Unof. 559, 99 N.W. 522 (1904).

(d) SERVICE ON AGENT OF DEFENDANT

25-528 Personal service upon appointed resident agent; appointment invalidates constructive service, when.

It shall be lawful for any person, association or corporation, owning or claiming any interest in or lien upon any real estate lying within this state, to make and file in the office of the register of deeds of the county in which such real estate is situated an appointment, in writing, of some person, who shall be

a resident of the county in which said lands lie, upon whom process may be served in any suit, action or proceeding, concerning or affecting such real estate, to which such owner or claimant shall be made a party. Such appointment shall be acknowledged in the manner provided by law for the acknowledgment of deeds, and shall specifically describe the lands affected by such appointment. From and after the filing of such appointment as herein provided, service of any writ, summons, order or notice, in any suit, action or proceeding, concerning or affecting such real estate, shall be made upon the person so appointed and designated in such manner as may be provided by law for the service of process upon persons found in this state, and shall be held and taken to be a valid and effectual service upon such owner or claimant. A copy of such appointment, or of the record thereof, duly certified by the said register of deeds, shall be deemed sufficient evidence thereof. No service made by publication shall be valid in respect to any such owner or claimant, who shall have filed an appointment under the provisions of this article; *Provided*, such appointment may be at any time revoked by such owner or claimant, but such revocation shall be in writing duly acknowledged, and shall specifically describe the lands affected by such appointment, and filed and recorded in the office of the register of deeds of the county in which any such real property is situated.

Source: Laws 1877, § 1, p. 17; R.S.1913, § 7649; C.S.1922, § 8593; Laws 1927, c. 65, § 1, p. 227; C.S.1929, § 20-528.

25-529 Personal service upon appointed resident agent; appointment; recording and indexing; fees.

The register of deeds of each county shall record such appointment as shall be filed under the provisions of section 25-528 and any revocation thereof in the Miscellaneous Record, shall enter such instruments in the numerical index against the lands described therein, and shall be entitled to demand and receive fees as provided in sections 33-109 and 33-112.

Source: Laws 1877, § 2, p. 18; R.S.1913, § 7650; C.S.1922, § 8594; Laws 1927, c. 65, § 2, p. 228; C.S.1929, § 20-529; R.S.1943, § 20-529; Laws 1984, LB 679, § 11.

25-530 Repealed. Laws 1983, LB 447, § 104.

25-530.01 Repealed. Laws 1983, LB 447, § 104.

25-530.02 Repealed. Laws 1983, LB 447, § 104.

25-530.03 Repealed. Laws 1983, LB 447, § 104.

25-530.04 Repealed. Laws 1983, LB 447, § 104.

25-530.05 Repealed. Laws 1983, LB 447, § 104.

25-530.06 Repealed. Laws 1983, LB 447, § 104.

25-530.07 Repealed. Laws 1983, LB 447, § 104.

25-530.08 Company, firm, or unincorporated association; appointment of agent; execution on judgment; fees.

When a company, firm, or unincorporated association described in section 25-313 has its principal place of business or activity outside of this state and does not have a usual place of doing business or activity within the state or a clerk or general agent within the state, such company, firm, or unincorporated association shall appoint an agent or agents in this state, and before it is authorized to engage in any kind of business or activity in this state, such company, firm, or unincorporated association shall file in the office of the Secretary of State a certified statement setting forth that such company, firm, or unincorporated association is doing business or conducting activities in the State of Nebraska, stating the nature of the business or activity, and designating an agent or agents within the State of Nebraska upon whom process or other legal notice of the commencement of any legal proceeding or in the prosecution thereof may be served. Executions issued on any judgments rendered in such proceedings shall be levied only on property of the company, firm, or unincorporated association. A fee of five dollars shall be paid for filing the certified statement with the Secretary of State. If there is a change of the agent or agents or if there is a change of street address, a statement shall be filed with the Secretary of State stating the name of the new agent or agents or the new street address or both. A filing fee of three dollars shall be paid for the filing of such statement. This section shall not apply to domestic limited partnerships and foreign limited partnerships governed by the Nebraska Uniform Limited Partnership Act.

Source: R.S.1867, Code § 25, p. 397; R.S.1913, § 7595; C.S.1922, § 8538; C.S.1929, § 20-314; R.S.1943, § 25-314; Laws 1947, c. 82, § 2, p. 257; Laws 1959, c. 96, § 1, p. 414; Laws 1961, c. 109, § 1, p. 346; Laws 1974, LB 951, § 1; Laws 1983, LB 447, § 16; R.S.Supp.,1984, § 25-314; Laws 1989, LB 482, § 5.

Cross References

Nebraska Uniform Limited Partnership Act, see section 67-296.

1. Right to serve
2. Procedure
3. Miscellaneous

1. Right to serve

An unincorporated association to represent employees in collective bargaining must comply with this section before it may bring an action in court. Nebraska Council of Educational Leaders v. Nebraska Dept. of Education, 189 Neb. 811, 205 N.W.2d 537 (1973).

Prior to 1947 amendment, where unincorporated association was not formed to carry on some trade or business, or to hold some species of property in this state, service of process could not be properly made on such association in this state. Hurley v. Brotherhood of Railroad Trainmen, 147 Neb. 781, 25 N.W.2d 29 (1946).

Nonresident firm of attorneys, not having office in this state, was not subject to service of process under this section. State ex rel. Johnson v. Tautges, Rerat & Welch, 146 Neb. 439, 20 N.W.2d 232 (1945).

Where the members of a partnership reside in another state and are not within this state, service of summons upon the firm cannot be made in a county where it has no usual place of business. Stelling v. Peddicord, 78 Neb. 779, 111 N.W. 793 (1907).

To authorize summons to another county, nonresident must be bona fide defendant. Stull Bros. v. Powell, 70 Neb. 152, 97 N.W. 249 (1903).

Section is cumulative, and does not prevent service on individual members of partnership. Herron v. Cole Bros., 25 Neb. 692, 41 N.W. 765 (1889).

In suit to enjoin violation of federal statute by members of partnership, federal district court for Missouri, wherein members resided, had jurisdiction although place of partnership's business was in Nebraska. Sutherland v. United States, 74 F.2d 89 (8th Cir. 1934).

2. Procedure

Defendant having given other reasons for refusing to recognize plaintiff as negotiating agent could not change ground after litigation started and base refusal on tardy filing of certificate designating agent. Orleans Education Assn. v. School Dist. of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975).

In suit against a partnership, filing of a petition by individual partners to remove suit to federal court is not a general appearance but a special appearance only. Security State Bank of Norfolk v. Jackson Bros., Boesel & Co., 130 Neb. 562, 265 N.W. 747 (1936).

Service in an action against a partnership may be made by copy left at the usual place of business. Wittstruck v. Temple, 58 Neb. 16, 78 N.W. 456 (1899).

Where action is brought against firm in the individual names of its members and one member is absent from state, service

upon the others is sufficient. Winters v. Means, 25 Neb. 241, 41 N.W. 157 (1888).

Service on partnership at usual place of business is sufficient. Rosenbaum & Co. v. Hayden & Co., 22 Neb. 744, 36 N.W. 147 (1888).

3. Miscellaneous

Service of process in an action against individual members of a partnership is not governed by this section. Hanna v. Emerson, 45 Neb. 708, 64 N.W. 229 (1895).

(e) LIS PENDENS

25-531 Lis pendens; notice; where filed; contents; recording; cancellation; filing fee.

When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency. While the action is pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title. In all actions brought to affect the title to real property, the plaintiff may either at the time of filing his or her complaint or afterwards, file, or in case any defendant sets up an affirmative cause of action and demands relief which shall affect the title to real estate, he or she may, at the time of filing such answer or at any time afterwards, file with the clerk or register of deeds of each county in which the real estate thus to be affected, or any part thereof, is situated, a notice of the pendency of such action. The notice shall contain the names of the parties, the object of the action, and a description of the property in such county sought to be affected thereby. If the action is for foreclosure of a mortgage, such notice shall contain the date of the mortgage, the parties thereto, and the time and place of recording the same. The clerk or register of deeds of such county shall record the notice thus filed and enter the same upon the numerical index of all lands, any part of which is included in the description in the notice, for which he or she shall be entitled to receive filing fees in accordance with sections 33-109 and 33-112, to be paid by the person filing such notice, and which shall be taxed as part of the costs in the action. From the time of filing such notice the pendency of such action shall be constructive notice to any purchaser or encumbrancer to be affected thereby. Every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer and shall be bound by all proceedings taken in the action after the filing of such notice to the same extent as if he or she were made a party to the action. The court in which such action was commenced or any judge thereof may at any time thereafter on the application of any person aggrieved, on good cause shown, and on such notice as the court or judge may determine, order the notice to be canceled by the clerk or register of deeds of any county in which the notice may have been filed or recorded by filing a notice of release. In actions in which such notice is filed in a county or counties, other than the county in which the action is pending, the county clerk or the register of deeds of the county in which the action was begun may cancel such notice by executing a written release under his or her hand and seal by reason of the order of the court or judge, and forward such release by mail to the county clerk or register of deeds of the county in which the notice has been filed or recorded, and which certificate such county clerk or register of deeds shall record in the records of his or her office. At any time after such notice of pendency is recorded, the party on whose behalf the same was filed or the party's attorney of record may cause the notice to be canceled in the office of the county clerk or register of deeds of any county in which the notice has been filed or recorded. Such cancellation may be made by written release in the same manner as such cancellations are entered on order of the

court. For the service required by this section, the county clerk or register of deeds shall be entitled to charge and receive fees in accordance with sections 33-109 and 33-112, to be paid by the party causing the service to be performed.

Source: R.S.1867, Code § 85, p. 407; Laws 1887, c. 92, § 1, p. 643; R.S.1913, § 7651; C.S.1922, § 8595; C.S.1929, § 20-531; R.S. 1943, § 25-531; Laws 1959, c. 140, § 1, p. 544; Laws 1963, c. 140, § 1, p. 517; Laws 1969, c. 181, § 1, p. 772; Laws 1971, LB 90, § 1; Laws 2002, LB 876, § 18.

1. Scope
2. Subsequent purchasers

1. Scope

The purpose and nature of the property and the intent of the parties determines whether buildings or other items located on leased land affect the title to real property. Ondrak v. Matis, 270 Neb. 46, 699 N.W.2d 367 (2005).

Lis pendens has no application to independent titles, not derived from any of the parties to the suit nor in succession to them. Coffin v. Old Line Life Ins. Co., 138 Neb. 857, 295 N.W. 884 (1941).

Claims based upon deed made after lis pendens is filed are subordinated to and determined by the judgment in mortgage foreclosure suit. Hadley v. Corey, 137 Neb. 204, 288 N.W. 826 (1939).

Notice of pendency of suit, while preventing other than parties to the suit from acquiring interest in subject matter pendente lite, does not affect existing rights or prevent the court from their adjudication. First Nat. Bank of Decatur v. Young, 124 Neb. 598, 247 N.W. 586 (1933).

In action to wind up farm lease partnership, intervening creditors of one partner, having constructive notice hereunder of their debtor's limited interest, must share with other partner in distribution of debtor's property. Sacks v. Lytle, 119 Neb. 642, 230 N.W. 501 (1930).

Filing lis pendens at commencement of quiet title action gives constructive notice of plaintiff's claims. Gwynne v. Goldware, 102 Neb. 260, 166 N.W. 625 (1918).

Filing lis pendens does not impound property for plaintiff not having general or specific lien. Purchaser after action is started is not bound by rights subsequently set up by amendment. Hulen v. Chilcoat, 79 Neb. 595, 113 N.W. 122 (1907).

Section does not refer to rights of third parties not derived through parties to suit. Merrill v. Wright, 65 Neb. 794, 91 N.W. 697 (1902).

Lessee under lease made during suit is subject to decree against lessor. McLean v. McCormick, 4 Neb. Unof. 187, 93 N.W. 697 (1903).

Lis pendens applies only to specific property pointed out by pleadings, and must be definite. Hillebrand v. Nelson, 1 Neb. Unof. 783, 95 N.W. 1068 (1901).

Nonresident assignee of note and mortgage, failing to record his assignment, is bound by decree canceling mortgage. Heck v. Nicholas, 6 F.2d 10 (8th Cir. 1925).

2. Subsequent purchasers

The court having jurisdiction, a party cannot, while the action is pending, dispose of the property and avoid the effect of the final judgment in the case. Stanton v. Stanton, 146 Neb. 71, 18 N.W.2d 654 (1945).

A purchaser pendente lite need not be made a party to a mechanic's lien foreclosure proceeding. Johnson v. Olson, 132 Neb. 778, 273 N.W. 201 (1937).

One failing to record deed until after lis pendens filed in action to set aside deeds is subsequent purchaser and bound by proceedings. Justice v. Shaw, 103 Neb. 423, 172 N.W. 253 (1919).

Amendment of 1887 cutting off prior unrecorded interests was constitutional; purpose of amendment stated. Munger v. Beard & Bro., 79 Neb. 764, 113 N.W. 214 (1907).

Mortgagee acquiring rights after levy of attachment took subject thereto even though petition in attachment suit was thereafter amended. Nagle v. First Nat. Bank of Omaha, 57 Neb. 552, 77 N.W. 1074 (1899).

Purchaser pendente lite is bound by decree. Clark v. Charles, 55 Neb. 202, 75 N.W. 563 (1898); Lincoln Rapid Transit Co. v. Rundle, 34 Neb. 559, 52 N.W. 563 (1892).

Judgment is superior to mortgage executed during term, though recorded before judgment. Norfolk State Bank v. Murphy, 40 Neb. 735, 59 N.W. 706 (1894).

Purchaser after summons served is subject to judgment. Shuman v. Willets, 17 Neb. 478, 23 N.W. 358 (1885).

25-532 Notice of judgment when property situated in more than one county.

When any part of the real property, the subject matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the clerk's office of such other county or counties before it shall operate therein as a notice, so as to charge third persons as provided in section 25-531. It shall operate as such notice without record in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute now in force which does not require such record.

Source: R.S.1867, Code § 86, p. 407; R.S.1913, § 7652; C.S.1922, § 8596; C.S.1929, § 20-532.

25-533 Attachment and execution issued from another county; notice upon entry in encumbrance book.

No levy of attachment or execution on real estate issued from any other county shall be notice to a subsequent vendee or encumbrancer in good faith, unless the sheriff shall have entered in a book, which shall be kept in the office of the clerk of the district court by such clerk and called the ''encumbrance book,'' a statement that the land, describing it, has been so attached or levied on, the cause in which it was so attached, and when it was done, signed by such sheriff. Such book shall be open, as other books kept by such clerk, to public inspection.

Source: Laws 1895, c. 73, § 2, p. 314; R.S.1913, § 7653; C.S.1922, § 8597; C.S.1929, § 20-533.

(f) SERVICE PURSUANT TO SUPREME COURT RULES

25-534 Order, motion, or notice; service; delivery.

Whenever in any action or proceeding, any order, motion, notice, or other document, except a summons, is required by statute or rule of the Supreme Court to be served upon or given to any party, the service or delivery shall be made in accordance with the rules of pleading in civil actions promulgated by the Supreme Court pursuant to section 25-801.01.

Source: Laws 1959, c. 100, § 1, p. 420; Laws 1981, LB 42, § 15; Laws 2008, LB1014, § 8.
Operative date July 18, 2008.

Notice was satisfied when address used was correct but included wrong office designation and no evidence showed notice was not received. City of Lincoln v. MJM, Inc., 9 Neb. App. 715, 618 N.W.2d 710 (2000).

(g) SERVICE FOR ACTS PERFORMED IN THIS STATE

25-535 Person, defined.

As used in sections 25-535 to 25-541, person includes an individual, executor, administrator, personal representative, corporation, partnership, limited liability company, association, or other legal or commercial entity, whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state.

Source: Laws 1967, c. 143, § 1, p. 439; Laws 1993, LB 121, § 167.

Under this and succeeding sections where copies of complaint, summons, and interrogatories were sent by registered mail to limited partnership defendant at its foreign office, Nebraska long-arm statute was satisfied. Blum v. Kawaguchi, Ltd., 331 F.Supp. 216 (D. Neb. 1971).

25-536 Jurisdiction over a person.

A court may exercise personal jurisdiction over a person:

(1) Who acts directly or by an agent, as to a cause of action arising from the person:

(a) Transacting any business in this state;

(b) Contracting to supply services or things in this state;

(c) Causing tortious injury by an act or omission in this state;

(d) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(e) Having an interest in, using, or possessing real property in this state; or

(f) Contracting to insure any person, property, or risk located within this state at the time of contracting; or

(2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.

Source: Laws 1967, c. 143, § 2, p. 439; Laws 1983, LB 447, § 35.

Cross References

Resident agent appointment in real estate matters, see section 25-528.
Service on foreign corporations, registered agent, see sections 21-19,152, 21-19,155, 21-20,174, and 21-20,177.
Service on foreign insurance corporations, see sections 44-135, 44-2009 to 44-2013, and 44-5507.
Workers' compensation cases, additional method of jurisdiction exists, see sections 48-146, 48-175, 48-175.01, and 48-190.

1. Subject to jurisdiction

Nebraska's long-arm statute extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. Ameritas Invest. Corp. v. McKinney, 269 Neb. 564, 694 N.W.2d 191 (2005); Brunkhardt v. Mountain West Farm Bureau Mut. Ins., 269 Neb. 222, 691 N.W.2d 147 (2005).

The long-arm statute expressly extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation with Nebraska as far as the U.S. Constitution permits. Quality Pork Internat. v. Rupari Food Servs., 267 Neb. 474, 675 N.W.2d 642 (2004).

This section expressly extends Nebraska's jurisdiction over nonresidents as far as the U.S. Constitution permits. Crete Carrier Corp. v. Red Food Stores, Inc., 254 Neb. 323, 576 N.W.2d 760 (1998).

This section expressly extends Nebraska's jurisdiction over nonresidents as far as the U.S. Constitution permits. The fiduciary shield doctrine is not a bar to personal jurisdiction over a corporate agent or employee when the agent or employee has sufficient minimum contacts of his own with Nebraska to satisfy federal due process requirements. Crystal Clear Optical v. Silver, 247 Neb. 981, 531 N.W.2d 535 (1995).

This section explicitly extends Nebraska's jurisdiction as far as the U.S. Constitution permits. Wagner v. Unicord Corp., 247 Neb. 217, 526 N.W.2d 74 (1995).

Nonresident defendant's conduct and connection with the State of Nebraska was such that it reasonably should have anticipated being haled into court over plaintiff's cause of action for the return of its loan application fee. 24th and Dodge Ltd. v. Commercial Nat. Bank, 243 Neb. 98, 497 N.W.2d 386 (1993).

In order to subject a defendant to a judgment in personam, if the defendant is not within the territory of the forum, due process requires that such defendant have certain minimum contacts with the forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice. McGowan Grain v. Sanburg, 225 Neb. 129, 403 N.W.2d 340 (1987).

The establishment of a marital relationship in this state from which a nonresident has left is sufficient minimum contact with this state to permit a court of this state to exercise in personam jurisdiction over the nonresident in an action to dissolve that marriage. York v. York, 219 Neb. 883, 367 N.W.2d 133 (1985).

Company having an interest in, using or possessing real property in this state at a time when it was transacting business in this state was subject to jurisdiction of court in this state and its special appearance was properly overruled. Grand Island Hotel Corp. v. Second Island Development Co., 191 Neb. 98, 214 N.W.2d 253 (1974).

Nonresident manufacturer comes under long-arm statute when it places its products in the stream of commerce expecting delivery in Nebraska. Stoehr v. American Honda Motor Co., Inc., 429 F.Supp. 763 (D. Neb. 1977).

By statute, defendant is under state jurisdiction when defendant contracts for sale of motorcycles in Nebraska. Hetrick v. American Honda Motor Co., Inc., 429 F.Supp. 116 (D. Neb. 1976).

Where after defendant Illinois corporation entered into distributorship agreement for Nebraska, area contacts were numerous and continuous. Nebraska corporations antitrust cause of action arose out of interrelated acts allegedly indicating unfair competition; sufficient contacts existed to permit in personam jurisdiction. Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 333 F.Supp. 187 (D. Neb. 1971).

Where the delivery, installation, operation, and alleged injury resulting from defective machine occurred in Nebraska, the manufacturer who had shipped same indirectly was subject to Nebraska jurisdiction. Blum v. Kawaguchi, Ltd., 331 F.Supp. 216 (D. Neb. 1971).

2. Not subject to jurisdiction

Neither an act of sexual intercourse between consenting adults nor the failure of a putative father to support his child is an act ''causing tortious injury'' under the terms of the Nebraska long-arm statute. State ex rel Larimore v. Snyder, 206 Neb. 64, 291 N.W.2d 241 (1980).

For tortious act in other state, jurisdiction for damage action in Nebraska not supported by telephone calls, travel to Nebraska, and unspecified acts which induced victim to travel to other state. Von Seggern v. Saikin, 187 Neb. 315, 189 N.W.2d 512 (1971).

Where defendants maintained no offices, salespersons, or agents in Nebraska; where contracts neither executed nor performed in Nebraska; where goods neither came from or to Nebraska; the Nebraska contracts insufficient to attach jurisdiction under long-arm statutes. Aaron Ferer & Sons Co. v. American Compressed Steel Co., 564 F.2d 1206 (8th Cir. 1977) affirming, Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co., 558 F.2d 450 (8th Cir. 1977).

National Trailer Leasing Company under facts of case not subject to jurisdiction under this section which requires actual presence in state plus additional requirement of regular or persistent course of conduct. Peterson v. U-Haul Co., 409 F.2d 1174 (8th Cir. 1969).

Where the activities of a physician and hospital in administering chemotherapy treatment were localized and confined to the State of Iowa, there were insufficient contacts with Nebraska for purposes of application of the Nebraska long-arm statute in a wrongful death action against the physician and hospital, notwithstanding the foreseeability of alleged effects occurring in

Nebraska where the patient resided. Glover v. Wagner, 462 F.Supp. 308 (D. Neb. 1978).

Where purchase contracts were executed outside Nebraska by nonresident sellers for shipment of goods to other states, and defendants did not transact nor solicit business in Nebraska, buyers' Nebraska residence did not give federal court in Nebraska personal jurisdiction in this suit under Bankruptcy Act. Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co., 418 F.Supp. 674 (D. Neb. 1976).

3. Miscellaneous

The provisions of this section requiring notice of homestead exemption rights do not apply to foreclosure of a tax lien represented by a tax sale certificate. Destiny 98 TD v. Miodowski, 269 Neb. 427, 693 N.W.2d 278 (2005).

Nebraska's long-arm statute is to be interpreted broadly in view of the rationale and philosophy underlying its adoption. Quality Pork Internat. v. Rupari Food Servs., 267 Neb. 474, 675 N.W.2d 642 (2004).

The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. The existence of a Nebraska choice-of-law clause is a factor to be considered in determining whether a party should reasonably anticipate being haled into court in Nebraska. Castle Rose v. Philadelphia Bar & Grill of Arizona, Inc., 254 Neb. 299, 576 N.W.2d 192 (1998).

While language of this section does not cover divorce in specific words, it indicates the legislative intention to apply the minimum contacts rule where it does not offend traditional concepts of fair play and substantial justice. Stucky v. Stucky, 186 Neb. 636, 185 N.W.2d 656 (1971).

Out-of-state seller, who allegedly sold heifers to a cow-calf operation that were unfit for breeding purposes, did not have continuous and systematic business contact with Nebraska sufficient to warrant the exercise of personal general jurisdiction over seller. There was no evidence that seller designated an agent for service of process, held a license in the state, had employees in the state, or was incorporated in the state. South Dakota cattle seller's sending industry directories, in which it had placed advertisements to buyer, and maintaining 800 number, was not purposeful availment to the laws of Nebraska, as was required to warrant exercise of specific jurisdiction over seller in buyers' action alleging that seller breached warranty that heifers were fit for breeding purposes. Higgins v. Rausch Herefords, 9 Neb. App. 212, 609 N.W.2d 712 (2000).

Concept of due process in Nebraska's long-arm statutes is at least as broad as the constitutional standard of due process. Pioneer Ins. Co. v. Gelt, 558 F.2d 1303 (8th Cir. 1977).

Question of whether in personam jurisdiction is acquired under Nebraska long-arm statute depends primarily on the quantity, nature, and quality of the parties' contacts with the forum state. Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co., 558 F.2d 450 (8th Cir. 1977).

It is a nonresident defendant's contacts with the forum state that are of interest in determining if in personam jurisdiction exists, not its contacts with the resident plaintiff. Gendler v. General Growth Properties, 461 F.Supp. 434 (D. Neb. 1978).

Nebraska long-arm statute is limited only by the constitutional constraints imposed by the minimum contacts rule. Vergara v. Aeroflot Soviet Airlines, 390 F.Supp. 1266 (D. Neb. 1975).

Under facts in this case, defendant was amenable to service, and when copy of complaint and a summons were served by registered mail with signed receipt required, requirements of due process were met. General Leisure Products Corp. v. Gleason Corp., 331 F.Supp. 278 (D. Neb. 1971).

25-537 Service outside state.

When the exercise of personal jurisdiction is authorized by sections 25-535 to 25-541, service may be made outside this state.

Source: Laws 1967, c. 143, § 3, p. 439.

Unless defendant transacts some business in Nebraska, jurisdiction over him may not be obtained hereunder by service outside the state. Conner v. Southern, 186 Neb. 164, 181 N.W.2d 446 (1970).

Concept of due process in Nebraska's long-arm statutes is at least as broad as the constitutional standard of due process. Pioneer Ins. Co. v. Gelt, 558 F.2d 1303 (8th Cir. 1977).

25-538 Action in another forum; stay or dismissal of action.

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

Source: Laws 1967, c. 143, § 4, p. 439.

Trial court did not abuse its discretion in refusing to dismiss case on basis of forum non conveniens. Woodmen of the World Life Ins. Soc. v. Kight, 246 Neb. 619, 522 N.W.2d 155 (1994).

Where diverse parties to a contract have agreed in writing that the defendant will assume the burden of litigating an action on the contract in the plaintiff's home jurisdiction, and where there is no evidence of fraud or duress or any other action by the plaintiff that would retroactively render void the contractual forum selection, this section does not authorize a court to arbitrarily amend the contract by nullifying the forum selection clause and reassigning to the plaintiff the burden of litigating an action on the contract in a foreign jurisdiction. Woodmen of the World Life Ins. Soc. v. Walker, 1 Neb. App. 882, 510 N.W.2d 439 (1993).

25-539 Jurisdiction authorized.

A court of this state may exercise jurisdiction on any other basis authorized by law.

Source: Laws 1967, c. 143, § 5, p. 440.

In personam jurisdiction may be acquired over a nonresident defendant in a divorce action by extra-territorial personal service of process made in accordance with a statute of this state if there exists sufficient contacts between the defendant and this state relevant to the cause of action to satisfy traditional notions of fair play and substantive justice. In this case, defendant's last marital domicile was in Nebraska and no showing was made that it was later superseded by a new domicile. Stucky v. Stucky, 186 Neb. 636, 185 N.W.2d 656 (1971).

25-540 Service outside state; manner.

(1) When the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:

(a) In the manner prescribed for service within this state;

(b) In the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction;

(c) As directed by the foreign authority in response to a letter rogatory; or

(d) As directed by the court.

(2) Proof of service outside this state may be made by affidavit of the individual who made the service or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction.

Source: Laws 1967, c. 143, § 6, p. 440; Laws 1983, LB 447, § 36.

Cross References

Workers' compensation cases, additional nonresident jurisdiction and method of proof of service exists, see section 48-175.01.

When service of process is made outside of the state by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court. Lydick v. Smith, 201 Neb. 45, 266 N.W.2d 208 (1978).

Proof of service by mail must include a receipt signed by the addressee, or other satisfactory evidence of personal delivery, and an affidavit to be considered on appeal must be offered in evidence and preserved in the bill of exceptions. Anderson v. Autocrat Corp., 194 Neb. 278, 231 N.W.2d 560 (1975).

Where affidavit showed service personally upon defendant Reiff individually and as district manager of defendant corporation, and by certified mail, return receipt requested upon individual defendants in their office in Morton, Illinois, together with return receipts showing that copies of summons and complaint were served upon each, the process was in conformity with this section. Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 333 F.Supp. 187 (D. Neb. 1971).

25-541 Sections, how construed.

Sections 25-535 to 25-541 do not repeal or modify any other law of this state permitting another procedure for service.

Source: Laws 1967, c. 143, § 7, p. 440.

A 1974 amendment to this statute was intended to eliminate proceedings in error as a method of obtaining district court review of a county court decision; thus, the action was properly dismissed. SapaNajin v. Wolford, 222 Neb. 387, 383 N.W.2d 796 (1986).

On appeal from the county or municipal court to the district court in civil matters under this section, the district court is to review the record and reach an independent conclusion without reference to the decision of the county or municipal court. However, on appeal to the Supreme Court, the judgment of the district court on the facts will not be set aside if there is sufficient competent evidence on the record to support it. Denton v. Nelson, 205 Neb. 833, 290 N.W.2d 462 (1980); County of Merrick v. Beck, 205 Neb. 829, 290 N.W.2d 636 (1980).

Order of county court dismissing case for plaintiff's failure to timely answer interrogatories could be set aside by district court upon trial de novo on the record, and Supreme Court will affirm in absence of showing of abuse of discretion. Von Seggern v. Kassmeier Implement, 195 Neb. 791, 240 N.W.2d 842 (1976).

(h) GENERAL PROVISIONS

25-542 Service of process; applicability.

Unless specifically provided to the contrary or the context otherwise requires, the provisions of Chapter 25, article 5, on service of process, as such provisions may from time to time be amended, shall apply to all civil proceedings in all courts of this state and to all proceedings under any statute which refers to or incorporates the general provisions on process or service of process.

Source: Laws 1983, LB 447, § 37.

25-543 Repealed. Laws 1999, LB 43, § 30.

ARTICLE 6
DISMISSAL OF ACTIONS

Section
25-601. Dismissal without prejudice.
25-602. Dismissal without prejudice; by plaintiff in vacation; exceptions; payment of costs.
25-603. Dismissal without prejudice; trial on setoff or counterclaim.

25-601 Dismissal without prejudice.

An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court; (2) by the court where the plaintiff fails to appear at the trial; (3) by the court for want of necessary parties; (4) by the court on the application of some of the defendants where there are others whom the plaintiff fails to diligently prosecute; (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action the decision must be upon the merits.

Source: R.S.1867, Code § 430, p. 465; R.S.1913, § 7654; C.S.1922, § 8598; C.S.1929, § 20-601.

1. Before final submission
2. After final submission
3. Want of necessary parties
4. Disobedience by plaintiff
5. Miscellaneous

1. Before final submission

A plaintiff has the right to dismiss the action it has brought at any time prior to final submission. United States Fire Ins. Co. v. Affiliated FM Ins. Co., 225 Neb. 218, 403 N.W.2d 383 (1987).

An order sustaining a demurrer is not a final order. Therefor, an action may be dismissed as a matter of right upon plaintiff's motion following the demurrer. Koll v. Stanton-Pilger Drainage Dist., 207 Neb. 425, 299 N.W.2d 435 (1980).

Plaintiff had right hereunder to dismiss his claim for reinstatement in union and could then pursue claim for damages for wrongful discharge without exhausting administrative remedies. Poppert v. Brotherhood of R. R. Trainmen, 187 Neb. 297, 189 N.W.2d 469 (1971).

Right of plaintiff to dismiss action is not a matter of judicial grace or discretion. In divorce action, until trial court enters an order imposing some obligation, plaintiff has unqualified right to dismiss regardless of nature of pleadings on file. Werner v. Werner, 186 Neb. 558, 184 N.W.2d 646 (1971).

County attorney may dismiss action in juvenile court before trial without leave of court. In re Interest of Moore, 186 Neb. 67, 180 N.W.2d 917 (1970).

Plaintiff may dismiss action as a matter of right at any time before final submission of case. Gebhart v. Tri-State G. & T. Assn., 181 Neb. 457, 149 N.W.2d 41 (1967).

An action may be dismissed without prejudice by a plaintiff as a matter of right at any time before final submission of the case. Giesler v. City of Omaha, 175 Neb. 706, 123 N.W.2d 650 (1963).

Section applies to dismissal of counterclaim before final submission. Harbert v. Mueller, 156 Neb. 838, 58 N.W.2d 221 (1953).

A counterclaim may be dismissed as a matter of right at any time before final submission. Feight v. Mathers, 153 Neb. 839, 46 N.W.2d 492 (1950).

Plaintiff may dismiss without prejudice to take advantage of amended venue statutes and bring action in another county. Grosc v. Bredthauer, 136 Neb. 43, 284 N.W. 869 (1939).

The right of the plaintiff to dismiss without prejudice before final submission applies in appeals from the Workmen's Compensation Court to district court. Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N.W. 366 (1939).

Before final submission of a case to the jury or court, a dismissal by plaintiff without prejudice to a future action is not a matter of judicial grace or discretion, but is a statutory right. Duffy v. Cody, 129 Neb. 737, 262 N.W. 828 (1935).

Before final submission plaintiff may dismiss as a matter of right. Reams v. Sinclair, 97 Neb. 542, 150 N.W. 826 (1915); Snyder v. Collier, 85 Neb. 552, 123 N.W. 1023 (1909).

One of several plaintiffs has right to dismiss action so far as he is concerned; informality in dismissal is cured where cause proceeds to final determination between remaining parties. Henkel v. Boudreau, 94 Neb. 338, 143 N.W. 236 (1913).

Plaintiff may, as a matter of right, dismiss his action without prejudice at any time before its final submission. Snyder v. Collier, 85 Neb. 552, 123 N.W. 1023 (1909).

Plaintiff has absolute right to dismiss without prejudice before final submission of cause. Beals v. Western Union Tel. Co., 53 Neb. 601, 74 N.W. 54 (1898); Sharpless v. Giffen, 47 Neb. 146, 66 N.W. 285 (1896).

Where property was not taken or has been returned, plaintiff in replevin may dismiss. Saussay v. Lemp Brew. Co., 52 Neb. 627, 72 N.W. 1026 (1897).

Plaintiff in replevin, who has taken property, cannot dismiss without defendant's consent. Vose v. Muller, 48 Neb. 602, 67 N.W. 598 (1896).

Plaintiff in replevin, who has obtained possession of property under the writ, cannot dismiss without consent of defendant.

Garber v. Palmer, Blanchard & Co., 47 Neb. 699, 66 N.W. 656 (1896).

Trial court has no authority to enter involuntary nonsuit and judgment of dismissal. Proper practice is to instruct jury to return verdict for defendant. Zittle v. Schlesinger, 46 Neb. 844, 65 N.W. 892 (1896).

Refusal of court to dismiss is not final order. Supreme Court will not reinstate action when plaintiff has dismissed. Grimes v. Chamberlain, 27 Neb. 605, 43 N.W. 395 (1889).

Plaintiff may dismiss as to one defendant during trial though answer pleads misjoinder of defendants. Morrissey v. Schindler, 18 Neb. 672, 26 N.W. 476 (1886).

This section applies to a case on appeal from the small claims court pending in district court, if there has not been final submission to the district court judge. Sutherland v. Shoemaker, 6 Neb. App. 157, 570 N.W.2d 375 (1997).

2. After final submission

After defendant moves for a directed verdict and arguments of both parties are completed, a case is under submission and plaintiff loses absolute right to dismiss without prejudice. Any time before final submission of the case to the fact finder, plaintiff may dismiss an action, without prejudice, as a matter of right. Collection Specialists v. Vesely, 238 Neb. 181, 469 N.W.2d 549 (1991).

When a case has been submitted upon a motion for a directed verdict, plaintiff's absolute right to dismiss without prejudice is lost, but when the motion is overruled there is no longer a final submission where issues remain to be determined by the jury and have not been submitted to it. Miller v. Harris, 195 Neb. 75, 236 N.W.2d 828 (1975).

Where plaintiff presented her case and rested, the defendant moved for dismissal, and the court took the matter under advisement, the case was submitted and plaintiff had lost her right to dismiss without prejudice. Gydesen v. Gydesen, 188 Neb. 538, 197 N.W.2d 67 (1972).

After final submission, dismissal without prejudice requires leave of court. Tuttle v. Wyman, 149 Neb. 769, 32 N.W.2d 742 (1948).

When defendant moves to dismiss plaintiff's action at close of plaintiff's evidence, he admits plaintiff's testimony to be true, together with every conclusion that may fairly and reasonably be drawn therefrom, and court must thereupon determine as question of law whether plaintiff's evidence is sufficient to support judgment for plaintiff. Schroeder v. Bartlett, 129 Neb. 645, 262 N.W. 447 (1935).

Dismissal is not demandable as a right after the cause has been fully tried and unconditionally submitted to the court. Pettegrew v. Pettegrew, 128 Neb. 783, 260 N.W. 287 (1935).

Final submission of action contemplates its submission upon both law and fact. Plattsmouth Loan & Bldg. Assn. v. Sedlak, 128 Neb. 509, 259 N.W. 367 (1935).

Trial court's ruling on defendant's motion to dismiss jury was final submission hereunder so that plaintiff could not dismiss the case without prejudice thereafter. Stungis v. Wavecrest Realty Co., 124 Neb. 769, 248 N.W. 78 (1933).

Dismissal after final submission must be by order of court entered on journal. Knaak v. Brown, 115 Neb. 260, 212 N.W. 431 (1927).

Plaintiff may dismiss without prejudice after reversal and remand for new trial. Bancroft Drainage Dist. v. Chicago, St. P., M. & O. Ry. Co., 102 Neb. 455, 167 N.W. 731 (1918).

Court may permit dismissal after submission. Nelson v. Omaha & C. B. St. Ry. Co., 93 Neb. 154, 139 N.W. 860 (1913).

Plaintiff appealing to district court may dismiss action. Dismissal is not affirmance of judgment below, and is not res judicata. Thornhill v. Hargreaves, 76 Neb. 582, 107 N.W. 847 (1906).

Absolute right to dismiss is lost after submission on demurrer to evidence. Fronk v. Evans City Steam Laundry Co., 70 Neb. 75, 96 N.W. 1053 (1903).

When a case has been submitted upon a demurrer to the evidence, and the demurrer sustained, plaintiff's absolute right to dismiss without prejudice is lost. Bee Building Co. v. Dalton, 68 Neb. 38, 93 N.W. 930 (1903).

Court may impose reasonable terms or refuse dismissal. Horton v. State ex rel. Hayden, 63 Neb. 34, 88 N.W. 146 (1901).

Involuntary nonsuit for failure of proof is unauthorized; it is error, without prejudice, where directed verdict would have been proper. Thompson v. Missouri P. Ry., 51 Neb. 527, 71 N.W. 61 (1897).

Plaintiff cannot dismiss after cause has been submitted to court or jury. State ex rel. Board of Supervisors of Holt County v. Hazelet, 41 Neb. 257, 59 N.W. 891 (1894).

Appellant from justice court may dismiss without consent of appellee. Eden Musee Co. v. Yohe, 37 Neb. 452, 55 N.W. 866 (1893).

Equity rule prevails; court may excuse payment of costs in first action as prerequisite to maintaining second. Union P. Ry. Co. v. Mertes, 35 Neb. 204, 52 N.W. 1099 (1892).

After a demurrer to plaintiff's petition has been sustained, plaintiff cannot afterwards dismiss the action. State ex rel. Burlington & M. River R. R. Co. v. Scott, 22 Neb. 628, 36 N.W. 121 (1888).

Plaintiff's privilege of dismissal without prejudice is not demandable as of right after cause has been submitted, but may be granted in exercise of discretion. Iowa-Nebraska Light & Power Co. v. Daniels, 63 F.2d 322 (8th Cir. 1933).

3. Want of necessary parties

Action may be dismissed by court for want of necessary parties. Dempster v. Ashton, 125 Neb. 535, 250 N.W. 917 (1933).

Where motion is made to dismiss for want of prosecution, defendant must serve notice on plaintiff. Berggren v. Berggren, 24 Neb. 764, 40 N.W. 284 (1888).

4. Disobedience by plaintiff

A civil action may be dismissed if, absent a showing of good cause, a litigant fails to prosecute the action in compliance with the Nebraska Supreme Court's Case Progression Standards for civil actions in district courts. Billups v. Jade, Inc., 240 Neb. 494, 482 N.W.2d 269 (1992).

Pursuant to subsection (5) of this section, it is within the discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action. Kerndt v. Ronan, 236 Neb. 26, 458 N.W.2d 466 (1990).

It is within the sound discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action. Vodehnal v. Grand Island Daily Independent, 191 Neb. 836, 218 N.W.2d 220 (1974).

Action may be dismissed without prejudice for failure of plaintiff to appear at pretrial conference. Pressey v. State, 173 Neb. 652, 114 N.W.2d 518 (1962).

Failure or refusal of plaintiff to comply with a proper order of court with respect to amendment of petition may be valid ground for dismissal of the action. Bushnell v. Thompson, 133 Neb. 115, 274 N.W. 453 (1937).

Court has power to dismiss, with prejudice, for plaintiff's failure to comply with rules or orders. Ferson v. Armour & Co., 109 Neb. 648, 192 N.W. 125 (1923).

District court has discretionary power to dismiss petition without prejudice for disobedience of reasonable order. Howell v. Malmgren, 79 Neb. 16, 112 N.W. 313 (1907).

5. Miscellaneous

No case addressing the right of a party to dismiss pursuant to this section has required the party to pay costs pursuant to section 25-602. Without a motion for attorney fees pending, such fees would not be a part of the costs to be paid under

either this section or section 25-602. Kansas Bankers Surety Co. v. Halford, 263 Neb. 971, 644 N.W.2d 865 (2002).

Where wife dismissed her suit to dissolve marriage, husband had no right to notice, hearing, or right to attach conditions to dismissal because he did not file a request for affirmative relief on merits of cause. Temporary orders perished with dismissal because nothing remained to invoke jurisdiction. Schroeder v. Schroeder, 223 Neb. 684, 392 N.W.2d 787 (1986).

The right of a plaintiff to dismiss is not a matter of judicial grace or discretion, but may be made subject to condition, such as reimbursement of costs, where equity so requires. Dawson v. Papio Nat. Resources Dist., 210 Neb. 100, 313 N.W.2d 242 (1981).

District court has jurisdiction to enter judgment of dismissal without prejudice upon sustaining of demurrer. Akins v. Chamberlain, 164 Neb. 428, 82 N.W.2d 632 (1957).

Filing of petition for probate of will is not an action. Hill v. Humlicek, 156 Neb. 61, 54 N.W.2d 366 (1952).

Practice of entering ''nonsuit'' upon conclusion of opening statements by counsel to jury is disapproved. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N.W. 349 (1934).

Proceedings under writ ad quod damnum are included in term ''action'' used in this section, providing for dismissal. Blue River Power Co. v. Hronik, 116 Neb. 405, 217 N.W. 604 (1928).

Filing petition for appointment of administrator is not an ''action'' hereunder. In re Estate of Glover, 104 Neb. 151, 175 N.W. 1017 (1920).

Where the only relief is against a nominal defendant who did not appear and upon whom the record fails to show service of process, dismissal of plaintiff's cause of action by court is proper. Elmore v. McMillan, 79 Neb. 621, 113 N.W. 165 (1907).

Court cannot adjudge that new action shall not be subject to defense of statute of limitations. Linton v. Cooper, 75 Neb. 167, 106 N.W. 170 (1905).

Dismissal does not operate as estoppel; before action is recommenced, court may require payment of costs in first. Yates v. Jones Nat. Bank, 74 Neb. 734, 105 N.W. 287 (1905).

Where one of two plaintiffs had judgment in replevin, the other cannot dismiss without defendant's consent. Houck v. Linn, 56 Neb. 743, 77 N.W. 51 (1898).

25-602 Dismissal without prejudice; by plaintiff in vacation; exceptions; payment of costs.

The plaintiff, in any case pending in the district or Supreme Court of the state, shall, when no counterclaim or setoff has been filed by the opposite party, have the right in the vacation of any of said courts to dismiss his said action without prejudice, upon payment of costs, which dismissal shall be, by the clerk of any of said courts, entered upon the journal and take effect from and after the date thereof.

Source: Laws 1867, § 1, p. 51; R.S.1913, § 7655; C.S.1922, § 8599; C.S.1929, § 20-602.

No case addressing the right of a party to dismiss pursuant to section 25-601 has required the party to pay costs pursuant to this section. Without a motion for attorney fees pending, such fees would not be a part of the costs to be paid under either section 25-601 or this section. Kansas Bankers Surety Co. v. Halford, 263 Neb. 971, 644 N.W.2d 865 (2002).

Plaintiff had right to dismiss without prejudice to take advantage of amended statute on venue of action. Grosc v. Bredthauer, 136 Neb. 43, 284 N.W. 869 (1939).

Dismissal after final submission of case must be by order of court entered on journal. Knaak v. Brown, 115 Neb. 260, 212 N.W. 431 (1927).

Filing petition for appointment of administrator is not an ''action.'' In re Estate of Glover, 104 Neb. 151, 175 N.W. 1017 (1920).

Section is applicable to election contest; cannot set aside dismissal without notice to contestant, to allow another to intervene. Moore v. Waddington, 69 Neb. 615, 96 N.W. 279 (1903).

Dismissal before appearance by defendant ends case. Sims v. Davis, 48 Neb. 720, 67 N.W. 765 (1896).

Right to dismiss is not absolute, but depends upon payment of costs. Sheedy v. McMurtry, 44 Neb. 499, 63 N.W. 21 (1895).

After case is submitted, power to dismiss without prejudice ceases. Sharp v. Brown, 34 Neb. 406, 51 N.W. 1030 (1892).

Where there is no setoff or counterclaim, and costs are paid, court cannot at next term permit intervention. Harris v. Cronk, 17 Neb. 475, 23 N.W. 341 (1885).

25-603 Dismissal without prejudice; trial on setoff or counterclaim.

In any case where a setoff or counterclaim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed the action or failed to appear.

Source: R.S.1867, Code § 431, p. 465; R.S.1913, § 7656; C.S.1922, § 8600; C.S.1929, § 20-603.

A cross-appeal is an appeal perfected by a second party to the action filed subsequent to a prior appeal by an adverse party. Gebhart v. Tri-State G. & T. Assn., 181 Neb. 457, 149 N.W.2d 41 (1967).

Where a setoff or counterclaim has been presented, a defendant has the right to proceed to trial on his claim, although plaintiff may have dismissed his action. Giesler v. City of Omaha, 175 Neb. 706, 123 N.W.2d 650 (1963).

Dismissal of counterclaim did not prevent plaintiff from proceeding on set-off against same. Feight v. Mathers, 153 Neb. 839, 46 N.W.2d 492 (1951).

Where plaintiff in action to foreclose first mortgage dismissed case before final submission, a defendant filing a cross-petition for foreclosure of second mortgage is entitled to trial of his cross-complaint. Plattsmouth Loan & Bldg. Assn. v. Sedlak, 128 Neb. 509, 259 N.W. 367 (1935).

Plaintiff has no right to dismiss as to defendants who have pleaded facts entitling them to affirmative relief. Toop v. Palmer, 108 Neb. 850, 189 N.W. 394 (1922).

Plaintiff on appeal to district court cannot by dismissing action defeat judgment on set-off below. Hess v. Hess, 78 Neb. 347, 110 N.W. 999 (1907).

Right of plaintiff to dismiss without prejudice does not affect the right of defendant to proceed to trial on cross-petition. Adams v. Osgood, 55 Neb. 766, 76 N.W. 446 (1898).

ARTICLE 7

JOINDER OF CAUSES; CONSOLIDATION OF ACTIONS

Section
25-701. Joinder of claims.
25-702. Repealed. Laws 1998, LB 234, § 12.
25-703. Consolidation of actions; motion and notice.
25-704. Consolidation of actions; order.
25-705. Joinder; procedures; misjoinder.

25-701 Joinder of claims.

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party.

Source: R.S.1867, Code § 87, p. 407; Laws 1867, § 3, p. 71; R.S.1913, § 7657; C.S.1922, § 8601; C.S.1929, § 20-701; R.S.1943, § 25-701; Laws 1998, LB 234, § 3.

1. Same transaction
2. Contracts
3. Trustees
4. Recovery of property
5. Other actions

1. Same transaction

For application of res judicata a petition in quantum meruit is a restatement of the earlier cause of action on express contract where both petitions are based on same services. Vantage Enterprises, Inc. v. Caldwell, 196 Neb. 671, 244 N.W.2d 678 (1976).

Damages for loss of possession of lease and loss of crops could be joined. Dinkel v. Hagedorn, 156 Neb. 419, 56 N.W.2d 464 (1953).

In suit to enjoin nuisance, damages may be recovered. Brchan v. The Crete Mills, 155 Neb. 505, 52 N.W.2d 333 (1952).

Plaintiff may unite a cause of action growing out of breach of promise to marry, and another in damages for seduction, where both causes arise out of the same transaction. Ryan v. Oswald, 134 Neb. 265, 278 N.W. 508 (1938).

Malicious prosecution and false imprisonment arising out of same transaction may be joined. Scott v. Flowers, 60 Neb. 675, 84 N.W. 81 (1900).

Causes of action in tort, all growing out of and connected with the same transaction, may be joined. Dinges v. Riggs, 43 Neb. 710, 62 N.W. 74 (1895).

2. Contracts

Amendment of petition allowed to include action in quantum meruit with action on express contract. Associated Wrecking v. Wiekhorst Bros., 228 Neb. 764, 424 N.W.2d 343 (1988).

Agreement to pay principal of debt at one time and interest thereon at another gives rise to separate causes of action which plaintiff may join or not at his pleasure. Peters v. Meyer, 131 Neb. 847, 270 N.W. 312 (1936).

Action on quantum meruit may be joined with action on express contract. Stout v. Omaha, L. & B. Ry. Co., 97 Neb. 816, 151 N.W. 295 (1915).

Action to foreclose mortgage and on unsecured note cannot be joined. McCague Sav. Bank v. Croft, 80 Neb. 702, 115 N.W. 315 (1908).

Action to foreclose mortgage and for deficiency judgment may be joined. Commercial Nat. Bank of Omaha v. Grant, 73 Neb. 435, 103 N.W. 68 (1905).

Action to correct official bond and for damages for breach of bond may be joined. Stewart v. Carter, 4 Neb. 564 (1876).

3. Trustees

Action to enforce trust agreement under which defendant purchased plaintiff's property at judicial sale, and action based upon alleged invalidity of sale may be joined. Williams v. Lowe, 4 Neb. 382 (1876).

4. Recovery of property

Under prior law, under subsection (6) of this section, plaintiff may seek rents and profits in an ejectment action. Wicker v. Waldemath, 238 Neb. 515, 471 N.W.2d 731 (1991).

Action for conversion of corporate assets may be joined with one for statutory liability of stockholders on account of failure to publish notice of amount of corporate indebtedness. Malm v. Stock, 99 Neb. 374, 156 N.W. 656 (1916).

Action by stockholder to enforce lien for money ordered paid by court in setting aside fraudulent conveyance to officers, and for appointment of receiver may be joined. Ponca Mill Co. v. Mikesell, 55 Neb. 98, 75 N.W. 46 (1898).

Actions to recover illegal fees and for statutory penalty were joinable. Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N.W. 855 (1897).

Ejectment and action for rents and profits may be joined. Fletcher v. Brown, 35 Neb. 660, 53 N.W. 577 (1892); Harrall v. Gray, 12 Neb. 543, 11 N.W. 851 (1882).

5. Other actions

Causes of action involving different defendants cannot be joined unless each cause affects all defendants and they have a joint or common liability or interest. Gould v. Orr, 244 Neb. 163, 506 N.W.2d 349 (1993); S.I.D. No. 272 of Douglas County v. Marquardt, 233 Neb. 39, 443 N.W.2d 877 (1989).

Under the provisions of sections 25-701 and 25-702, R.R.S. 1943, the joinder in a single action of the cause against an uninsured motorist with the insurer carrying the uninsured motorist coverage for the claimant is not permissible. Eich v. State Farm Mut. Automobile Ins. Co., 208 Neb. 714, 305 N.W.2d 621 (1981).

If the plaintiff does not choose to unite several causes of action in one petition and the defendant does not successfully require joinder, there is no legal requirement that distinct causes of action be joined in one suit. Suhr v. City of Scribner, 207 Neb. 24, 295 N.W.2d 302 (1980).

Plaintiff cannot join an individual cause of action with a representative cause of action. Niklaus v. Abel Construction Co., 164 Neb. 842, 83 N.W.2d 904 (1957).

Causes of action under the Fair Labor Standards Act may be united in one action. Archer v. Musick, 147 Neb. 1018, 25 N.W.2d 908 (1947).

Cause which might have been joined may be added by amendment. Freeman v. Webb, 21 Neb. 160, 31 N.W. 656 (1887).

Actions against the principal and sureties on separate bonds for a default of the official occurring after the execution of the second bond may be properly joined. Holeran v. School Dist. No. 17, Adams County, 10 Neb. 406, 6 N.W. 472 (1880).

Damages for breach of covenant and for quiet enjoyment of lease may be joined. Herpolsheimer v. Funke, 1 Neb. Unof. 471, 95 N.W. 688 (1901).

25-702 Repealed. Laws 1998, LB 234, § 12.

25-703 Consolidation of actions; motion and notice.

Whenever two or more actions are pending in the same court which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no such cause be shown, the said several actions shall be consolidated.

Source: R.S.1867, Code § 150, p. 416; R.S.1913, § 7659; C.S.1922, § 8603; C.S.1929, § 20-703.

If the plaintiff does not choose to unite several causes of action in one petition and the defendant does not successfully require joinder, there is no legal requirement that distinct causes of action be joined in one suit. Suhr v. City of Scribner, 207 Neb. 24, 295 N.W.2d 302 (1980).

Right of consolidation under this section is dependent upon an application by a defendant. Bruno v. Kramer, 176 Neb. 597, 126 N.W.2d 885 (1964).

Two or more actions pending in the same court which might have been joined, may, upon application, be consolidated. Peters v. Meyer, 131 Neb. 847, 270 N.W. 312 (1936).

Consolidating actions for trial is inherent power of equity court. Butler v. Secrist, 84 Neb. 85, 120 N.W. 1109 (1909).

Where plaintiffs who should have joined bring separate actions, motion to consolidate is proper. Downey v. Coykendall, 81 Neb. 648, 116 N.W. 503 (1908).

Actions must be such as might have been joined. Weeks v. Wheeler, 41 Neb. 200, 59 N.W. 554 (1894).

Plaintiff is not required to join distinct claims in one action but may be required to consolidate actions. Beck v. Devereaux, 9 Neb. 109, 2 N.W. 365 (1879).

Five actions on separate policies and an action to enjoin encumbrances on three more policies may be consolidated. Equitable Life Assur. Soc. v. Wert, 102 F.2d 10 (8th Cir. 1939).

25-704 Consolidation of actions; order.

The order for consolidation may be made by the court or by a judge thereof in vacation.

Source: R.S.1867, Code § 151, p. 417; R.S.1913, § 7660; C.S.1922, § 8604; C.S.1929, § 20-704.

25-705 Joinder; procedures; misjoinder.

(1) This section applies when an action involves multiple parties or more than one cause of action.

(2) A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more of the defendants according to their respective liabilities.

(3) The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party and may order separate trials or make other orders to prevent delay or prejudice.

(4) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with section 25-311 or 25-320.

(5) Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Source: Laws 1998, LB 234, § 4; Laws 1999, LB 43, § 2; Laws 2000, LB 921, § 4.

Pursuant to this section, an order that adjudicates the rights and liabilities of fewer than all the parties will constitute a final, appealable order only if the trial court expressly directs the entry of a final judgment as to the party or parties adjudicated and expressly determines that there is no just reason for delay. Scottsdale Ins. Co. v. City of Lincoln, 260 Neb. 372, 617 N.W.2d 806 (2000).

Where multiple causes of action are alleged, the resolution of one cause of action constitutes a final, appealable order only if the trial court expressly directs the entry of a final judgment on that one issue and expressly determines that there is no just reason for delay. Chief Indus., Inc. v. Great Northern Ins. Co., 259 Neb. 771, 612 N.W.2d 225 (2000).

ARTICLE 8

PLEADINGS

(a) GENERAL PROVISIONS

Section

(b) FRIVOLOUS ACTIONS

(a) GENERAL PROVISIONS

25-801 Repealed. Laws 2002, LB 876, § 92.

25-801.01 Rules of pleading; Supreme Court; promulgate.

(1) By January 1, 2003, the Supreme Court shall have rules of pleading in civil actions promulgated which are not in conflict with the statutes governing such matters.

(2) For all civil actions filed on or after January 1, 2003:

(a) The rules of pleading promulgated by the Supreme Court shall apply;

(b) The plaintiff's initial pleading shall be a petition when that designation is provided elsewhere by statutes. In all other civil actions the plaintiff's initial pleading shall be a complaint;

(c) The cross-petition, cross-bill, and cross-suit are abolished. Demurrers to a pleading and special appearances shall not be used. The plea in bar, plea in abatement, and other dilatory pleas shall not be used in civil actions; and

(d) All pleadings shall be construed as to do substantial justice.

Source: Laws 2002, LB 876, § 1.

25-802 Repealed. Laws 2002, LB 876, § 92.

25-803 Repealed. Laws 2002, LB 876, § 92.

(b) FRIVOLOUS ACTIONS

25-804 Repealed. Laws 2002, LB 876, § 92.

25-805 Repealed. Laws 2002, LB 876, § 92.

25-806 Repealed. Laws 2002, LB 876, § 92.

25-807 Repealed. Laws 2002, LB 876, § 92.

25-808 Repealed. Laws 2002, LB 876, § 92.

25-809 Repealed. Laws 2002, LB 876, § 92.

25-810 Repealed. Laws 2002, LB 876, § 92.

25-811 Repealed. Laws 2002, LB 876, § 92.

25-812 Repealed. Laws 2002, LB 876, § 92.

25-813 Repealed. Laws 2002, LB 876, § 92.

25-814 Repealed. Laws 2002, LB 876, § 92.

25-815 Repealed. Laws 2002, LB 876, § 92.

25-816 Repealed. Laws 2002, LB 876, § 92.

25-817 Repealed. Laws 2002, LB 876, § 92.

25-818 Repealed. Laws 2002, LB 876, § 92.

25-819 Repealed. Laws 2002, LB 876, § 92.

25-820 Repealed. Laws 2002, LB 876, § 92.

25-821 Repealed. Laws 2002, LB 876, § 92.

25-822 Repealed. Laws 2002, LB 876, § 92.

25-823 Repealed. Laws 2002, LB 876, § 92.

25-824 Pleadings; use in other actions; frivolous pleading; effect; effect of signature; frivolous actions; award of attorney's fees and costs.

(1) A pleading shall not be used against a party in any criminal prosecution or action or proceeding for a penalty or forfeiture as proof of a fact admitted or alleged in such pleading. If a pleading is frivolous or made in bad faith, it may be stricken. The signature of a party or of an attorney on a pleading constitutes a certificate by him or her that he or she has read the pleading; that to the best of his or her knowledge, information, and belief there is good ground for the filing of the pleading; and that it is not interposed for delay.

(2) Except as provided in subsections (5) and (6) of this section, in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

(3) When a court determines reasonable attorney's fees or costs should be assessed, it shall allocate the payment of such fees or costs among the offending attorneys and parties as it determines most just and may charge such amount or portion thereof to any offending attorney or party.

(4) The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney's fees and costs.

(5) No attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state or if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that he or she would not prevail on such claim or action.

(6) No party who is appearing without an attorney shall be assessed attorney's fees unless the court finds that the party clearly knew or reasonably should have known that his or her action or defense or any part of such action or defense was frivolous or made in bad faith, except that this subsection shall not apply to any situation in which an attorney licensed to practice law in the state is appearing without an attorney, in which case he or she shall be held to the standards for attorneys prescribed in this section.

Source: R.S.1867, Code § 113, p. 412; R.S.1913, § 7684; Laws 1915, c. 144, § 1, p. 313; C.S.1922, § 8628; C.S.1929, § 20-824; R.S. 1943, § 25-824; Laws 1969, c. 182, § 1, p. 774; Laws 1983, LB 277, § 1; Laws 1987, LB 261, § 1.

1. Verification
2. Frivolous or bad faith pleading
3. Miscellaneous

1. Verification

The failure of a party to sign an answer is waived if not raised before trial. Schaneman v. Wright, 238 Neb. 309, 470 N.W.2d 566 (1991).

Want of verification is not a jurisdictional defect. Northup v. Bathrick, 80 Neb. 36, 113 N.W. 808 (1907).

Verification is not necessary to petition in error. Newlove v. Woodward, 9 Neb. 502, 4 N.W. 237 (1880).

Failure to verify is not ground for dismissal. Fritz v. Barnes, 6 Neb. 435 (1877).

Verification on belief of affiant is sufficient. Harden v. Atchison & N. R. R. Co., 4 Neb. 521 (1876).

Agent or attorney may make verification. Cropsey v. Wiggerhorn, 3 Neb. 108 (1873).

2. Frivolous or bad faith pleading

A frivolous action is one in which a litigant asserts a legal position wholly without merit, that is, without rational argument based on law and evidence to support the litigant's position. Cornett v. City of Omaha Police & Fire Ret. Sys., 266 Neb. 216, 664 N.W.2d 23 (2003).

The term frivolous, as used in subsection (2) of this section, connotes an improper motive or legal position so wholly without merit as to be ridiculous. Cornett v. City of Omaha Police & Fire Ret. Sys., 266 Neb. 216, 664 N.W.2d 23 (2003).

The term ''frivolous'' as used in subsection (2) of this section connotes an improper motive or legal position so wholly without merit as to be ridiculous. Peter v. Peter, 262 Neb. 1017, 637 N.W.2d 865 (2002).

''Frivolous'' means an attempt to relitigate the same issues resolved in prior proceedings with the same parties or a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position. Cox v. Civil Serv. Comm. of Douglas Cty., 259 Neb. 1013, 614 N.W.2d 273 (2000).

Although appellant's burden of proof on appeal was difficult, the appeal was not considered frivolous, and therefore, there was no basis for an award of attorney fees pursuant to this section because appellant did not attempt to relitigate the same issues resolved in prior proceedings with the same parties and appellant's argument was not wholly without merit. Schuelke v. Wilson, 255 Neb. 726, 587 N.W.2d 369 (1998).

A party forced to defend a frivolous action may recover his or her attorney fees; a frivolous action is one in which a litigant asserts a legal position wholly without merit, that is, without rational argument based on law and evidence. Zimmerman v. FirsTier Bank, 255 Neb. 410, 585 N.W.2d 445 (1998).

For the purposes of subsection (2) of this section, ''frivolousness'' is defined as being ''a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position''. Foiles v. Midwest Street Rod Assn. of Omaha, Inc., 254 Neb. 552, 578 N.W.2d 418 (1998).

Pursuant to subsection (2) of this section, in determining sanctions, the court uses its discretion in determining the appropriate cost or fee permitted by this section. Malicky v. Heyen, 251 Neb. 891, 560 N.W.2d 773 (1997).

As used in subsection (2) of this section, ''frivolous'' means a legal position wholly without merit, that is, without rational argument based on law and evidence to support litigant's position in the lawsuit. Surratt v. Watts Trucking, 249 Neb. 35, 541 N.W.2d 41 (1995).

For the purpose of this section, ''frivolous'' is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. First Nat. Bank in Morrill v. Union Ins. Co., 246 Neb. 636, 522 N.W.2d 168 (1994).

As used in subsection (2) of this section concerning allowance of an attorney fee, ''frivolous'' means a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. Nebraska Pub. Emp. v. City of Omaha, 244 Neb. 328, 506 N.W.2d 686 (1993).

A legal position is frivolous if the position is wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. Sports Courts of Omaha v. Meginnis, 242 Neb. 768, 497 N.W.2d 38 (1993).

Under subsection (2) of this section, the Supreme Court applies an abuse-of-discretion standard to district court decisions concerning the imposition of sanctions for frivolous lawsuits. Millard v. Hyplains Dressed Beef, 237 Neb. 907, 468 N.W.2d 124 (1991).

The term ''frivolous,'' as used in subsection (2) of this section, connotes an improper motive or a legal position so wholly without merit as to be ridiculous. Behrens v. American Stores Packing Co., 236 Neb. 279, 460 N.W.2d 671 (1990).

The attorney fees generated in defending against a frivolous appeal are authorized under subsection (2) of this section regardless of the fact that the fees were not requested or ordered in the trial court. First Nat. Bank v. Chadron Energy Corp., 236 Neb. 199, 459 N.W.2d 736 (1990).

The term ''frivolous,'' as used in this section, connotes an improper motive or legal position wholly without merit. Peterson v. Don Peterson & Assoc. Ins. Agency, 234 Neb. 651, 452 N.W.2d 517 (1990).

A city's defense to a hospital's action to recover for services was frivolous where the hospital sought to recover for services rendered to indigent prisoners and the Nebraska Supreme Court had held that the city was liable in an earlier suit. Lutheran Medical Center v. City of Omaha, 229 Neb. 802, 429 N.W.2d 347 (1988).

All doubts as to whether an action is frivolous should be resolved in favor of the petitioner. Sanctions should not be imposed except in the clearest cases. Shanks v. Johnson Abstract & Title, 225 Neb. 649, 407 N.W.2d 743 (1987).

This section is authority for granting fees to a party defendant when the party initiating the court proceeding does so vexatiously. Stratman v. Hagen, 221 Neb. 157, 376 N.W.2d 3 (1985).

But for the fact that the amendment to this section permitting the assessment of reasonable expenses, including attorney fees, to attorneys is new, a portion of the attorney fee awarded to the defendants would have been taxed to the plaintiffs' attorneys. Graham v. Waggener, 219 Neb. 907, 367 N.W.2d 707 (1985).

The trial court did not abuse its discretion in denying attorney fees under subsection (2) of this section even though the plaintiff's suit was wrongly commenced, because the suit was not frivolous. Pipe and Piling Supplies (U.S.A.) Ltd. v. Betterman & Katelman, 8 Neb. App. 475, 596 N.W.2d 24 (1999).

The term ''frivolous'', as used in subsection (2) of this section, means a legal position wholly without merit, that is, without a rational argument based on law and evidence to support the litigant's position in the lawsuit. Janet K. v. Kevin B., 5 Neb. App. 169, 556 N.W.2d 270 (1996).

3. Miscellaneous

A motion for attorney fees pursuant to this section must be made prior to the judgment of the court in which the attorney's services were rendered. When a motion for attorney fees is made prior to judgment, the judgment will not become final and appealable until the court has ruled upon the motion. Salkin v. Jacobsen, 263 Neb. 521, 641 N.W.2d 356 (2002).

In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. Peter v. Peter, 262 Neb. 1017, 637 N.W.2d 865 (2002).

An award of fees under this section may be taxed against an offending attorney. Cedars Corp. v. Sun Valley Dev. Co., 253 Neb. 999, 573 N.W.2d 467 (1998).

On appeal, a trial court's decision allowing or disallowing an attorney fee will be upheld in the absence of the trial court's abuse of discretion. Lincoln Lumber Co. v. Fowler, 248 Neb. 221, 533 N.W.2d 898 (1995).

On appeal, a trial court's decision allowing or disallowing attorney fees will be upheld in the absence of the trial court's abuse of discretion. Sports Courts of Omaha v. Meginnis, 242 Neb. 768, 497 N.W.2d 38 (1993).

Under code, an answer, except so far as statements therein may involve admissions against interest, has been wholly deprived of the characteristics of evidence. Marshall v. Rowe, 126 Neb. 817, 254 N.W. 480 (1934).

On appeal, a trial court's decision allowing or disallowing attorney fees will be upheld in the absence of the trial court's abuse of discretion. Janet K. v. Kevin B., 5 Neb. App. 169, 556 N.W.2d 270 (1996).

25-824.01 Frivolous actions; attorney's fees; costs; determination of amount.

In determining the amount of a cost or an attorney's fee award pursuant to subsection (2) of section 25-824, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall, in determining whether to assess attorney's fees and costs and the amount to be assessed against offending attorneys and parties, consider the following factors, including, but not limited to: (1) The extent to which any effort was made to determine the validity of any action or claim before the action was asserted; (2) the extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses that have been found not to be valid; (3) the availability of facts to assist the party to determine the

validity of a claim or defense; (4) the relative financial position of the parties involved; (5) whether or not the action was prosecuted or defended in whole or in part in bad faith; (6) whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict; (7) the extent to which the party prevailed with respect to the amount of and number of claims in controversy; (8) the amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court; (9) the extent to which a reasonable effort was made to determine prior to the time of filing of a claim that all parties sued or joined were proper parties owing a legally defined duty to the plaintiff or defendant; and (10) the extent of any effort made after the commencement of an action to reduce the number of parties in the action.

Source: Laws 1987, LB 261, § 2.

25-824.02 Frivolous actions; actual attorney's fee; effect of award; stipulations authorized.

Nothing in sections 25-824 to 25-824.03 shall be construed to prevent an attorney and his or her client from negotiating the actual fee which the client is to pay the attorney. Nothing in such sections shall be intended to limit the authority of the court to approve written stipulations filed with the court or oral stipulations in open court agreeing to no award of attorney's fees or costs or an award of attorney's fees or costs in a manner different than that provided in such sections.

Source: Laws 1987, LB 261, § 3.

25-824.03 Frivolous actions; applicability of sections.

Sections 25-824 to 25-824.03 shall apply unless attorney's fees are otherwise specifically provided by law, in which case the provision allowing the greater award shall prevail.

Source: Laws 1987, LB 261, § 4.

25-825 Repealed. Laws 1969, c. 182, § 2.

25-826 Repealed. Laws 1969, c. 182, § 2.

25-827 Repealed. Laws 1969, c. 182, § 2.

25-828 Repealed. Laws 1969, c. 182, § 2.

25-829 Repealed. Laws 1969, c. 182, § 2.

25-830 Repealed. Laws 1969, c. 182, § 2.

25-831 Repealed. Laws 1969, c. 182, § 2.

25-832 Repealed. Laws 2002, LB 876, § 92.

25-833 Repealed. Laws 2002, LB 876, § 92.

25-834 Repealed. Laws 2002, LB 876, § 92.

25-835 Repealed. Laws 2002, LB 876, § 92.

25-836 Repealed. Laws 2002, LB 876, § 92.

25-837 Repealed. Laws 2002, LB 876, § 92.

25-838 Repealed. Laws 2002, LB 876, § 92.

(c) DEFAMATORY STATEMENTS

25-839 Libel or slander; how sufficiently pleaded; burden of proof.

In an action for a libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him.

Source: R.S.1867, Code § 131, p. 414; R.S.1913, § 7699; C.S.1922, § 8643; C.S.1929, § 20-839.

In an action for a libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation is denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him. White v. Ardan, Inc., 230 Neb. 11, 430 N.W.2d 27 (1988).

Words to be slanderous per se must not only charge an offense which is actionable, but also the nature thereof. Nelson v. Rosenberg, 135 Neb. 34, 280 N.W. 229 (1938).

Writing libelous per se defined. Bigley v. National Fid. & Casualty Co., 94 Neb. 813, 144 N.W. 810 (1913).

Where publication is not libelous per se, special damages must be pleaded. Callfas v. World Pub. Co., 93 Neb. 108, 139 N.W. 830 (1913).

It is not necessary in action for slander to allege the name of the person to whom the words were spoken. Fitzgerald v. Young, 89 Neb. 693, 132 N.W. 127 (1911).

This section abrogates common law rule requiring facts and circumstances to be stated, connecting plaintiff with publication. Sheibley v. Huse, 75 Neb. 811, 106 N.W. 1028 (1906).

Words imputing indictable offense are actionable per se. Herzog v. Campbell, 47 Neb. 370, 66 N.W. 424 (1896).

Words should be given their natural and ordinary meaning. World Pub. Co. v. Mullen, 43 Neb. 126, 61 N.W. 108 (1894).

Words, which in effect charge embezzlement, are libelous per se and special damage need not be alleged. Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N.W. 358 (1894).

25-840 Libel or slander; truth as defense; effect of actual malice.

In the actions mentioned in section 25-839, the defendant may allege the truth of the matter charged as defamatory, prove the same and any mitigating circumstances to reduce the amount of damages, or prove either. The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.

Source: R.S.1867, Code § 132, p. 414; R.S.1913, § 7700; C.S.1922, § 8644; C.S.1929, § 20-840; R.S.1943, § 25-840; Laws 1957, c. 83, § 1, p. 329.

In an action for libel or slander, a defendant may allege the truth of the matter charged as defamatory. The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication. White v. Ardan, Inc., 230 Neb. 11, 430 N.W.2d 27 (1988).

As a general rule, in a case of alleged libel or slander, truth is a complete defense absent proof of actual malice. Turner v. Welliver, 226 Neb. 275, 411 N.W.2d 298 (1987).

For failure to allege, as ordered by the court, whether or not publication was malicious and whether defendant gave notice and requested correction, the petition was properly dismissed. Vodehnal v. Grand Island Daily Independent, 191 Neb. 836, 218 N.W.2d 220 (1974).

Plaintiff has burden of proving actual malice. Whitcomb v. Nebraska State Education Assn., 184 Neb. 31, 165 N.W.2d 99 (1969).

Defendant cannot prove truth of defamatory charge under general denial. Murten v. Garbe, 93 Neb. 589, 141 N.W. 146 (1913).

In action for libel, truth is not complete defense; good motives, etc., are necessary. Sheibley v. Fales, 81 Neb. 795, 116 N.W. 1035 (1908); Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N.W. 358 (1894).

Insofar as slander is concerned, truth is complete defense. Larson v. Cox, 68 Neb. 44, 93 N.W. 1011 (1903).

25-840.01 Libel; invasion of privacy; damages; retraction; effect.

(1) In an action for damages for the publication of a libel or for invasion of privacy as provided by section 20-204 by any medium, the plaintiff shall recover no more than special damages unless correction was requested as

herein provided and was not published. Within twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice by certified or registered mail specifying the statements claimed to be libelous or to have invaded privacy as provided by section 20-204 and specifically requesting correction. Publication of a correction shall be made within three weeks after receipt of the request. It shall be made in substantially as conspicuous a manner as the original publication about which complaint was made. A correction, published prior to receipt of a request therefor, shall have the same force and effect as if published after such request. The term special damages, as used in this section, shall include only such damages as plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication.

(2) This section shall not apply if it is alleged and proved that the publication was prompted by actual malice, and actual malice shall not be inferred or presumed from the publication.

Source: Laws 1957, c. 83, § 2, p. 329; Laws 1979, LB 394, § 12; Laws 1987, LB 93, § 8.

For failure to allege, as ordered by the court, whether or not publication was malicious and whether defendant gave notice and requested correction, the petition was properly dismissed. Vodehnal v. Grand Island Daily Independent, 191 Neb. 836, 218 N.W.2d 220 (1974).

Where no attempt to comply with this section made, assumption is that cause of action predicated on actual malice. Whitcomb v. Nebraska State Education Assn., 184 Neb. 31, 165 N.W.2d 99 (1969).

25-840.02 Broadcasting stations; liability.

(1) The owner, licensee, or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee, or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, by any person other than such owner, licensee, or operator, or an agent or employee thereof, unless it is alleged and proved by the complaining party that such owner, licensee, or operator, or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

(2) In no event shall any owner, licensee, or operator, or an agent or employee thereof, be held liable for any damages for any defamatory statement uttered over the facilities of the visual or sound radio broadcasting station or network by any person other than such owner, licensee, or operator, or an agent or employee thereof, by, on behalf of, or against any candidate for public office.

(3) In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as such party has alleged and proved.

Source: Laws 1949, c. 316, § 1, p. 1037; R.S.1943, (1999), § 86-601; Laws 2002, LB 1105, § 420.

Cross References

Limitation on cause of action, see section 20-209.

25-841 Repealed. Laws 2002, LB 876, § 92.

25-842 Repealed. Laws 2002, LB 876, § 92.

25-843 Repealed. Laws 2002, LB 876, § 92.

25-844 Repealed. Laws 2002, LB 876, § 92.

25-845 Repealed. Laws 2002, LB 876, § 92.

25-846 Repealed. Laws 2002, LB 876, § 92.

25-847 Repealed. Laws 2002, LB 876, § 92.

25-848 Repealed. Laws 2002, LB 876, § 92.

25-849 Repealed. Laws 2002, LB 876, § 92.

25-850 Repealed. Laws 2002, LB 876, § 92.

25-851 Repealed. Laws 2002, LB 876, § 92.

25-852 Repealed. Laws 2002, LB 876, § 92.

25-853 Repealed. Laws 2002, LB 876, § 92.

25-854 Repealed. Laws 2002, LB 876, § 92.

25-855 Repealed. Laws 2002, LB 876, § 92.

25-856 Repealed. Laws 2002, LB 876, § 92.

ARTICLE 9
MISCELLANEOUS PROCEEDINGS; MOTIONS AND ORDERS

(a) OFFER TO COMPROMISE

Section

(b) SUBMITTING CONTROVERSY WITHOUT ACTION

(c) OFFER TO CONFESS JUDGMENT

(d) MOTIONS AND ORDERS

(a) OFFER TO COMPROMISE

25-901 Offer of judgment before trial; procedure; effect.

The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to

allow judgment to be taken against him for the sum specified therein. If the plaintiff accepts the offer and gives notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer verified by affidavit; and, in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited the offer shall be deemed withdrawn, and shall not be given in evidence, or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's cost from the time of the offer.

Source: R.S.1867, Code § 565, p. 493; R.S.1913, § 7717; C.S.1922, § 8661; C.S.1929, § 20-901.

An offer to confess judgment, and its acceptance pursuant to section 25-901, require the entry of a judgment according to the offer and acceptance. Jaixen v. Turner, 204 Neb. 123, 281 N.W.2d 404 (1979).

Settlement agreement at former trial did not establish liability and as it constituted a question of fact was not binding as law of case in subsequent trial on the merits. System Meat Co. v. Stewart, 190 Neb. 682, 211 N.W.2d 902 (1973).

Tender by insurance company of a sum of money, accompanied by demand for execution of receipt and formal release and return of policy, was not absolute and unconditional. Baird v. Union Mutual Life Ins. Co., 104 Neb. 352, 177 N.W. 156 (1920).

Negotiations for settlement between litigants cannot be disclosed to jury. Tankersley v. Lincoln Traction Co., 101 Neb. 578, 163 N.W. 850 (1917).

If notice of acceptance is not given within five days, offer may be withdrawn; judgment on later acceptance vacated. Becker v. Breen, 68 Neb. 379, 94 N.W. 614 (1903).

Plaintiff should be taxed with all costs from time of offer. Wachsmuth v. Orient Ins. Co., 49 Neb. 590, 68 N.W. 935 (1896).

Offer must be made in open court or served on plaintiff though filed. Rose v. Peck, 18 Neb. 529, 26 N.W. 363 (1886).

Section is not applicable to proceedings in ad quod damnum. Johnson v. Sutliff, 17 Neb. 423, 23 N.W. 9 (1885).

25-902 Offer of judgment; no cause for continuance or postponement.

The making of an offer pursuant to the provisions contained in section 25-901 shall not be a cause for a continuance of an action, or a postponement of a trial.

Source: R.S.1867, Code § 566, p. 493; R.S.1913, § 7718; C.S.1922, § 8662; C.S.1929, § 20-902.

(b) SUBMITTING CONTROVERSY WITHOUT ACTION

25-903 Submitting controversy without action; procedure.

Parties to a question which might be the subject of a civil action may without action agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall, thereupon, hear and determine the case, and render judgment as if an action were pending.

Source: R.S.1867, Code § 567, p. 493; R.S.1913, § 7719; C.S.1922, § 8663; C.S.1929, § 20-903.

Cross References

For declaratory judgments, see sections 25-21,149 to 25-21,164.

If interests are adverse, case is not moot, though it is friendly suit. State v. First Catholic Church of Lincoln, 88 Neb. 2, 128 N.W. 657 (1910).

It is the duty of Supreme Court to act when controversy is submitted under this section. In re Groff, 21 Neb. 647, 33 N.W. 426 (1887).

25-904 Record; what constitutes.

The case, the submission and the judgment shall constitute the record.

Source: R.S.1867, Code § 568, p. 494; R.S.1913, § 7720; C.S.1922, § 8664; C.S.1929, § 20-904.

25-905 Judgment; effect.

The judgment shall be with costs, may be enforced, and shall be subject to reversal, in the same manner as if it had been rendered in an action, unless otherwise provided in the submission.

Source: R.S.1867, Code § 569, p. 494; R.S.1913, § 7721; C.S.1922, § 8665; C.S.1929, § 20-905.

(c) OFFER TO CONFESS JUDGMENT

25-906 Confession of judgment after action brought; effect.

After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff, being present, refuses to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence upon the trial.

Source: R.S.1867, Code § 570, p. 494; R.S.1913, § 7722; C.S.1922, § 8666; C.S.1929, § 20-906.

In order that a confession of judgment may be binding on the plaintiff, it is essential that he, either expressly or impliedly, assent thereto; if it is made without his request, knowledge, or consent, and entered at the instance of the debtor alone, it will have no validity unless the creditor ratifies or accepts it. In re Estate of Redpath, 224 Neb. 845, 402 N.W.2d 648 (1987).

No compliance was had with requirements for confession of judgment. James v. Hogan, 154 Neb. 306, 47 N.W.2d 847 (1951).

An offer to confess judgment, incorporated in an answer, should not be referred to in the instructions. Hammang v. Chicago & N.W. Ry. Co., 107 Neb. 684, 186 N.W. 991 (1922).

Offer must be made in open court or served on plaintiff though filed. Rose v. Peck, 18 Neb. 529, 26 N.W. 363 (1886).

This section is not applicable to proceedings in ad quod damnum. Johnson v. Sutliff, 17 Neb. 423, 23 N.W. 9 (1885).

25-907 Confession of judgment before action brought; effect.

Before an action for the recovery of money is brought against any person, he may go into the court of the county of his residence, or of that in which the person having the cause of action resides, which would have jurisdiction of the action, and offer to confess judgment in favor of such person for a specified sum on such cause of action. Whereupon, if such person, having had such notice that the offer would be made, of its amount and of the time and place of making it, as the court shall deem reasonable, does not attend to accept the confession, or attending, refuses to accept it, and should afterward commence an action upon such cause, and not recover more than the amount so offered to be confessed, he shall pay all the costs of the action; and on the trial thereof, the offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence.

Source: R.S.1867, Code § 571, p. 494; R.S.1913, § 7723; C.S.1922, § 8667; C.S.1929, § 20-907.

(d) MOTIONS AND ORDERS

25-908 Motion, defined.

A motion is an application for an order addressed to the court or a judge in vacation, by any party to a suit or proceeding, or one interested therein.

Source: R.S.1867, Code § 572, p. 495; R.S.1913, § 7724; C.S.1922, § 8668; C.S.1929, § 20-908.

Application or motion to set aside order vacating decree of divorce, and to reinstate decree, was after the term and required notice. Carmony v. Carmony, 112 Neb. 651, 200 N.W. 830 (1924).

Application for deficiency judgment may be made by motion. Crary v. Buck, 1 Neb. Unof. 596, 95 N.W. 839 (1901).

25-909 Motion; several objects authorized.

Several objects may be included in the same motion, if they all grow out of or are connected with the action or proceeding in which it is made.

Source: R.S.1867, Code § 573, p. 495; R.S.1913, § 7725; C.S.1922, § 8669; C.S.1929, § 20-909.

Cross References

Motion for a directed verdict, see sections 25-1315.01 to 25-1315.03.
Motion for new trial, see section 25-1315.02 et seq.

25-910 Notice of motion; contents.

Where notice of a motion is required, it must be in writing and shall state (1) the names of the parties to the action or proceeding in which it is to be made, (2) the name of the court or judge before whom it is to be made, (3) the place where and the day on which it will be heard, (4) the nature and terms of the order or orders to be applied for, and (5) if affidavits are to be used on the hearing, the notice shall state that fact. It shall be served a reasonable time before the hearing.

Source: R.S.1867, Code § 574, p. 495; R.S.1913, § 7726; C.S.1922, § 8670; C.S.1929, § 20-910.

Orders for alimony may be modified for good cause shown but nunc pro tunc decree entered without notice is a nullity. Howard v. Howard, 196 Neb. 351, 242 N.W.2d 884 (1976).

Application or motion to set aside order vacating decree of divorce, and to reinstate decree, was after the term and required notice. Carmony v. Carmony, 112 Neb. 651, 200 N.W. 830 (1924).

Notice not under seal of court is process in nature of summons. Fowler v. Brown, 51 Neb. 414, 71 N.W. 54 (1897).

What is reasonable notice stated. Sterling Mfg. Co. v. Hough, 49 Neb. 618, 68 N.W. 1019 (1896).

25-911 Repealed. Laws 1961, c. 284, § 1.

25-912 Repealed. Laws 1961, c. 284, § 1.

25-913 Motion to strike pleadings and papers from files; notice, when.

Motions to strike pleadings and papers from the files may be made with or without notice, as the court or judge shall direct.

Source: R.S.1867, Code § 577, p. 495; R.S.1913, § 7729; C.S.1922, § 8673; C.S.1929, § 20-913.

Motions to strike filed under this section are aimed at petitions filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed. Motions to strike under this section may also be filed when a party declines to amend the petition or refuses to follow the court's orders. Nuss ex rel. Estate of Nuss v. Alexander, 257 Neb. 36, 595 N.W.2d 263 (1999).

A motion to strike a petition is not a substitute for a demurrer or a motion to strike or make more definite and certain, and may be directed only to a petition filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed. Hecker v. Ravenna Bank, 237 Neb. 810, 468 N.W.2d 88 (1991).

Petition may be stricken on motion if fatal defects extend to the pleading as a whole, or if the plaintiff, in filing it, ignored an order of court. Ferson v. Armour & Co., 109 Neb. 648, 192 N.W. 125 (1923).

This section, as construed by the Supreme Court of Nebraska, applies in actions at law in federal courts, and petition failing to

state cause of action may be stricken on motion. Jack v. Armour & Co., 291 F. 741 (8th Cir. 1923).

25-914 Order, defined.

Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.

Source: R.S.1867, Code § 578, p. 495; R.S.1913, § 7730; C.S.1922, § 8674; C.S.1929, § 20-914.

25-915 Orders out of court; journal entry.

Orders made out of court shall be forthwith entered by the clerk in the journal of the court in the same manner as orders made in term.

Source: R.S.1867, Code § 579, p. 495; R.S.1913, § 7731; C.S.1922, § 8675; C.S.1929, § 20-915.

ARTICLE 10

PROVISIONAL REMEDIES

(a) ATTACHMENT AND GARNISHMENT

Section
25-1001. Attachment; grounds.
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(a) ATTACHMENT AND GARNISHMENT

25-1001 Attachment; grounds.

The plaintiff, in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant when the defendant or one of several defendants (1) has absconded with the intent to defraud his or her creditors; (2) has left the county of his or her residence to avoid the service of a summons; (3) so conceals himself or herself that a summons cannot be served upon him or her; (4) is about to remove his or her property, or a part thereof, out of the county in which the property is located, with the intent to defraud his or her creditors; (5) is about to convert his or her property, or a part thereof, into money, for the purpose of placing it beyond the reach of his or her creditors; (6) has property, or rights, in action, which he or she conceals; (7) has assigned, removed or disposed of, or is about to dispose of his or her property, or a part thereof, with the intent to defraud his or her creditors; or (8) fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought. The grounds for attachment on a claim before it is due are set forth in section 25-1049.

Source: R.S.1867, Code § 198, p. 424; Laws 1911, c. 168, § 1, p. 544; R.S.1913, § 7732; Laws 1915, c. 145, § 1, p. 314; C.S.1922, § 8676; C.S.1929, § 20-1001; R.S.1943, § 25-1001; Laws 1980, LB 597, § 1.

1. Nonresident
2. Absconded
3. Removal of property
4. Fraudulent conveyance
5. Other grounds
6. Commencement of action

1. Nonresident

Property of nonresident may be attached at or after commencement of suit. Federal Farm Mortgage Corp. v. Hughes, 137 Neb. 454, 289 N.W. 866 (1940).

Actual residence and not domicile determines status of debtor. Webb v. Wheeler, 79 Neb. 172, 112 N.W. 369 (1907).

A nonresident defendant cannot attack the jurisdiction of the court upon the sole ground that he is not the owner of the property seized under the writ. Kneeland v. Weigley, 76 Neb. 276, 107 N.W. 574 (1906).

One absent from state on business or pleasure is not nonresident, residence question of fact. Johnson v. May, 49 Neb. 601, 68 N.W. 1032 (1896).

Husband becoming resident here, wife is not nonresident though she remains in former state. Swaney v. Hutchins, 13 Neb. 266, 13 N.W. 282 (1882).

One actually residing here is not nonresident, though permanent legal domicile is elsewhere. Olmstead v. Rivers, 9 Neb. 234, 2 N.W. 366 (1879).

2. Absconded

''Abscond'' means to hide, conceal or absent oneself clandestinely to avoid process; not necessary to leave state. Gandy v. Jolly, Swan, Dew & Hardin, 34 Neb. 536, 52 N.W. 376 (1892).

3. Removal of property

Even though property is removed from state, fraudulent intent is essential. Hunter v. Soward, 15 Neb. 215, 18 N.W. 58 (1883).

Removal is immaterial unless coupled with intent to defraud. Steele v. Dodd, 14 Neb. 496, 16 N.W. 909 (1883).

4. Fraudulent conveyance

Creditors may attach property fraudulently conveyed, whether debtor is resident or nonresident. Ainsworth v. Roubal, 74 Neb. 723, 105 N.W. 248 (1905).

Real estate fraudulently conveyed may be attached though record title is in another. Coulson v. Galtsman, 1 Neb. Unof. 502, 96 N.W. 349 (1901).

5. Other grounds

While the U.S. Supreme Court in Connecticut v. Doehr, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991), stated that any given exigency requirement alone would not necessarily protect a statutory attachment scheme from due process challenges, we find that this requirement in our statutes, in conjunction with the bond, affidavit, and discharge hearing provisions, does comply with due process under the 14th Amendment to the U.S. Constitution. Andrews v. Schram, 252 Neb. 298, 562 N.W.2d 50 (1997).

Grounds for attachment and garnishment are set out in this section. Insurance Co. of North America v. Maxim's of Nebraska, 178 Neb. 274, 132 N.W.2d 885 (1965).

Statutory provisions relating to garnishment before judgment have no application to registration and enforcement of foreign judgment. Sullivan v. Sullivan, 168 Neb. 850, 97 N.W.2d 348 (1959).

Action for damages for breach of brokerage contract authorized attachment. National Reefer Service, Inc. v. Felman, 164 Neb. 783, 83 N.W.2d 547 (1957).

Mere insolvency of a debtor is not a ground for attachment. Federal Farm Mtg. Corp. v. Mulder, 135 Neb. 133, 280 N.W. 454 (1938).

In absence of fraud or collusion, no garnishable debt arises from contract for personal services paid for in advance. Salyers Auto Co. v. De Vore, 116 Neb. 317, 217 N.W. 94 (1927).

Affidavit is sufficient that sets forth nature of claim, that it is just, the amount plaintiff ought to recover, and existence of statutory grounds for attachment. McDonald v. Marquardt, 52 Neb. 820, 73 N.W. 288 (1897).

Property of insolvent bank before receiver appointed is not exempt from attachment. Arnold v. Weimer, 40 Neb. 216, 58 N.W. 709 (1894).

Action on breach of warranty in deed is for a debt, which may be recovered by attachment. Cheney v. Straube, 35 Neb. 521, 53 N.W. 479 (1892).

Attachment may lie on bond for attachment, though damages are unliquidated. Withers & Kolls v. Brittain, Smith & Co., 35 Neb. 436, 53 N.W. 375 (1892).

Preference of bona fide creditors is not ground for attachment. Britton v. Boyer, 27 Neb. 522, 43 N.W. 356 (1889).

An order of attachment covering a cause of action upon a debt not fraudulently contracted coupled with a cause of action upon a debt fraudulently contracted issued on affidavit alleging fraudulently contracted debt is subject to proper discharge. Meyer v. Evans, 27 Neb. 367, 43 N.W. 109 (1889).

Debt is not fraudulently contracted where damage is due merely to negligence in performing services. Rawlings v. Powers, 25 Neb. 681, 41 N.W. 651 (1889).

Action upon contract express or implied will sustain attachment. Hart v. Barnes, 24 Neb. 782, 40 N.W. 322 (1888).

At least one of causes enumerated must exist; insolvency is insufficient. Walker v. Hagerty, 20 Neb. 482, 30 N.W. 556 (1886).

Debt incurred by false representations is ground for attachment. Young & Co. v. Cooper, 12 Neb. 610, 12 N.W. 91 (1882).

Writ of attachment held unconstitutional because issued on conclusive affidavit, without bond, and without judicial supervision. Aaron Ferer & Sons Co. v. Berman, 431 F.Supp. 847 (D. Neb. 1977).

6. Commencement of action

Neither county judge nor Supreme Court Judges can allow attachment in action pending in district court when district judge is present in county. Ferson v. Armour & Co., 103 Neb. 809, 174 N.W. 425 (1919).

Provision requiring plaintiff in action on claim other than contract to be bona fide resident for six months does not violate federal Constitution. Tanner v. DeVinney, 101 Neb. 46, 161 N.W. 1052 (1917).

Action is deemed commenced, so attachment writ may issue, when petition filed and summons issued with intent to serve same. Johnson v. Larson, 96 Neb. 193, 147 N.W. 476 (1914); Hoagland v. Wilcox, 42 Neb. 138, 60 N.W. 376 (1894); Coffman v. Brandhoeffer, 33 Neb. 279, 50 N.W. 6 (1891).

Attachment is not allowed in proceeding to revive judgment. Farak v. First Nat. Bank of Schuyler, 67 Neb. 463, 93 N.W. 682 (1903).

Affidavit can be filed simultaneously with bringing of suit. McCord, Brady & Co. v. Bowen, 51 Neb. 247, 70 N.W. 950 (1897).

Order of attachment can properly issue before summons is served. Coffman v. Brandhoeffer, 33 Neb. 279, 50 N.W. 6 (1891).

Attachment is a provisional remedy. Shoaff v. Gage, 163 F.Supp. 179 (D. Neb. 1958).

25-1002 Attachment; affidavit of plaintiff; contents.

An order of attachment shall be approved by a judge of any district court or county court only after there has been presented to him or her an affidavit or affidavits based upon personal knowledge (1) that the facts set forth in plaintiff's complaint which state a valid cause of action and the amount plaintiff is entitled to recover are true, (2) describing the existence and approximate value of any of defendant's property known to the plaintiff to be subject to the jurisdiction of the court, and (3) stating specific facts demonstrating reasonable cause that one or more of the grounds for an attachment enumerated in section 25-1001 exist.

Source: R.S.1867, Code § 199, p. 425; Laws 1911, c. 168, § 2, p. 545; R.S.1913, § 7733; C.S.1922, § 8677; C.S.1929, § 20-1002; R.S. 1943, § 25-1002; Laws 1980, LB 597, § 2; Laws 1984, LB 13, § 36; Laws 1991, LB 732, § 42; Laws 2002, LB 876, § 19.

1. By whom made
2. Nature of claim
3. Miscellaneous

1. By whom made

In affidavit for garnishment affiant should swear to the fact that he is plaintiff, agent or attorney. Crawford State Bank v. Murphy, 142 Neb. 795, 7 N.W.2d 762 (1943).

Affidavit taken before plaintiff's attorney is bad, but is amendable. Dobry v. Western Mfg. Co., 57 Neb. 228, 77 N.W. 656 (1898).

Affidavit must distinctly show it was made by natural person. Clements & Co. v. Puckett, 1 Neb. Unof. 356, 95 N.W. 796 (1901).

2. Nature of claim

Where attachment is issued for total claimed in five counts, and one count is dismissed, attachment should be dissolved. First Nat. Bank of Greenwood v. Van Doren, 68 Neb. 142, 93 N.W. 1017 (1903).

Slight variance in amounts claimed in petition and affidavit is immaterial. Grotte v. Nagle, 50 Neb. 363, 69 N.W. 973 (1897).

Affidavit in language of statute is sufficient. Burnham v. Ramge, 47 Neb. 175, 66 N.W. 277 (1896).

Where several grounds are joined, should be alleged in conjunctive. Tessier v. Englehart & Co., 18 Neb. 167, 24 N.W. 734 (1885).

Affidavit need not state cause of action; condensed statement of nature of claim is sufficient. Dorrington v. Minnick, 15 Neb. 397, 19 N.W. 456 (1884).

Affidavit upon a promissory note described in petition was sufficient. Livingston v. Coe, 4 Neb. 379 (1876).

Mere statement that defendant is nonresident of this state is sufficient. Citizens State Bank of Wood River v. Porter, 4 Neb. Unof. 73, 93 N.W. 391 (1903).

3. Miscellaneous

Affidavit of attachment is required in garnishment proceedings. Insurance Co. of North America v. Maxim's of Nebraska, 178 Neb. 274, 132 N.W.2d 885 (1965).

Burden rests upon plaintiff to sustain requirements of statute. National Reefer Service, Inc. v. Felman, 164 Neb. 783, 83 N.W.2d 547 (1957).

Amendable even after motion to quash. Clarke Banking Co. v. Wright, 37 Neb. 382, 55 N.W. 1060 (1893).

Attachment may be obtained pending appeal. Strickler v. Hargis, 34 Neb. 468, 51 N.W. 1039 (1892).

Plaintiff may supply defects in affidavit for publication of service. Miller v. Eastman, 27 Neb. 408, 43 N.W. 179 (1889).

One affidavit is sufficient to cover successive orders of attachment. Thompson v. Stetson, 15 Neb. 112, 17 N.W. 368 (1883).

Omission of venue cannot be attacked in collateral action. Crowell v. Johnson, 2 Neb. 146 (1873).

25-1003 Attachment; plaintiff's undertaking; bond; amount.

(1) The judge to whom the affidavit described in section 25-1002 is presented shall determine the amount of an undertaking the plaintiff shall be required to file. The judge shall also approve the sufficiency of one or more sureties of the plaintiff, unless the plaintiff presents, by affidavit or otherwise, specific facts demonstrating that no sureties are necessary to protect the defendant from loss.

(2) In determining the amount of the bond described in subsection (1) of this section, the judge shall be guided by the amount of probable damage that will be suffered by the defendant if his or her property is wrongfully attached. In estimating the probable damage the defendant would suffer, the judge shall consider all the circumstances presented to him or her in the plaintiff's affidavits, including the value of any of the defendant's property described therein.

(3) After determining the amount of the plaintiff's undertaking, along with necessary sureties, the judge shall, if an order of attachment is otherwise proper under section 25-1002, direct the clerk to issue, after the necessary bond is filed, an order of attachment in an amount determined by the judge to approximate the amount of the claim and the costs of the action including the costs of the attachment.

Source: R.S.1867, Code § 200, p. 425; Laws 1911, c. 168, § 3, p. 545; R.S.1913, § 7734; C.S.1922, § 8678; C.S.1929, § 20-1003; R.S. 1943, § 25-1003; Laws 1969, c. 183, § 1, p. 775; Laws 1980, LB 597, § 3.

Cross References

State officers and departments, not required to give attachment bond, see section 25-21,216.

1. Bond
2. Nonresident or foreign corporation
3. Sureties
4. Miscellaneous

1. Bond

Statute required plaintiff to comply with the provisions of the general statute on attachment as to necessary allegations, and with the bond provisions of this section. VonSeggern v. Willman, 244 Neb. 565, 508 N.W.2d 261 (1993).

Foreign corporation which has domesticated or obtained certificate of authority to do business is not subject to waiver of bond provisions. Schreiner v. Irby Constr. Co., 184 Neb. 222, 166 N.W.2d 121 (1969).

Bond to protect against wrongful attachment is required. Insurance Co. of North America v. Maxim's of Nebraska, 178 Neb. 274, 132 N.W.2d 885 (1965).

In attachment proceedings bond is required in all cases except where defendant is nonresident or foreign corporation, but if defendant fails to assail the validity of the attachment and, for a consideration, agrees that money in hands of garnishee be paid into court to abide judgment, he ratifies and confirms such attachment proceedings though no bond was given. Vanburg v. Mauel, 131 Neb. 685, 269 N.W. 626 (1936).

Action on bond and for malicious attachment are not inconsistent remedies. Simons v. Fagen, 62 Neb. 287, 87 N.W. 21 (1901).

Bond is valid where plaintiff fails to sign, though he is not liable thereon. Storz v. Finklestein, 50 Neb. 177, 69 N.W. 856 (1897).

Attaching creditor need not sign attachment bond. It is sufficient if signed by surety alone. Storz v. Finklestein, 48 Neb. 27, 66 N.W. 1020 (1896).

2. Nonresident or foreign corporation

Filing of a bond is not jurisdictional to the right to have an attachment issued against a nonresident defendant for a debt not due. Gutterson v. Meyer, 68 Neb. 767, 94 N.W. 969 (1903).

3. Sureties

Surety is not liable if sheriff seizes property of third person. Hopewell v. McGrew, 50 Neb. 789, 70 N.W. 397 (1897).

Defendant in action on bond may set off debt due from plaintiff to principal. Field v. Maxwell, 44 Neb. 900, 63 N.W. 62 (1895).

Partnership may sign as surety; attorney should not, but bond is valid. Tessier v. Crowley, 17 Neb. 207, 22 N.W. 422 (1885).

Surety is liable for all damages sustained until property is returned. McReady v. Rogers, 1 Neb. 124 (1871).

4. Miscellaneous

In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. Carlson v. Schroeder, 164 Neb. 443, 82 N.W.2d 416 (1957).

Attachment procured in action brought without plaintiff's authority is ''wrongfully obtained.'' Bauer v. Mitchell, 80 Neb. 187, 113 N.W. 986 (1907).

On general denial burden is on plaintiff to negative grounds alleged; dissolution of attachment not alone sufficient. Jandt v. Deranleau, 57 Neb. 497, 78 N.W. 22 (1899); Storz v. Finklestein, 50 Neb. 177, 69 N.W. 856 (1897).

Obligation of bond is for payment of damages, and liability upon it occurs when the damages accrue. Waller v. Deranleau, 4 Neb. Unof. 497, 94 N.W. 1038 (1903).

25-1004 Attachment; order; contents; service; manner.

The order of attachment shall (1) require the sheriff to attach the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, money, and effects of the defendant in his or her county not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the amount stated in the order of attachment; (2) inform the defendant of his or her right to obtain redelivery of the property attached by executing a redelivery bond in accordance with sections 25-1009 and 25-1024; and (3) inform the defendant of his or her right under section 25-1040, to move to discharge the attachment after service of the order upon him or her and of the plaintiff's obligation under section 25-1041, to prove the grounds upon which the attachment order was issued by a preponderance of the evidence if such a motion to discharge is made.

The order of attachment shall be directed and delivered to the sheriff and shall be served on the defendant in any manner authorized by statute for service of a summons.

Source: R.S.1867, Code § 201, p. 426; R.S.1913, § 7735; C.S.1922, § 8679; C.S.1929, § 20-1004; R.S.1943, § 25-1004; Laws 1980, LB 597, § 4.

Indebtedness of maker upon promissory note, before maturity, is not the subject of attachment. Fisher v. O'Hanlon, 93 Neb. 529, 141 N.W. 157 (1913).

Writ is limited to seizure of property sufficient to satisfy amount plaintiff claims to be entitled to recover and probable costs. First Nat. Bank of Greenwood v. Van Doren, 68 Neb. 142, 93 N.W. 1017 (1903).

Stock owned by defendant in domestic corporation may be reached by garnishment. Farmers' & Merchants' Nat. Bank v. Mosher, 63 Neb. 130, 88 N.W. 552 (1901).

Order need not state nature of claim. Tessier v. Englehart & Co., 18 Neb. 167, 24 N.W. 734 (1885).

Order need not recite filing of affidavit and bond. Tessier v. Crowley, 16 Neb. 369, 20 N.W. 264 (1884).

25-1005 Attachment; several and successive orders; issuance to several counties; costs; taxation.

Orders of attachment may be issued to the sheriffs of different counties; and several of them may, at the option of the plaintiff, be issued at the same time or in succession; but such only as have been executed shall be taxed in the costs, unless otherwise directed by the court.

Source: R.S.1867, Code § 202, p. 426; R.S.1913, § 7736; C.S.1922, § 8680; C.S.1929, § 20-1005.

While order of attachment may issue to another county, garnishee summons cannot. Benedict v. T. L. V. Land & Cattle Co., 66 Neb. 236, 92 N.W. 210 (1902).

Several orders of attachment may be issued at the same time, or in succession; but in such case only a simple affidavit is necessary. Thompson v. Stetson, 15 Neb. 112, 17 N.W. 368 (1883).

25-1006 Attachment; order; return day.

The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons; when issued afterwards, it shall be twenty days after it issued.

Source: R.S.1867, Code § 203, p. 426; R.S.1913, § 7737; C.S.1922, § 8681; C.S.1929, § 20-1006.

Action commenced when petition is filed and summons issued is bona fide. Coffman v. Brandhoeffer, 33 Neb. 279, 50 N.W. 6 (1891).

25-1007 Attachment; several orders against same defendant; time of service.

When there are several orders of attachment against the same defendant, they shall be executed in the order in which they are received by the sheriff.

Source: R.S.1867, Code § 204, p. 426; R.S.1913, § 7738; C.S.1922, § 8682; C.S.1929, § 20-1007.

First levy has priority. Moore v. Fedewa, 13 Neb. 379, 14 N.W. 170 (1882).

25-1008 Attachment; order; execution; inventory; appraisement.

The order of attachment shall be executed by the sheriff without delay. He shall go to the place where defendant's property may be found, and there, in the presence of two residents of the county, declare that by virtue of said order he attaches said property at the suit of such plaintiff; and the officer, with the said residents, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisement of all the property attached, which shall be signed by the officer and residents and returned with the order. Where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order. Where it is personal property, and accessible, he shall take the same into his custody, and hold it subject to the order of the court.

Source: R.S.1867, Code § 205, p. 426; R.S.1913, § 7739; C.S.1922, § 8683; C.S.1929, § 20-1008.

Cross References

Appraisers' fees, mileage, see section 33-122.

1. Order
2. Inventory
3. Appraisement
4. Miscellaneous

1. Order

Where order of attachment was not executed in presence of two witnesses, dissolution of attachment was proper. Carlson v. Schroeder, 164 Neb. 443, 82 N.W.2d 416 (1957).

Order must be strictly followed; witnesses must be disinterested. Ames v. Parrott, 61 Neb. 847, 86 N.W. 503 (1901).

Leaving copy with occupant is sufficient, though he is not owner or lessee of land. Westervelt v. Hagge, 61 Neb. 647, 85 N.W. 852 (1901).

Levy in absence of witnesses is void. Citizens State Bank of Wood River v. Porter, 4 Neb. Unof. 73, 93 N.W. 391 (1903).

2. Inventory

Inventory and appraisement are admissible in evidence in action against sheriff for conversion. Maul v. Drexel, 55 Neb. 446, 76 N.W. 163 (1898).

3. Appraisement

Appraisement is neither limited to net value of interest of attachment debtors nor is such interest therein required to be separately appraised. Federal Farm Mort. Corp. v. Hughes, 137 Neb. 820, 291 N.W. 475 (1940).

Where several writs are levied, one appraisement is sufficient. Connelly and Duffy v. Edgerton and Miller, 22 Neb. 82, 34 N.W. 76 (1887).

4. Miscellaneous

Sheriff's failure to take crop of standing corn into possession as required hereunder was excused by reason of snowstorm; judgment of contempt sustained. Leadabrand v. State, 121 Neb. 836, 238 N.W. 656 (1931).

In action for failure to levy, burden is on plaintiff to show debtor had seizable property and sheriff negligently failed to levy. Conway v. Magill, 53 Neb. 370, 73 N.W. 702 (1898).

Sheriff must take and keep possession of personal property or sureties are liable for loss. Deering & Co. v. Wisherd, 46 Neb. 720, 65 N.W. 788 (1896).

Posting copy where there is an occupant is void as to third persons. Shoemaker v. Harvey, 43 Neb. 75, 61 N.W. 109 (1894).

Failure to return order of attachment physically to the court file does not defeat the court's jurisdiction. Shoaff v. Gage, 163 F.Supp. 179 (D. Neb. 1958).

25-1009 Attachment or garnishment; delivery of property to defendant or garnishee; conditions.

(1) The sheriff shall deliver the property attached to the person in whose possession it was found, and property or money seized in garnishment, to the defendant in the attachment proceedings, if the defendant be the true owner thereof, upon the delivery by such person, either to the sheriff at any time before the return of the sheriff of the attachment or garnishment process or to the clerk of the court, after the return by the sheriff to the court, of an undertaking to the plaintiff, with one or more sufficient sureties resident in the county, or a bonding company authorized to do business in the State of Nebraska, to the effect that the parties to the same are bound, in the amount of the appraised value thereof, or in the case of garnishment, in the amount of the value of the property or money in the hands of the garnishee, that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action; but if it shall appear to the court that any part of said property has been lost or destroyed by unavoidable accident, the value thereof shall be remitted to the person so bound. In case of garnishment, the garnishee shall be discharged upon the approval of said bond.

(2) If the defendant presents to the court, by affidavit or otherwise, specific facts demonstrating that no sureties are necessary to insure that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action, the court may allow the undertaking to be executed by the defendant alone.

Source: R.S.1867, Code § 206, p. 426; R.S.1913, § 7740; Laws 1915, c. 146, § 1, p. 316; C.S.1922, § 8684; C.S.1929, § 20-1009; R.S. 1943, § 25-1009; Laws 1980, LB 597, § 5.

Defendant who has given ''forthcoming bond'' under this section may move to dissolve attachment. Burnham-Munger-Root D. G. Co. v. Strahl, 102 Neb. 142, 166 N.W. 266 (1918).

Principal in redelivery bond is estopped, in action thereon, to deny that he is owner of the attached property. Commercial Nat. Bank of Kearney v. Faser, 99 Neb. 105, 155 N.W. 601 (1915).

After property is returned to officer, party may claim title in proper action. Runquist v. Anderson, 64 Neb. 755, 90 N.W. 760 (1902).

Principal in bond is estopped to claim title to property. Cooper v. Davis Mill Co., 48 Neb. 420, 67 N.W. 178 (1896).

Only officer holding writ may approve. Dewey & Stone v. Kavanaugh, 45 Neb. 233, 63 N.W. 396 (1895).

Sureties are not liable unless bond is approved and property delivered; need not indorse approval on bond; implied approval. Cortelyou v. Maben, 40 Neb. 512, 59 N.W. 94 (1894).

Defendant may move to dissolve attachment after redelivery bond is given. Wilson v. Shepherd, 15 Neb. 15, 16 N.W. 826 (1883).

Must allege order of sale had been made. Young v. Joseph Bros. & Davidson, 5 Neb. Unof. 559, 99 N.W. 522 (1904).

25-1010 Attachment; garnishment; affidavit; summons; answer; duties of garnishee; written interrogatories.

(1) When an affidavit is filed in a civil action containing the necessary allegations of an affidavit of attachment and in addition allegations that the affiant has good reason to and does believe that any person, partnership, limited liability company, or corporation to be named and within the county where the action is brought has property of the defendant, describing the same, in his or her possession that cannot be levied upon by attachment, a judge of any district court or county court may direct the clerk to issue a summons and order requiring such person, partnership, limited liability company, or corpora-

tion as garnishee to answer written interrogatories, to be furnished by the plaintiff and attached to such summons and order, respecting the matters set forth in section 25-1026. All answers must be given in writing but do not need to be verified or given under oath. All answers so given will be deemed to be true and subject to all of the penalties of perjury in the event of willful falsification.

(2) The summons and order referred to in subsection (1) of this section shall be returnable within five days from the date of the issuance thereof and shall require the garnishee to answer within ten days from the date of service upon him or her. The order shall inform the garnishee (a) of the penalties that may be imposed in the event of willful falsification, (b) that he or she is obligated to hold the property of every description and the credits of the defendant in his or her possession or under his or her control at the time of the service of the order and the interrogatories until further direction from the court, (c) of his or her ability to obtain discharge from liability to the defendant under section 25-1027, and (d) of the ability of the court to enter judgment against him or her upon failure to answer the interrogatories as provided in section 25-1028. If the answers to the interrogatories identify property of the defendant in the possession of the garnishee, the clerk shall mail to the last-known address of the defendant copies of the garnishment summons and answers to interrogatories within five days after the return of the answers to the interrogatories.

(3) Prior to final judgment in an action, no order of garnishment shall issue for wages due from an employer to an employee.

Source: R.S.1867, Code § 207, p. 427; R.S.1913, § 7741; C.S.1922, § 8685; C.S.1929, § 20-1010; R.S.1943, § 25-1010; Laws 1951, c. 67, § 1, p. 202; Laws 1955, c. 85, § 1, p. 254; Laws 1959, c. 101, § 1, p. 422; Laws 1971, LB 834, § 1; Laws 1980, LB 597, § 6; Laws 1984, LB 13, § 37; Laws 1991, LB 732, § 43; Laws 1993, LB 121, § 168.

1. Property subject to garnishment
2. Property not subject to garnishment
3. Miscellaneous

1. Property subject to garnishment

Liability of insurance company, which has taken charge of defense of insured against action for damages for death of latter's employee, is subject to garnishment if insured is insolvent. Elliott v. AEtna Life Ins. Co., 100 Neb. 833, 161 N.W. 579 (1917).

Stock of attachment defendant in domestic corporation may be garnished. Farmers' & Merchants' Nat. Bank v. Mosher, 63 Neb. 130, 88 N.W. 552 (1901).

Stock subscription, due and payable, may be garnished by creditor of corporation. Bohrer v. Adair, 61 Neb. 824, 86 N.W. 495 (1901).

Garnishee alone can raise defense, and may waive. Sturtevant Co. v. Bohn Sash & Door Co., 59 Neb. 82, 80 N.W. 273 (1899).

Mortgagee in possession may be garnished for interest of mortgagor in chattels. Meyer v. Miller, 51 Neb. 620, 71 N.W. 315 (1897).

Excess of pledge property may be garnished in hands of pledgee and an accounting for the surplus may be secured. Aetna Ins. Co. v. Bank of Wilcox, 48 Neb. 544, 67 N.W. 449 (1896).

Equity of redemption in mortgaged personalty is subject to garnishment, even after condition broken. Burnham v. Doolittle, 14 Neb. 214, 15 N.W. 606 (1883).

2. Property not subject to garnishment

Debtor can be garnished only in state where debt is payable, if creditor resides there. Bullard & Hoagland v. Chaffee, 61 Neb. 83, 84 N.W. 604 (1900).

Receiver is not subject to garnishment. Veith v. Ress, 60 Neb. 52, 82 N.W. 116 (1900).

Money in custody of law, as in hands of clerk for distribution under decree, cannot be garnished. Sturtevant Co. v. Bohn Sash & Door Co., 57 Neb. 671, 78 N.W. 265 (1899).

Money held by clerk of court in official capacity is in custody of law. Baker v. Peterson, 57 Neb. 375, 77 N.W. 774 (1899).

Order cannot be issued outside county where principal action brought. So. Omaha Nat. Bank v. Farmers & Merchants Nat. Bank of Fremont, 45 Neb. 29, 63 N.W. 128 (1895).

"In custody of law" applies only where sheriff must pay money in hand to execution plaintiff. Oppenheimer & Co. v. Marr, 31 Neb. 811, 48 N.W. 818 (1891).

Maker of negotiable note cannot be garnished if same has been transferred. Edney v. Willis, 23 Neb. 56, 36 N.W. 300 (1888).

Foreign corporation having no property of defendant in state or money payable to him here is not subject to garnishment. Wright v. Chicago, B. & Q. R. R. Co., 19 Neb. 175, 27 N.W. 90 (1886).

County cannot be garnished. State ex rel. Crawford v. Eberly, 12 Neb. 616, 12 N.W. 96 (1882).

City is not subject to garnishment proceedings. People ex rel. Spaun v. Mayor of Omaha, 2 Neb. 166 (1873).

3. Miscellaneous

In garnishment proceedings under this section, a bond must be given. Insurance Co. of North America v. Maxim's of Nebraska, 178 Neb. 274, 132 N.W.2d 885 (1965).

There is no unconstitutional discrimination between garnishment before judgment and statutory procedure to enforce foreign judgment. Sullivan v. Sullivan, 168 Neb. 850, 97 N.W.2d 348 (1959).

Section does not require that written notice which officer leaves with garnishee shall be issued and signed by officer. Crawford State Bank v. Murphy, 142 Neb. 795, 7 N.W.2d 762 (1943).

After judgment, summons in garnishment in aid of execution from one county to another is unauthorized. Hinds State Bank v. Loffler, 113 Neb. 110, 202 N.W. 465 (1925).

Garnishee must be resident of county; defendant may be nonresident of state. Hargreaves v. Tennis, 63 Neb. 356, 88 N.W. 486 (1901).

Affidavit must be filed before notice issues. State ex rel. Austrian, Wise & Co. v. Duncan, 37 Neb. 631, 56 N.W. 214 (1893).

Interpleader action in federal court did not preclude maintenance of state court garnishment proceedings. Globe v. Rutgers Fire Ins. Co. v. Viele, 110 F.Supp. 889 (D. Neb. 1958).

25-1011 Garnishment; service upon garnishee; forms; notice; hearing.

(1) The summons and order of garnishment and the interrogatories in duplicate, a notice to judgment debtor form, and a request for hearing form shall be served upon the garnishee in the manner provided for service of a summons in a civil action.

(2) The judgment creditor or his or her agent or attorney shall send to the judgment debtor by certified mail to the last-known address of the judgment debtor a copy of the summons and order of garnishment, a notice to judgment debtor form, and a request for hearing form within three business days of issuance by the court and shall certify in writing to the court the date of the mailing.

(3) The Supreme Court by rule of court shall promulgate uniform garnishment forms for use in all courts in this state. Until the forms are promulgated, garnishments shall continue in the courts by use of the existing forms. The forms shall include the summons and order of garnishment, the garnishment interrogatories, a notice to judgment debtor form, and a request for hearing form.

(4) The notice to judgment debtor form shall include the following information:

(a) That certain funds are exempt from garnishment if such funds are from certain government benefits and other sources;

(b) That wages are exempt up to a certain level and the amount that can be garnished varies if the judgment debtor is the head of a family;

(c) That if the judgment debtor believes the court should not allow a garnishment either because the funds sought are exempt or because the amount is not owed on the judgment, the judgment debtor is entitled to a hearing within ten days of a request by the judgment debtor to determine such issues; and

(d) That if the judgment debtor wishes a hearing as prescribed in subdivision (c) of this subsection, the judgment debtor shall make a request by filling out the request for hearing form and file the form with the court within three business days of receipt of the notice to judgment debtor form by the judgment debtor.

(5) If the judgment debtor in a garnishment proceeding requests a hearing, the court shall grant the hearing within ten days of the request.

Source: R.S.1867, Code § 208, p. 427; R.S.1913, § 7742; C.S.1922, § 8686; C.S.1929, § 20-1011; R.S.1943, § 25-1011; Laws 1951,

c. 67, § 2, p. 203; Laws 1955, c. 85, § 2, p. 255; Laws 1980, LB 597, § 7; Laws 1983, LB 447, § 39; Laws 1984, LB 845, § 23; Laws 1988, LB 1030, § 14.

This section not applicable when garnishee is a foreign insurance company which has complied with statutory provisions to obtain certificate of authority to do business. Pupkes v. Sailors, 183 Neb. 784, 164 N.W.2d 441 (1969).

Cannot serve nonresident or firm not doing business in state; service on person in possession. Mathews, Tootle & Maule v. Smith & Crittenden, 13 Neb. 178, 12 N.W. 821 (1882).

25-1012 Repealed. Laws 1980, LB 597, § 18.

25-1012.01 Garnishment; public officers and employees.

All provisions, including provisions for a continuing lien prescribed in section 25-1056, requirements, conditions, and exemptions of the garnishment laws of the State of Nebraska shall apply to all state, county, municipal, municipally owned corporation, township, and school district officers and employees to the same extent and effect as such laws apply under the existing statutes of the State of Nebraska to officers and employees of private corporations. Consent is hereby given for garnishment proceedings against the State of Nebraska and against all counties, townships, municipal corporations, municipally owned corporations, and school districts in the same manner and under the same procedure as is now provided by law for bringing such suits and proceedings against corporations and individuals. This section shall apply only in case it is sought to hold and apply the earnings of such officers and employees, which earnings have been earned or are to be earned by personal services rendered to the state or to any county, township, municipal corporation, municipally owned corporation, or school district.

Source: Laws 1980, LB 597, § 16; Laws 1988, LB 1030, § 15.

25-1012.02 Garnishment; public officers and employees; procedure; process; answer.

Such proceedings may be brought against the State of Nebraska or any county, township, municipal corporation, municipally owned corporation, or school district as garnishee defendant, and process shall be served in the manner provided for service of a summons in a civil action, except that certified mail service may not be used. It shall be the duty of the garnishee defendant to answer any garnishment summons served under the provisions of this section and section 25-1012.01 in the same manner as is now provided by law for the answer of corporations, and such defendant shall abide the order of the court issuing the garnishment, with regard to paying into court any amount ordered, not in excess of the amount earned by the officer or employee garnished, to the date of the answer. Such defendant may submit a written answer by United States mail to the clerk of the court issuing the summons. Such answer in garnishment shall in addition to any other matters stated therein state the amount of money due the officer or employee whose earnings are sought to be held to the answer day as shown in such summons, but shall not include the amount of any check or warrant which has been drawn and signed at the time of the service of garnishment summons.

Source: Laws 1980, LB 597, § 17; Laws 1984, LB 845, § 24.

25-1013 Repealed. Laws 1980, LB 597, § 18.

25-1014 Several attachments of same property; inventory and appraisement.

Different attachments of the same property may be made by the same officer, and one inventory and appraisement shall be sufficient, and it shall not be necessary to return the same with more than one order.

Source: R.S.1867, Code § 209, p. 427; R.S.1913, § 7743; C.S.1922, § 8687; C.S.1929, § 20-1014.

One appraisement is sufficient. Connelly and Duffy v. Edgerton and Miller, 22 Neb. 82, 34 N.W. 76 (1887).

25-1015 Attached property; subsequent orders; procedure.

When the property is under attachment, it shall be attached under subsequent orders as follows: (1) If it is real property, it shall be attached in the manner prescribed in section 25-1008; (2) if it is personal property, it shall be attached as in the hands of the officer and subject to any previous attachment; and (3) if the same person or corporation be made a garnishee, a copy of the order and notice shall be left with him in the manner prescribed in section 25-1011.

Source: R.S.1867, Code § 210, p. 427; R.S.1913, § 7744; C.S.1922, § 8688; C.S.1929, § 20-1015; R.S.1943, § 25-1015; Laws 1959, c. 102, § 1, p. 425.

Cannot levy subsequent orders after property is taken from control by replevin. Merrill v. Wedgwood, 25 Neb. 283, 41 N.W. 149 (1888).

25-1016 Order of attachment; return; contents.

The officer shall return upon every order of attachment what he or she has done under it. The return must show when and how the defendant was served, and the property attached and the time it was attached. When garnishees are served, their names and the time each was served must be stated. The officer shall also return with the order all undertakings given under it.

Source: R.S.1867, Code § 211, p. 427; R.S.1913, § 7745; C.S.1922, § 8689; C.S.1929, § 20-1016; R.S.1943, § 25-1016; Laws 1980, LB 597, § 8.

Return not describing appraisement is sufficient after judgment. Grebe v. Jones, 15 Neb. 312, 18 N.W. 81 (1883).

Irregular to permit amendment without showing, so as to release property. Griffith v. Short, 14 Neb. 259, 15 N.W. 335 (1883).

Return should state if redelivery bond was given, etc. Hilton v. Ross, 9 Neb. 406, 2 N.W. 862 (1879).

25-1017 Order of attachment; effect; lien of consignee; interest and other costs; how computed.

An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, money, and credits in his hands, or due from him to defendant, from the time he is served with the written notice mentioned in section 25-1011, notwithstanding the money or debt owing by such garnishee, and which is sought to be attached, may be payable at the place of residence of a nonresident defendant; but where the property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment.

At the time of the issuance of the order of attachment, all interest and other costs due, as of that date, shall be computed. All interest and other costs which accrue after such date shall be specified on a per day basis or such other basis for assessment as may exist. Upon delivery of the attached property by the

garnishee, such garnishee shall not be liable for interest or costs other than those specified in the order of attachment.

Source: R.S.1867, Code § 212, p. 427; Laws 1911, c. 168, § 4, p. 546; R.S.1913, § 7746; C.S.1922, § 8690; C.S.1929, § 20-1017; R.S. 1943, § 25-1017; Laws 1959, c. 102, § 2, p. 425; Laws 1978, LB 670, § 1.

1. Scope of lien
2. Priorities
3. Miscellaneous

1. Scope of lien

Proceedings in garnishment are in the nature of notice of attachment to party in possession who becomes trustee. Crawford State Bank v. Murphy, 142 Neb. 795, 7 N.W.2d 762 (1943).

Debt owing by one Illinois corporation to another on contract payable in that state may, by attachment and garnishment in Nebraska, be subjected to payment of debt owing to resident of Iowa. Morrison v. Illinois C. R. R. Co., 101 Neb. 49, 161 N.W. 1032 (1917).

Lien of garnishment of debt due insolvent is subject to bankruptcy law. Hall v. Chicago, B. & Q. R. R. Co., 88 Neb. 20, 128 N.W. 645 (1910).

Attachment lien merges in judgment lien. Lincoln Upholstering Co. v. Baker, 82 Neb. 592, 118 N.W. 321 (1908).

Lien is not lost by taking money judgment without order for sale. Coulson v. Saltsman, 71 Neb. 495, 98 N.W. 1055 (1904).

Plaintiff does not acquire full lien but right to hold garnishee personally liable for property or value. Benedict v. T. L. V. Land & Cattle Co., 66 Neb. 236, 92 N.W. 210 (1902).

Lien by garnishment may attach to property held by fraudulent grantee of debtor. Glover v. Hargadine-McKittrick Dry Goods Co., 62 Neb. 483, 87 N.W. 170 (1901).

Attachment creditors of grantee of fraudulent conveyance acquire no valid lien against creditors of grantor. Westervelt v. Hagge, 61 Neb. 647, 85 N.W. 852 (1901).

Plaintiff by service of writ becomes entitled to all rights of defendant against garnishee. Cahn v. Carpless Co., 61 Neb. 512, 85 N.W. 538 (1901); Chamberlain Banking House v. Reliance Ins. Co., 59 Neb. 195, 80 N.W. 822 (1899).

Plaintiff has lien only to extent of defendant's actual interest. Barnes v. Cox, 58 Neb. 675, 79 N.W. 550 (1899); Chicago, B. & Q. R. R. Co. v. First Nat. Bank of Omaha, 58 Neb. 548, 78 N.W. 1064 (1899).

Lien of attachment on insolvent bank is not vacated by appointment of receiver. Arnold v. Weimer, 40 Neb. 216, 58 N.W. 709 (1894).

Garnishment does not affect vendor's rights of stoppage in transit. Chicago, B. & Q. R. R. Co. v. Painter & Sons, 15 Neb. 394, 19 N.W. 488 (1884).

Deed executed after attachment levied is subject to judgment. Wright v. Smith, 11 Neb. 341, 7 N.W. 537 (1881).

2. Priorities

Garnishment is subject to prior bona fide assignments of debt. Cockins v. Bank of Alma, 84 Neb. 624, 122 N.W. 16 (1909).

Rights of holder of prior unrecorded deed stated. Naudain v. Fullenwider, 72 Neb. 221, 100 N.W. 296 (1904).

Attachment lien is prior to rights of vendor under unrecorded conditional sale contract. New Home Sewing Machine Co. v. Beals, 44 Neb. 816, 62 N.W. 1092 (1895).

3. Miscellaneous

This section is designed to supplement and implement general attachment statute. Insurance Co. of North America v. Maxim's of Nebraska, 178 Neb. 274, 132 N.W.2d 885 (1965).

Lien may be enforced by creditor's bill. Hargreaves v. Tennis, 63 Neb. 356, 88 N.W. 486 (1901).

Officer holding personal property under lawful attachment levy may be charged as garnishee and the property bound from the time of the service of summons in garnishment on him. Pitkin v. Burnham, 62 Neb. 385, 87 N.W. 160 (1901).

Purchaser after attachment is bound by adjudication as to validity of attachment. Nagle v. First Nat. Bank of Omaha, 57 Neb. 552, 77 N.W. 1074 (1899).

Property is in custody of law after garnishee is summoned. Meyer v. Miller, 51 Neb. 620, 71 N.W. 315 (1897).

Judgment debtor may be garnished; but not under writ from another court. Scott v. Rohman, 43 Neb. 618, 62 N.W. 46 (1895).

25-1018 Attachment; receiver; appointment; oath; bond; accounting.

The court, or any judge thereof during vacation, may, on the application of the plaintiff and on good cause shown, appoint a receiver, who shall take an oath faithfully to discharge his duty, and shall give an undertaking to the State of Nebraska in such sum as the court or judge may direct and with such security as shall be approved by the clerk of the court for the faithful performance of his duty as such receiver, and to pay over all money, and account for all property which may come into his hands by virtue of his appointment, at such times and in such manner as the court may direct.

Source: R.S.1867, Code § 213, p. 428; R.S.1913, § 7747; C.S.1922, § 8691; C.S.1929, § 20-1018.

Cross References

For other bond provisions, see section 25-1084.

Court may appoint receiver where garnishee abandons property to defendant. Northfield Knife Co. v. Shapleigh, 24 Neb. 635, 39 N.W. 788 (1888).

25-1019 Attachment; receiver; powers and duties; actions by.

Such receiver shall take possession of all notes, due bills, books of account, accounts and all other evidences of debt, that have been taken by the sheriff or other officer as the property of the defendant in attachment, and shall proceed to settle and collect the same. For that purpose, he may commence and maintain actions in his own name as such receiver but in such actions no right of defense shall be impaired or affected.

Source: R.S.1867, Code § 214, p. 428; R.S.1913, § 7748; C.S.1922, § 8692; C.S.1929, § 20-1019.

Accounts due defendant are subject to attachment. Sloan v. Thomas Mfg. Co., 58 Neb. 713, 79 N.W. 728 (1899).

25-1020 Attachment; receiver; appointment; notice to debtors of defendant in attachment; effect.

Such receiver shall forthwith give notice of his appointment to the persons indebted to the defendant in attachment. The notice shall be written or printed, and shall be served on the debtor or debtors by copy personally or by copy left at the residence. From the date of such service the debtors shall stand liable to the plaintiff in attachment for the amount of money and credits in their hands, or due from them to the defendant in attachment, and shall account therefor to the receiver.

Source: R.S.1867, Code § 215, p. 428; R.S.1913, § 7749; C.S.1922, § 8693; C.S.1929, § 20-1020.

25-1021 Attachment; receiver; reports; custody of property; duties.

Such receiver shall, when required, report his proceedings to the court, and hold all money collected by him and property which may come into his hands subject to the order of the court.

Source: R.S.1867, Code § 216, p. 428; R.S.1913, § 7750; C.S.1922, § 8694; C.S.1929, § 20-1021.

25-1022 Attachment; sheriff; powers when no receiver appointed; bond.

When a receiver is not appointed by the court or a judge thereof, as provided in section 25-1018, the sheriff or other officer attaching the property shall have all the powers and perform all the duties of a receiver appointed by the court or judge, and may, if necessary, commence and maintain actions in his own name as such officer. He may be required to give security other than his official undertaking.

Source: R.S.1867, Code § 217, p. 428; R.S.1913, § 7751; C.S.1922, § 8695; C.S.1929, § 20-1022.

25-1023 Attached property; preservation; sale; proceeds.

The court shall make proper orders for the preservation of the property during the pendency of the suit. It may direct the sale of property when, because of its perishable nature or the costs of keeping it, a sale will be for the benefits of the parties. In vacation, such sale may be ordered by the judge of the

court. The sale shall be public, after such advertisement as is prescribed for the sale of like property on execution, and shall be made in such manner, and upon such terms of credit, with security, as the court or judge, having regard to the probable duration of the action, may direct. The proceeds, if collected by the sheriff, with all the money received by him from garnishees, shall be held and paid over by him under the same requirement and responsibilities of himself and sureties as are provided in respect to money deposited in lieu of bail.

Source: R.S.1867, Code § 218, p. 429; R.S.1913, § 7752; C.S.1922, § 8696; C.S.1929, § 20-1023.

25-1024 Attachment; discharge; bond; effect; restitution of property or proceeds.

(1) If the defendant, or any other person on his or her behalf, at any time before judgment, causes an undertaking to be executed to the plaintiff by one or more sureties resident in the county, to be approved by the court, in the amount of the plaintiff's claim as stated in his or her affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged and restitution made of any property taken under it or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee in such action for any property of the defendant in his or her hands.

(2) If the defendant presents to the court, by affidavit or otherwise, specific facts demonstrating that no sureties are necessary to insure satisfaction of the plaintiff's claim, the court may allow the undertaking to be executed by the defendant alone.

Source: R.S.1867, Code § 219, p. 429; R.S.1913, § 7753; C.S.1922, § 8697; C.S.1929, § 20-1024; R.S.1943, § 25-1024; Laws 1980, LB 597, § 9.

Upon dissolution of an attachment, ordinarily all property should be returned to the defendant. Ceres Fertilizer, Inc. v. Beekman, 209 Neb. 447, 308 N.W.2d 347 (1981).

Failure to return property upon order dissolving attachment may create liability on attachment bond. Schneider v. Daily, 148 Neb. 413, 27 N.W.2d 550 (1947).

After defendant in attachment proceedings has given ''forthcoming'' bond, he may move to dissolve attachment, but not if he gives ''discharge'' bond, because approval of same ipso facto discharges writ. Burnham-Munger-Root Dry Goods Co. v. Strahl, 102 Neb. 142, 166 N.W. 266 (1918).

25-1025 Attachment; discharge; bond, how executed.

The undertaking mentioned in subsection (1) of section 25-1024 may, in vacation, be executed in the presence of the sheriff having the order of attachment in his or her hands, or, after the return of the order, before the clerk, with the same effect as if executed in court, the sureties in either case to be approved by the officer before whom the undertaking is executed.

Source: R.S.1867, Code § 220, p. 429; R.S.1913, § 7754; C.S.1922, § 8698; C.S.1929, § 20-1025; R.S.1943, § 25-1025; Laws 1980, LB 597, § 10.

25-1026 Garnishee; answer; interrogatories; filing fee; costs.

The garnishee shall answer, under oath, all the interrogatories put to him touching the property of every description and credits of the defendant in his possession or under his control at the time of the service of the summons and interrogatories, and he shall disclose truly the amount owing by him to the defendant, whether due or not, and, in case of a corporation, any stock therein held by or for the benefit of the defendant, at the time of the service of the

summons and interrogatories. The fee for filing of answer may be taxed and collected in the same manner as other costs in such proceedings.

Source: R.S.1867, Code § 221, p. 429; Laws 1877, § 1, p. 10; R.S.1913, § 7755; C.S.1922, § 8699; C.S.1929, § 20-1026; R.S.1943, § 25-1026; Laws 1951, c. 67, § 3, p. 203; Laws 1959, c. 101, § 2, p. 423.

Failure to tender garnishee fee excuses failure to appear but does not discharge garnishee from liability. Crawford State Bank v. Murphy, 142 Neb. 795, 7 N.W.2d 762 (1943).

After stating substance of this section, comment made that while garnishee appeared in person to answer questions, he did not file written answer. Hilton v. Clements, 137 Neb. 791, 291 N.W. 483 (1940).

Stock of domestic corporation for which certificate has been issued and delivered to purchaser is deemed to be in possession of corporation subject to attachment or garnishment proceedings. Danbom v. Danbom, 132 Neb. 858, 273 N.W. 502 (1937).

A nonresident whose property has been seized under a writ of attachment may, without making a general appearance, demand relief to which want of jurisdiction entitles him. McCartney v. McCartney, 128 Neb. 671, 260 N.W. 184 (1935).

After judgment, summons in garnishment from one county to another in aid of execution, is unauthorized. Hinds State Bank v. Loffler, 113 Neb. 110, 202 N.W. 465 (1925).

Section applies to all garnishment proceedings; unless fees are tendered, garnishee need not appear. Chicago, B. & Q. R. R. Co. v. Van Cleave, 52 Neb. 67, 71 N.W. 971 (1897).

Where garnishee after answer receives notice of assignment made before levy, he should make supplemental answer. Coleman v. Scott, 27 Neb. 77, 42 N.W. 896 (1889).

Prepayment is waived by appearance and answer without objection. Pope v. Kingman & Co., 2 Neb. Unof, 184, 96 N.W. 519 (1901).

Where insurance company denies indebtedness to judgment debtor in answer to garnishee summons, judgment creditor should be remitted to action for unsatisfactory disclosure. State Farm Mut. Auto. Ins. Co. v. Mackechnie, 114 F.2d 728 (8th Cir. 1940).

25-1027 Garnishee; payment into court; effect; costs.

A garnishee may pay the money owing to the defendant by him into court. He shall be discharged from liability to the defendant for any money so paid not exceeding the plaintiff's claim. He shall not be subjected to costs beyond those caused by his resistance of the claim against him; and if he disclose the property in his hands, or the true amount owing by him, and deliver or pay the same according to the order of the court, he shall be allowed his costs.

Source: R.S.1867, Code § 222, p. 430; R.S.1913, § 7756; C.S.1922, § 8700; C.S.1929, § 20-1027; R.S.1943, § 25-1027; Laws 1951, c. 67, § 4, p. 204.

Garnishee may pay money into court. Scott v. McDonald, 125 Neb. 803, 252 N.W. 323 (1934).

Where money is voluntarily paid into court by defendant's debtor upon attempted garnishment, court's order to apply it upon plaintiff's judgment will not be set aside because of insufficiency in garnishment proceeding. Ryan v. Bullion, 100 Neb. 705, 161 N.W. 167 (1916).

Payment into court in good faith protects garnishee though made before defendant was summoned. Scott v. Kirschbaum, 47 Neb. 331, 66 N.W. 443 (1896).

25-1028 Garnishee; failure to answer; presumption; judgment.

If the garnishee fails to answer, as required by section 25-1026, he shall be presumed to be indebted to the defendant in the full amount of the claim of plaintiff. Upon notice to the garnishee given within such time and in such manner as the court shall direct, judgment may be entered for such amount as the court may find due from the garnishee.

Source: R.S.1867, Code § 223, p. 430; R.S.1913, § 7757; C.S.1922, § 8701; C.S.1929, § 20-1028; R.S.1943, § 25-1028; Laws 1951, c. 67, § 5, p. 204.

A presumption of indebtedness arising under this section is rebuttable. Spaghetti Ltd. Partnership v. Wolfe, 264 Neb. 365, 647 N.W.2d 615 (2002).

A notice did not inform the garnishee that if it failed to appear, default judgment would be taken against it. Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc., 10 Neb. App. 948, 640 N.W.2d 677 (2002).

25-1029 Garnishment; property; delivery into court; bond in lieu of delivery.

If the garnishee answers that, at the time of the service of the summons and interrogatories upon him or her, he or she was possessed of any property of the defendant or was indebted to him or her, the court may order the delivery of such property and the payment of the amount owing by the garnishee into court; or the court may permit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff by one or more sufficient sureties to the effect that the amount shall be paid or the property forthcoming as the court may direct. If the garnishee presents to the court, by affidavit or otherwise, specific facts demonstrating that no sureties are necessary to insure that the amount owing by the garnishee shall be paid, or the property forthcoming, the court may allow the undertaking to be executed by the garnishee alone.

Source: R.S.1867, Code § 224, p. 430; R.S.1913, § 7758; C.S.1922, § 8702; C.S.1929, § 20-1029; R.S.1943, § 25-1029; Laws 1951, c. 67, § 6, p. 204; Laws 1959, c. 101, § 3, p. 423; Laws 1980, LB 597, § 11.

Where original judgment on which garnishment proceedings are based is made ineffective by bankruptcy of judgment debtor, the garnishment summons and power and rights thereunder cease; garnishee is released from liability on summons although court made no order. Savard v. Physicians Casualty Co., 124 Neb. 627, 247 N.W. 567 (1933).

In absence of fraud or collusion, no garnishable debt arises from contract for personal services paid for in advance. Salyers Auto Co. v. De Vore, 116 Neb. 317, 217 N.W. 94 (1927).

Where garnishment proceedings are void, money should be returned to garnishee. Yeiser v. Cathers, 73 Neb. 317, 102 N.W. 612 (1905).

Judgment debtor is liable to process of garnishment when the two actions are brought in the same court. Scott v. Rohman, 43 Neb. 618, 62 N.W. 46 (1895).

Garnishee, not making full disclosure, is liable over to creditor. Smith v. Ainscow, 11 Neb. 476, 9 N.W. 646 (1881).

Garnishee, not making full disclosure, defendant have judgment, if appeal is taken. Dolby v. Tingley, 9 Neb. 412, 2 N.W. 866 (1879).

Liability of garnishee is to be determined by status of fund when answer is taken. First Nat. Bank of Pawnee City v. Manning, 2 Neb. Unof. 3, 95 N.W. 1128 (1901).

25-1030 Garnishee; answer; controvert; allegations; liability; release.

If the garnishee appears and answers and his or her disclosure is not satisfactory to the plaintiff, or if he or she fails to comply with the order of the court, by delivering the property and paying the money owing into court, or giving the undertaking required in section 25-1029, the plaintiff may file an application within twenty days for determination of the liability of the garnishee. The application may controvert the answer of the garnishee, or may allege facts showing the existence of indebtedness of the garnishee to the defendant or of the property and credits of the defendant in the hands of the garnishee. The answer of the garnishee, if one has been filed, and the application for determination of the liability of the garnishee shall constitute the pleadings upon which trial of the issue of the liability of the garnishee shall be had. If the plaintiff fails to file such application within twenty days, the garnishee shall be released and discharged.

Source: R.S.1867, Code § 225, p. 430; R.S.1913, § 7759; C.S.1922, § 8703; C.S.1929, § 20-1030; R.S.1943, § 25-1030; Laws 1951, c. 67, § 7, p. 204; Laws 1980, LB 597, § 12.

1. Proceedings
2. Liability of garnishee

1. Proceedings

In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue. An answer to interrogatories which states that the garnishee has no property, money, or credit due and owing to the judgment debtor acts as a denial of all issues presented by the application to determine garnishee liability filed by the garnishor. Torrison v. Overman, 250 Neb. 164, 549 N.W.2d 124 (1996).

If a garnisher is dissatisfied with a garnishee's answer but does not controvert or traverse the answer given, then the garnishee's answer is the only filed pleading containing allega-

tions or statements about property, funds, or credits of a judgment debtor, a solitary pleading which is taken as true and conclusive. NC+Hybrids v. Growers Seed Assn., 228 Neb. 306, 422 N.W.2d 542 (1988).

Where a garnishee in its answer to a garnisher's interrogatories denies liability to the garnisher, and no application for determination of liability is filed, the answer of the garnishee is the solitary pleading before the court and must be taken as true and conclusive. Failure to proceed as required by this section constitutes an abandonment or discontinuance of garnishment proceedings. NC+Hybrids v. Growers Seed Assn., 219 Neb. 296, 363 N.W.2d 362 (1985).

Where answer of garnishee denies owing judgment debtor, remedy is provided by this section by filing of petition for unsatisfactory disclosure. Searcey v. Badgett, 137 Neb. 185, 288 N.W. 537 (1939).

Court having obtained jurisdiction, can give relief by rendering money judgment against garnishee if no other remedy is available. Ternes v. Watke, 134 Neb. 798, 279 N.W. 718 (1938).

Stock subscription to capital stock of a corporation may be garnished by a creditor of the corporation. Bohrer v. Adair, 61 Neb. 824, 86 N.W. 495 (1901).

Finding of court in main action is not conclusive upon rights or liabilities of garnishee. Hollingsworth v. Fitzgerald, 16 Neb. 492, 20 N.W. 836 (1884).

If personal judgment against garnishee is desired, plaintiff must proceed under this section. Clark v. Foxworthy, 14 Neb. 241, 15 N.W. 342 (1883).

Rights of creditor are no greater than rights of attachment debtor against garnishee. Fitzgerald v. Hollingsworth, 14 Neb. 188, 15 N.W. 345 (1883).

Execution need not have been returned unsatisfied in garnishment before judgment. Pope v. Kingman & Co., 2 Neb. Unof. 184, 96 N.W. 519 (1901).

2. Liability of garnishee

Failure to prove that original answer was false does not defeat action but does relieve from liability for costs. Western Smelting & Refining Co. v. First Nat. Bank of Omaha, 150 Neb. 477, 35 N.W.2d 116 (1948).

One obtaining goods under ''Bulk Sales Law'' was liable as trustee for benefit of creditors of his vendor and liable as garnishee. Damicus v. Kelly, 120 Neb. 588, 234 N.W. 416 (1931).

Garnishee, turning property over to defendant pending action, is liable to plaintiff. Farmers & Merchants Nat. Bank v. Mosher, 68 Neb. 713, 94 N.W. 1003 (1903), judgment below affirmed on rehearing, 68 Neb. 724, 100 N.W. 133 (1904).

It was duty of bank, when garnished, to set up claimed lien under chattel mortgage. Grainger v. First Nat. Bank of Sutton, 63 Neb. 46, 88 N.W. 121 (1901).

Garnishee is not liable unless defendant had right of action against him for legal demand due or to become due. Chicago, B. & Q. R. R. Co. v. Van Cleave, 52 Neb. 67, 71 N.W. 971 (1897).

Garnishee is liable if answer is not made in good faith, fully and unequivocally. Work v. Brown, 38 Neb. 498, 56 N.W. 1082 (1893).

Failure to prove answer incomplete is no bar to action; but relieves garnishee of costs. Burden is on garnishee to prove right to property. Cornish & Tibbets v. Russell, 32 Neb. 397, 49 N.W. 379 (1891).

Garnishee is mere stakeholder; and is protected only when money is paid into court. Russell v. Lau, 30 Neb. 805, 47 N.W. 193 (1890).

Insurance company is liable to judgment creditor for unsatisfactory disclosure, when it has issued valid policy, in force and effect, to pay judgment recovered against the judgment debtor. State Farm Mut. Auto. Ins. Co. v. Mackechnie, 114 F.2d 728 (8th Cir. 1940).

25-1030.01 Garnishee; application; notice; manner of service.

Upon filing an application for determination of liability of the garnishee, the plaintiff shall give the garnishee and the defendant in the original action notice of the filing thereof and of the time and place of trial thereon. The notice shall be given within such time and in such manner as the court shall direct.

Source: Laws 1951, c. 67, § 8, p. 205.

A notice of hearing for the determination of garnishee liability was given as required by this section where the county court entered an order setting the hearing on garnishee liability and requiring ''due service'' of the order on the parties, and notice of hearing as originally set and notice of continued hearing were sent to same address as the initial summons and garnishment interrogatories. General Serv. Bureau v. Moller, 12 Neb. App. 288, 672 N.W.2d 41 (2003).

This section does not require that notice of a garnishee liability hearing be given in a manner consistent with service of process on corporations. General Serv. Bureau v. Moller, 12 Neb. App. 288, 672 N.W.2d 41 (2003).

25-1030.02 Garnishee; application; hearing; judgment.

The trial of the determination of the liability of the garnishee shall be conducted the same as in a civil action. If it shall appear upon the trial of the liability of the garnishee that the garnishee was (1) indebted to the defendant, or (2) had any property or credits of the defendant, in his possession or under his control at the time of being served with the notice of garnishment, he shall be liable to the plaintiff, in case judgment is finally recovered by plaintiff against the defendant, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee. The plaintiff in such event may have a judgment against the garnishee (1) for the amount of money due from the garnishee to the defendant in the original action, or (2) for the delivery to the sheriff or to the clerk of the court of any property in the garnishee's hands belonging to the defendant in the original action within a time to be fixed by the

court, or for the value of the same as fixed in the judgment if not delivered within the time fixed.

Source: Laws 1951, c. 67, § 9, p. 205.

In a trial pursuant to this section, a garnishee may present evidence to rebut a presumption of indebtedness arising under section 25-1028. Spaghetti Ltd. Partnership v. Wolfe, 264 Neb. 365, 647 N.W.2d 615 (2002).

The garnishee is not liable unless the defendant had a right of action against him for a legal demand due or to become due. In an action to determine the liability of the garnishee, the plaintiff has the burden to establish why the garnishee was liable to the defendant at the time notice of garnishment was served. Gerdes v. Klindt, 253 Neb. 260, 570 N.W.2d 336 (1997).

In determining the liability of a garnishee to a garnishor, the test is whether, as of the time the summons in garnishment was served, the facts would support a recovery by the garnishor's judgment debtor against the garnishee. Davis Erection Co. v. Jorgensen, 248 Neb. 297, 534 N.W.2d 746 (1995).

Material issues of fact in a contested garnishment proceeding are triable by jury unless waived. Christiansen v. Moore, 184 Neb. 818, 172 N.W.2d 620 (1969).

A garnishee is not liable to the plaintiff unless the judgment debtor had a right of action against the garnishee. Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc., 10 Neb. App. 948, 640 N.W.2d 677 (2002).

Federal court would retain fund until state garnishment proceedings were completed. Globe & Rutgers Fire Ins. Co. v. Viele, 110 F.Supp. 889 (D. Neb. 1953).

25-1030.03 Garnishment; ownership of property; intervention; trial.

Any person claiming ownership of any money or property sought to be reached in the possession or under the control of the garnishee as the property of the defendant in the original action may intervene in the garnishment proceedings by a suitable pleading and set up facts showing that the debt or the property with which it is sought to charge the garnishee is the property of such intervenor. The defendant in the original action may by a suitable pleading filed in the garnishment proceedings set up facts showing that the debt or the property with which it is sought to charge the garnishee is (1) exempt from execution, or (2) for any other reason is not liable for plaintiff's claim. If issue on such intervention or on such pleading by the defendant in the original action is joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property or any part thereof is found to be the property of the intervenor, or is found to be exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable.

Source: Laws 1951, c. 67, § 10, p. 206.

Trial of an issue of fact should be treated as a trial between a plaintiff and a defendant. Christiansen v. Moore, 184 Neb. 818, 172 N.W.2d 620 (1969).

25-1031 Garnishee; final judgment; when rendered; effect; discharge by delivery of property; costs.

Final judgment shall not be rendered against the garnishee until the action against the defendant in the original action has been determined. If in such action judgment be rendered for the defendant, the garnishee shall be discharged and recover costs. If the plaintiff shall recover against the defendant in the original action, and the garnishee shall deliver up all the property, money, and credits of the defendant in his possession and pay all the money from him due as the court may order, the garnishee shall be discharged, and the costs of the proceedings against him shall be paid out of the property and money so surrendered, or as the court may think right and proper.

Source: R.S.1867, Code § 226, p. 431; R.S.1913, § 7760; C.S.1922, § 8704; C.S.1929, § 20-1031; R.S.1943, § 25-1031; Laws 1951, c. 67, § 11, p. 206.

Action under this section is a special proceeding. Western Smelting & Refining Co. v. First Nat. Bank of Omaha, 150 Neb. 477, 35 N.W.2d 116 (1948).

Order upon garnishee as to disposition of property awaits final judgment against defendant. Reed v. Fletcher, 24 Neb. 435, 39 N.W. 437 (1888).

Order of court is not conclusive on garnishee, and he may contest his liability. Hollingsworth v. Fitzgerald, 16 Neb. 492, 20 N.W. 836 (1884).

Order discharging garnishee is final order and reviewable. Turpin v. Coates, 12 Neb. 321, 11 N.W. 300 (1882).

25-1031.01 Garnishment; judgment; effect.

The judgment in the garnishment action shall be conclusive between the garnishee, plaintiff, defendant, and any intervenor.

Source: Laws 1951, c. 67, § 12, p. 206.

A specific holding, in a prior garnishment action by a creditor against a bank's insurer under a blanket employee dishonesty bond, that the bank did not suffer a loss within the coverage of such bond is res judicata in a subsequent suit brought by the bank to recover under the bond and cannot be relitigated. Bank of Mead v. St. Paul Fire & Marine Ins. Co., 202 Neb. 403, 275 N.W.2d 822 (1979).

25-1031.02 Garnishment; costs; fee.

(1) The party seeking garnishment shall advance the costs of transcript and docketing the matter in the district court.

(2) The district court shall be entitled to the following fee in civil matters: For issuance of a writ of execution, restitution, garnishment, attachment, and examination in aid of execution, a fee of five dollars each.

Source: Laws 1955, c. 86, § 3, p. 259; Laws 1988, LB 1030, § 16.

25-1032 Attachment; judgment for defendant; effect; return of property or proceeds.

If judgment is rendered in the action for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, shall be returned to him.

Source: R.S.1867, Code § 227, p. 431; R.S.1913, § 7761; C.S.1922, § 8705; C.S.1929, § 20-1032.

Order discharging garnishee ipso facto discharges attachment. Alpirn v. Goodman, 3 Neb. Unof. 397, 91 N.W. 530 (1902).

25-1033 Attachment; judgment for plaintiff; how satisfied; return of surplus.

If judgment is rendered for the plaintiff, it shall be satisfied as follows: So much of the property remaining in the hands of the officer, after applying the money arising from the sale of perishable property, and so much of the personal property and lands and tenements, if any, whether held by legal or equitable title, as may be necessary to satisfy the judgment, shall be sold by order of the court, under the same restrictions and regulations as if the same had been levied on by execution; and the money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there is not enough to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue in all respects as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant.

Source: R.S.1867, Code § 228, p. 431; R.S.1913, § 7762; C.S.1922, § 8706; C.S.1929, § 20-1033.

Attached property should be sold the same as if levied on by execution. Federal Farm Mortgage Corporation v. Hughes, 137 Neb. 820, 291 N.W. 475 (1940).

Purchaser at sale is protected from collateral attack based on defective publication of notice. Brown v. Bose, 55 Neb. 200, 75 N.W. 536 (1898).

Same rule applies as to sales on execution; notice was defective. Helmer v. Rehm, 14 Neb. 219, 15 N.W. 344 (1883).

Judgment was informal, but not subject to collateral attack. Crowell v. Johnson, 2 Neb. 146 (1873).

25-1034 Attached property; delivery to sheriff; power of court to compel.

The court may compel the delivery to the sheriff, for sale, of any of the attached property for which an undertaking may have been given, and may proceed summarily on such undertaking to enforce the delivery of the property or the payment of such sum as may be due upon the undertaking, by rules and attachments, as in cases of contempt.

Source: R.S.1867, Code § 229, p. 431; R.S.1913, § 7763; C.S.1922, § 8707; C.S.1929, § 20-1034.

25-1035 Attached property out of sheriff's possession; repossession; power of court to order.

The court may order the sheriff to repossess himself, for the purpose of selling it, of any of the attached property which may have passed out of his hands without having been sold or converted into money; and the sheriff shall, under such order, have the same power to take the property as he would have under an order of attachment.

Source: R.S.1867, Code § 230, p. 431; R.S.1913, § 7764; C.S.1922, § 8708; C.S.1929, § 20-1035.

25-1036 Attachment; intervening claimants; proceeding to ascertain title.

If personal property which has been attached be claimed by any person other than the defendant, it shall be the duty of the officer to have the validity of such claim tried, and such proceedings must be had thereon, with the like effect, as in case the property had been seized upon execution and claimed by a third person.

Source: R.S.1867, Code § 231, p. 431; R.S.1913, § 7765; C.S.1922, § 8709; C.S.1929, § 20-1036.

Sheriff may bring suit hereunder to try claim of party to personal property attached by him. Leadabrand v. State, 121 Neb. 836, 238 N.W. 656 (1931).

25-1037 Several attachments; same property; reference.

Where several attachments are executed on the same property, or the same persons are made garnishees, the court, on the motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and priorities of the several attachments.

Source: R.S.1867, Code § 232, p. 432; R.S.1913, § 7766; C.S.1922, § 8710; C.S.1929, § 20-1037.

Mere fact that party claims to be owner of attached property does not give him right to intervene in attachment suit and thus have question of his ownership determined in such suit. Geis v. Geis, 125 Neb. 394, 250 N.W. 252 (1933).

Second attaching creditor may intervene to try priority of liens. Deere, Wells & Co. v. Eagle Mfg. Co., 49 Neb. 385, 68 N.W. 504 (1896).

Court has authority to adjudicate priorities between attaching creditors. State ex rel. Austrian, Wise & Co. v. Duncan, 37 Neb. 631, 56 N.W. 214 (1893).

25-1038 Repealed. Laws 1980, LB 597, § 18.

25-1039 Attachment; additional security; right of defendant to require.

The defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court is satisfied that the surety in the plaintiff's undertaking has removed from this state, or is not sufficient for the amount thereof, it may vacate the order of attachment and direct restitution of any property taken under it, unless in a reasonable time, to be fixed by the court, sufficient security is given by the plaintiff.

Source: R.S.1867, Code § 234, p. 432; R.S.1913, § 7768; C.S.1922, § 8712; C.S.1929, § 20-1039.

25-1040 Attachment; motion to discharge; right of defendant.

The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or part of the property attached.

Source: R.S.1867, Code § 235, p. 432; R.S.1913, § 7769; C.S.1922, § 8713; C.S.1929, § 20-1040.

1. Motion to discharge
2. Issues determined

1. Motion to discharge

Upon dissolution of an attachment, ordinarily all property should be returned to the defendant. Ceres Fertilizer, Inc. v. Beekman, 209 Neb. 447, 308 N.W.2d 347 (1981).

Defendant who has given ''forthcoming bond'' may move to dissolve attachment, but not if he has given ''discharge bond.'' Burnham-Munger-Root D. G. Co. v. Strahl, 102 Neb. 142, 166 N.W. 266 (1918).

Defendant cannot move to discharge attachment on ground that property is not his. Kneeland v. Weigley, 76 Neb. 276, 107 N.W. 574 (1906).

Mortgagee of attached property cannot move to discharge. Meyer, Bannerman & Co. v. Keefer, 58 Neb. 220, 78 N.W. 506 (1899).

Court cannot hear motion to discharge attachment filed before, but not submitted until after judgment. Herman v. Hayes, 58 Neb. 54, 78 N.W. 365 (1899).

Defendant may move to discharge attachment although, prior to levy, he has sold interest therein. Kountze v. Scott, 52 Neb. 460, 72 N.W. 585 (1897).

Issue on motion to discharge is not whether defendant owns property attached, but grounds for attachment. South Park Imp. Co. v. Baker, 51 Neb. 392, 70 N.W. 952 (1897).

Hearing of motion to discharge in attachment is a trial. Gibson v. Sidney, 50 Neb. 12, 69 N.W. 314 (1896).

Subsequent attaching creditors cannot move to dissolve attachment, but may intervene to have priorities determined. Deere, Well & Co. v. Eagle Mfg. Co., 49 Neb. 385, 68 N.W. 504 (1896).

Validity of mortgage executed by defendant cannot be determined on motion to discharge attachment. Landauer v. Mack, 43 Neb. 430, 61 N.W. 597 (1895).

Filing motion does not excuse failure to plead to petition. Stutzner v. Printz, 43 Neb. 306, 61 N.W. 620 (1895).

Motion must be made before judgment; but where submitted, court may rule on same after judgment for plaintiff. Stutzner v. Printz, 43 Neb. 306, 61 N.W. 620 (1895); Moline, Milburn & Stoddard Co. v. Curtis, 38 Neb. 520, 57 N.W. 161 (1893).

2. Issues determined

In a hearing under this section, the burden is upon the plaintiff to sustain by a preponderance of the evidence one or more of the grounds on which attachment is claimed. Ceres Fertilizer, Inc. v. Beekman, 205 Neb. 768, 290 N.W.2d 199 (1980).

Defendant, by filing answer to merits and motion to dissolve attachment on sufficiency and truthfulness of affidavit, made general appearance which waived defects in original summons. Johnson v. Larson, 96 Neb. 193, 147 N.W. 476 (1914).

Debtor alone can question grounds on which attachment is issued. Wagner v. Wolf, 75 Neb. 780, 106 N.W. 1024 (1906).

Defendant may contest, though he had disposed of all interest in property. Symns Gro. Co. v. Snow, 58 Neb. 516, 78 N.W. 1066 (1899).

Merits of case cannot be adjudicated on hearing to dissolve. McDonald v. Marquardt, 52 Neb. 820, 73 N.W. 288 (1897).

Plaintiff is estopped to deny interest of defendant to oppose attachment. Kountze v. Scott, 52 Neb. 460, 72 N.W. 585 (1897); McCord, Brady & Co. v. Bowen, 51 Neb. 247, 70 N.W. 950 (1897).

''Reasonable notice'' defined. Sterling Mfg. Co. v. Hough, 49 Neb. 618, 68 N.W. 1019 (1896).

25-1041 Attachment; motion to discharge; evidence.

The hearing of the motion to discharge shall be a trial of the issue of the existence, at the time of the issuance of the order, of one or more of the grounds of attachment listed in section 25-1001, as alleged in the affidavits under section 25-1002. The court shall discharge an order of attachment unless the plaintiff proves by a preponderance of the evidence one of the grounds alleged under section 25-1001 upon which the writ was issued. The court may

order that the evidence at the hearing of the motion to discharge be presented, in whole or part, by affidavits in the form prescribed by section 25-1334, for affidavits in support of or in opposition to a motion for summary judgment. In all cases in which the court does not so order, evidence presented at the hearing of the motion to discharge shall be governed by the Nebraska Evidence Rules.

Source: R.S.1867, Code § 236, p. 432; R.S.1913, § 7770; C.S.1922, § 8714; C.S.1929, § 20-1041; R.S.1943, § 25-1041; Laws 1980, LB 597, § 13.

Cross References

Nebraska Evidence Rules, see section 27-1103.

Where grounds are denied, burden is on plaintiff. Malcolm Savings Bank v. Cronin, 80 Neb. 231, 116 N.W. 150 (1908).

Affidavits sworn to before attorney in case, if objected to, cannot be used. Malcolm Savings Bank v. Cronin, 80 Neb. 228, 114 N.W. 158 (1907).

Whether plaintiff may use oral evidence is discretionary with trial court. Kountze v. Scott, 52 Neb. 460, 72 N.W. 585 (1897).

Hearing on motion to discharge is a ''trial,'' for which justice may charge fee. Gibson v. Sidney, 50 Neb. 12, 69 N.W. 314 (1896).

Plaintiff must prove grounds to satisfaction of court; may open and close, in discretion of court. Citizens State Bank v. Baird, 42 Neb. 219, 60 N.W. 551 (1894).

Affidavits constitute pleadings; plaintiff opens and closes and has burden of proof. Jordan v. Dewey, 40 Neb. 639, 59 N.W. 88 (1894).

Findings of trial court should not be disturbed unless clearly wrong. Fremont Brewing Co. v. Pekarek, 4 Neb. Unof. 531, 95 N.W. 12 (1903).

Manner of taking evidence on hearing is discretionary with trial court. Dittman Boot & Shoe Co. v. Graff, 3 Neb. Unof. 165, 91 N.W. 188 (1902).

25-1042 Attachment; county court; procedure.

Sections 25-1039 to 25-1041 shall apply to actions before county courts.

Source: Laws 1875, § 1, p. 44; R.S.1913, § 7771; C.S.1922, § 8715; C.S.1929, § 20-1042; R.S.1943, § 25-1042; Laws 1972, LB 1032, § 126.

25-1043 Attachment of lands in another county; copy to be filed with register of deeds.

Whenever an attachment shall issue to any other county than the one in which the action is brought, and any lands shall be attached by virtue thereof, it shall be the duty of the officer attaching such property to make out a true copy of the order of attachment, and file the same in the office of the register of deeds of the county where the lands so attached are situated. He shall also certify upon the copy of said order of attachment that the same is a true copy of the original writ received by him, and he shall also endorse thereon the description of the property attached, and the time when the same was attached, under and by virtue of the original order of attachment.

Source: G.S.1873, c. 57, § 1, p. 714; R.S.1913, § 7772; C.S.1922, § 8716; C.S.1929, § 20-1043.

25-1044 Attachment of lands in another county; writ and certificate; recording constitutes notice.

It shall be the duty of the register of deeds of the county, when the copy of the order of attachment has been filed as provided in section 25-1043, to record the same in the miscellaneous record, together with the certificate of the officers heretofore mentioned, and such copy of said orders of attachment and certificates so filed and recorded shall be sufficient notice to subsequent purchasers of the land so attached.

Source: G.S.1873, c. 57, § 2, p. 714; R.S.1913, § 7773; C.S.1922, § 8717; C.S.1929, § 20-1044.

25-1045 Attachment; discharge; duty of clerk to certify; duty of register of deeds to record.

If the order of attachment is discharged it shall be the duty of the clerk of the court in which the action is brought to certify that fact, together with the time when the order was discharged, to the register of deeds in whose office the copy of the order has been recorded as aforesaid, whereupon such register shall file such certificate and write across the record of such copy the word ''discharged,'' and also the time of discharge as shown in the certificate.

Source: G.S.1873, c. 57, § 3, p. 714; R.S.1913, § 7774; C.S.1922, § 8718; C.S.1929, § 20-1045.

25-1046 Attachment; copy of order; taxation as costs.

The officer, for making out said copy of the same, shall receive such compensation as is now allowed by law for similar services, to be taxed in the costs, unless otherwise ordered by the court.

Source: G.S.1873, c. 57, § 4, p. 714; R.S.1913, § 7775; C.S.1922, § 8719; C.S.1929, § 20-1046.

25-1047 Attachment; order of discharge; when and how superseded.

When an order is made discharging an attachment and any party affected thereby shall except to such order, the court or judge shall thereupon fix a time, not exceeding twenty days thereafter, within which such party may file his petition in error or perfect an appeal from such order during which time the attached property shall remain in the hands of the sheriff or other officer; *Provided*, no such appeal or petition in error shall operate to supersede such order unless such appellant or plaintiff in error shall, within the time so fixed, execute to the adverse party an undertaking, with sureties to be approved by the clerk or judge and conditioned for the payment of all damage which may be sustained by such adverse party, in consequence of such appeal or petition in error, in the event that such attachment be finally discharged as having been unlawfully issued.

Source: G.S.1873, c. 57, § 1, p. 715; R.S.1913, § 7776; C.S.1922, § 8720; C.S.1929, § 20-1047.

1. Bond
2. Miscellaneous

1. Bond

This section does not violate due process under the second prong of the test stated in the U.S. Supreme Court case Connecticut v. Doehr, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991), because it allows continued attachment of the property at issue in only those instances in which the plaintiff posts a bond to protect the defendant from any damages suffered in the event that the order of discharge is affirmed on appeal. Andrews v. Schram, 252 Neb. 298, 562 N.W.2d 50 (1997).

Filing petition and approval of bond in proper time continues lien; summons is not condition to superseding judgment. McDonald v. Bowman, 40 Neb. 269, 58 N.W. 704 (1894).

If petition and bond are not filed in twenty days, garnishee is discharged. Lehnoff & Soennichsen v. Fisher, 32 Neb. 107, 48 N.W. 821 (1891).

Bond is necessary only to preserve lien. Adams County Bank v. Morgan, 26 Neb. 148, 41 N.W. 993 (1889).

Property must be returned at end of twenty days unless petition in error and bond filed. State ex rel. Rieschick v. Cunningham, 9 Neb. 146, 1 N.W. 1011 (1879).

Party giving bond cannot deny property belonged to defendants. Metcalf v. Bockoven, 1 Neb. Unof. 822, 96 N.W. 406 (1901).

2. Miscellaneous

Motion that attachment writ be quashed, in form of special appearance, and order sustaining motion, entitle plaintiff to appeal. National Surety Co. v. Love, 102 Neb. 633, 168 N.W. 597 (1918); Legan v. Smith, 98 Neb. 682, 154 N.W. 228 (1915).

Appeal continues lien and brings ruling of justice discharging attachment to district court for review. Rhodes v. Samuels, 67 Neb. 1, 93 N.W. 148 (1903).

Applies to all courts. Osborne v. Canfield, 33 Neb. 330, 50 N.W. 167 (1891).

Order overruling motion to discharge is not final order. Wilson v. Shepherd, 15 Neb. 15, 16 N.W. 826 (1883).

25-1048 Attachment; order of discharge; appeal; original action unaffected.

The original action shall proceed to trial and judgment in every other respect as though no writ of error has been prosecuted.

Source: G.S.1873, c. 57, § 2, p. 715; R.S.1913, § 7777; C.S.1922, § 8721; C.S.1929, § 20-1048.

Proper dissolution of an attachment issued on a contractual obligation not yet due terminates action. McCartney v. McCartney, 128 Neb. 671, 260 N.W. 184 (1935).

Justice may proceed with original action though error proceedings taken on attachment. Rhodes v. Samuels, 67 Neb. 1, 93 N.W. 148 (1903).

25-1049 Attachment; claims not due; action authorized; when.

A creditor may bring an action on a claim before it is due and have an attachment against the property of the debtor (1) where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; (2) where he is about to make such sale, conveyance, or disposition of his property with such fraudulent intent; or (3) where he is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts.

Source: R.S.1867, Code § 237, p. 432; R.S.1913, § 7778; C.S.1922, § 8722; C.S.1922, § 20-1049.

In an action on a claim before it is due, an attachment is allowable only on grounds and conditions prescribed by statute. McCartney v. McCartney, 128 Neb. 671, 260 N.W. 184 (1935).

Surety paying note before due may attach, if payee could. Danker v. Jacobs, 79 Neb. 435, 112 N.W. 579 (1907).

When a debtor has committed any one of the fraudulent acts enumerated in this section, creditor may maintain an action on a claim before it is due. Cox & Cornell v. Peoria Mfg. Co., 42 Neb. 660, 60 N.W. 933 (1894).

An action can be maintained on a claim before it is due only in the exceptional cases enumerated in this section. Caulfield v. Bittenger, 37 Neb. 542, 56 N.W. 302 (1893).

Filing of affidavit is a request to grant writ and written application in addition is unnecessary. Winchell v. McKinzie, 35 Neb. 813, 53 N.W. 975 (1892).

25-1050 Attachment; claims not due; procedure; affidavit required.

The attachment authorized by section 25-1049 may be granted by the court in which the action is brought, or by a judge thereof, or by the county judge of the county; but before such action shall be brought or such attachment shall be granted, an affidavit or affidavits shall be presented to the judge; such affidavits shall be based upon personal knowledge and shall state specific facts demonstrating (1) that plaintiff will possess a valid cause of action against the defendant when the claim becomes due, (2) the date when the claim shall be due, (3) the amount of the claim, (4) a description of the existence and approximate value of any of defendant's property known to the plaintiff to be within the jurisdiction of the court and not exempt from attachment, and (5) the existence of any one of the grounds for attachment enumerated in section 25-1049.

Source: R.S.1867, Code § 238, p. 433; R.S.1913, § 7779; C.S.1922, § 8723; C.S.1929, § 20-1050; R.S.1943, § 25-1050; Laws 1980, LB 597, § 14.

Neither county judge nor Supreme Judges can allow attachment in district court action when district judge is present in county. Ferson v. Armour & Co., 103 Neb. 809, 174 N.W. 425 (1919).

Subsequent attaching creditors may intervene and contest attachment made without order. Deere, Wells & Co. v. Eagle Mfg. Co., 49 Neb. 385, 68 N.W. 504 (1896).

Affidavit, not petition, must show grounds for attachment. Cox & Cornell v. Peoria Mfg. Co., 42 Neb. 660, 60 N.W. 933 (1894).

Order allowing attachment is judicial act, and void if made on holiday. Merchants Nat. Bank of Omaha v. Jaffray, 36 Neb. 218, 54 N.W. 258 (1893).

Order authorizing attachment is not void though seal of court is omitted; it is amendable. Winchell v. McKinzie, 35 Neb. 813, 53 N.W. 975 (1892).

An attachment on debt before due can only be had in exceptional cases, and jurisdictional steps must be taken. Gamble v. Wilson, 33 Neb. 270, 50 N.W. 3 (1891).

It is unnecessary for affiant to state he is plaintiff, agent, or attorney. Reed, Jones & Co. v. Bagley, 24 Neb. 332, 38 N.W. 827 (1888).

Affidavit should state facts and not be merely in language of statute. Seidentopf v. Annabil, 6 Neb. 524 (1877).

25-1051 Attachment order in actions on claims not due; refusal requires dismissal of action.

If the court or judge refuse to grant an order of attachment as provided in sections 25-1049 and 25-1050, the action shall be dismissed, but without prejudice to a future action; and in all such actions application for an attachment must be made.

Source: R.S.1867, Code § 239, p. 433; R.S.1913, § 7780; C.S.1922, § 8724; C.S.1929, § 20-1051.

Dissolution of attachment terminates main action. Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622, 68 N.W. 1040 (1896).

Action depends upon attachment. Cox & Cornell v. Peoria Mfg. Co., 42 Neb. 660, 60 N.W. 933 (1894).

25-1052 Attachment order in actions on claims not due; amount; specification.

The order of the court or judge granting the attachment shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action.

Source: R.S.1867, Code § 240, p. 433; R.S.1913, § 7781; C.S.1922, § 8725; C.S.1929, § 20-1052.

Order need not appear on face of writ. Armstrong v. Lynch, 29 Neb. 87, 45 N.W. 274 (1890).

25-1053 Repealed. Laws 1980, LB 597, § 18.

25-1054 Attachment in actions on claims not due; judgment; when rendered.

The plaintiff in such action shall not have judgment on his claim before it becomes due, and the proceedings on attachment may be conducted without delay.

Source: R.S.1867, Code § 242, p. 433; R.S.1913, § 7783; C.S.1922, § 8727; C.S.1929, § 20-1054.

Attachment will not support creditor's bill to set aside fraudulent conveyance. Ainsworth v. Roubal, 74 Neb. 723, 105 N.W. 248 (1905).

Judgment cannot be entered before claim is due. Cox & Cornell v. Peoria Mfg. Co., 42 Neb. 660, 60 N.W. 933 (1894).

Purchase-money mortgage given to secure particular debt remains valid in equity regardless of form the debt may assume, if it can be traced. Troyer v. Mundy, 60 F.2d 818 (8th Cir. 1932).

25-1055 Attachment in actions on claims not due; procedure in general.

The proceedings under general attachment provided for in sections 25-1004 to 25-1041, so far as they are applicable, shall regulate the attachments authorized on claims before due.

Source: R.S.1867, Code § 243, p. 433; R.S.1913, § 7784; R.S.1922, § 8728; C.S.1929, § 20-1055.

Previous sections of this article regulate attachments before judgment. Insurance Co. of North America v. Maxim's of Nebraska, 178 Neb. 274, 132 N.W.2d 885 (1965).

(b) GARNISHMENT IN AID OF EXECUTION

25-1056 Garnishment in aid of execution; when issued; procedure; continuing lien; when invalid; priority.

(1) In all cases when a judgment has been entered by any court of record and the judgment creditor or his or her agent or attorney has filed an affidavit setting forth the amount due on the judgment, interest, and costs in the office of the clerk of the court where the judgment has been entered and that he or she has good reason to and does believe that any person, partnership, limited liability company, or corporation, naming him, her, or it, has property of and is indebted to the judgment debtor, the clerk shall issue a summons which shall set forth the amount due on the judgment, interest, and costs as shown in the affidavit and require such person, partnership, limited liability company, or corporation, as garnishee, to answer written interrogatories to be furnished by the plaintiff and to be attached to such summons respecting the matters set forth in section 25-1026. The summons shall be returnable within ten days from the date of its issuance and shall require the garnishee to answer within ten days from the date of service upon him or her. Except when wages are involved, the garnishee shall hold the property of every description and the credits of the defendant in his or her possession or under his or her control at the time of the service of the summons and interrogatories until the further order of the court. If the only property in the possession or under the control of the garnishee at the time of the service of the summons and interrogatories is credits of the defendant and the amount of such credits is not in dispute by the garnishee, then such garnishee shall only hold the credits of the defendant in his or her possession or under his or her control at the time of the service of the summons and interrogatories to the extent of the amount of the judgment, interest, and costs set forth in the summons until further order of the court. When wages are involved, the garnishee shall pay to the employee all disposable earnings exempted from garnishment by statute, and any disposable earnings remaining after such payment shall be retained by the garnishee until further order of the court. Thereafter, the service of the summons and interrogatories and all further proceedings shall be in all respects the same as is provided for in sections 25-1011 and 25-1026 to 25-1031.01 unless inconsistent with this section.

(2) If it appears from the answer of the garnishee that the judgment debtor was an employee of the garnishee, that the garnishee otherwise owed earnings to the judgment debtor when the garnishment order was served, or that earnings would be owed within sixty days thereafter and there is not a successful written objection to the order or the answer of the garnishee filed, on application by the judgment creditor, the court shall order that the nonexempt earnings, if any, withheld by the garnishee after service of the order be transferred to the court for delivery to the judgment creditor who is entitled to such earnings. Except for garnishments in support of a person, the payments may be made payable to the judgment creditor or assignee and shall be forwarded to the issuing court to record the judgment payment prior to the court delivering the payment to the judgment creditor or assignee. The court shall, upon application of the judgment creditor, further order that the garnishment is a continuing lien against the nonexempt earnings of the judgment debtor. An order of continuing lien on nonexempt earnings entered pursuant to this section shall require the garnishee to continue to withhold the nonexempt

earnings of the judgment debtor for as long as the continuing lien remains in effect.

Beginning with the pay period during which the writ was served and while the continuing lien remains in effect, the garnishee shall deliver the nonexempt earnings to the court from which the garnishment was issued for each pay period or on a monthly basis if the garnishee so desires and shall deliver to the judgment debtor his or her exempt earnings for each pay period.

(3) A continuing lien ordered pursuant to this section shall be invalid and shall have no force and effect upon the occurrence of any of the following:

(a) The underlying judgment is satisfied in full or vacated or expires;

(b) The judgment debtor leaves the garnishee's employ for more than sixty days;

(c) The judgment creditor releases the garnishment;

(d) The proceedings are stayed by a court of competent jurisdiction, including the United States Bankruptcy Court;

(e) The judgment debtor has not earned any nonexempt earnings for at least sixty days;

(f) The court orders that the garnishment be quashed; or

(g) Ninety days have expired since service of the writ. The judgment creditor may extend the lien for a second ninety-day period by filing with the court a notice of extension during the fifteen days immediately prior to the expiration of the initial lien, and the continuing lien in favor of the initial judgment creditor shall continue for a second ninety-day period.

(4)(a) To determine priority, garnishments and liens shall rank according to time of service.

(b) Garnishments, liens, and wage assignments which are not for the support of a person shall be inferior to wage assignments for the support of a person. Garnishments which are not for the support of a person and liens shall be inferior to garnishments for the support of a person.

(5) Only one order of continuing lien against earnings due the judgment debtor shall be in effect at one time. If an employee's wages are already being garnished pursuant to a continuing lien at the time of service of a garnishment upon an employer, the answer to garnishment interrogatories shall include such information along with the date of termination of such continuing lien and the title of the case from which such garnishment is issued. Except as provided in subsection (4) of this section, a continuing lien obtained pursuant to this section shall have priority over any subsequent garnishment or wage assignment.

Source: R.S.1867, Code § 244, p. 433; R.S.1913, § 7785; C.S.1922, § 8729; C.S.1929, § 20-1056; R.S.1943, § 25-1056; Laws 1953, c. 68, § 1, p. 219; Laws 1955, c. 85, § 3, p. 255; Laws 1959, c. 101, § 4, p. 423; Laws 1972, LB 1032, § 127; Laws 1974, LB 737, § 1; Laws 1980, LB 597, § 15; Laws 1988, LB 1030, § 17; Laws 1993, LB 121, § 169; Laws 1995, LB 420, § 1; Laws 1996, LB 1048, § 1; Laws 1997, LB 771, § 1.

1. Affidavit
2. Summons
3. Proceedings
4. When section is not applicable

1. Affidavit

Affidavit upon mere belief is sufficient. Clarke v. Neb. Nat. Bank, 57 Neb. 314, 77 N.W. 805 (1899).

Affidavit purporting not to be that of an individual is void; fact of agency should be sworn to. Jeary v. American Exchange Bank, 2 Neb. Unof. 657, 89 N.W. 771 (1902).

2. Summons

Acknowledgment on back of summons is equivalent to service. Scott v. McDonald, 125 Neb. 803, 252 N.W. 323 (1934).

After judgment, summons in garnishment from one county to another in aid of execution is unauthorized. Hinds State Bank v. Loffler, 113 Neb. 110, 202 N.W. 465 (1925).

Where summons is issued same day execution is returned, it will be presumed latter was returned first. Brunke v. Gruben, 84 Neb. 806, 122 N.W. 37 (1909).

If summons is issued before judgment, proceedings are void. Whitcomb v. Atkins, 40 Neb. 549, 59 N.W. 86 (1894).

Return of officer ''nulla bona'' is conclusive for purposes of garnishment. Wilson v. Burney, 8 Neb. 39 (1878).

3. Proceedings

Garnishment requires a judgment, and the dismissal of a suit pursuant to a settlement agreement does not suffice to allow a garnishment action to enforce the settlement. J.K. v. Kolbeck, 257 Neb. 107, 595 N.W.2d 875 (1999).

Garnishment in aid of execution of a judgment is proper in Nebraska only when the garnishee has property of and is indebted to the judgment debtor, and the test for determining the liability of the garnishee defendant to the garnisheeing plaintiff is whether or not the facts would support a recovery by the principal defendant against the garnishee. Darr v. Long, 210 Neb. 57, 313 N.W.2d 215 (1988).

Procedure for garnishment after domestic judgment and procedure for enforcement of foreign judgment compared. Sullivan v. Sullivan, 168 Neb. 850, 97 N.W.2d 348 (1959).

Where garnishee denies indebtedness by answer and interrogatories are not propounded, garnishee should be discharged. Searcey v. Badgett, 137 Neb. 185, 288 N.W. 537 (1939).

Judgment creditor of insolvent corporation cannot put himself in preferred position over other creditors. State ex rel. Sorensen v. State Bank of Omaha, 136 Neb. 880, 287 N.W. 762 (1939).

In a garnishment proceeding in aid of execution, the answer and evidence of garnishee only are admissible in response to the summons in garnishment. Orchard & Wilhelm Co. v. North, 135 Neb. 39, 280 N.W. 272 (1938).

A judicial order on a garnishee to turn over money or property in aid of execution can only be made upon an unqualified admission by him of a present indebtedness which execution debtor would be entitled to but for the garnishment. Shonsey Co. v. Belgrade-Hord Co., 133 Neb. 886, 277 N.W. 597 (1938); Early v. Belgrade-Hord Co., 133 Neb. 884, 277 N.W. 596 (1938).

Law of garnishment is purely statutory and will be interpreted more strongly against garnishor. Central Market v. King, 132 Neb. 380, 272 N.W. 244 (1937).

In garnishment proceedings in aid of execution the answer or evidence of the garnishee only may be taken by the court. Orchard & Wilhelm Co. v. North, 125 Neb. 723, 251 N.W. 895 (1933).

Indebtedness of maker upon promissory note, before maturity, is not the subject of attachment; his obligation is not to payee but to holder, whoever he may be. Fisher v. O'Hanlon, 93 Neb. 529, 141 N.W. 157 (1913).

If judgment is afterwards set aside, garnishment proceedings are dissolved. Clough v. Buck, 6 Neb. 343 (1877).

4. When section is not applicable

A garnishee bank waives its right of setoff if after notice of garnishment it permits the depositor to draw on the garnished account, reducing the account balance below the balance at the time of service or, if that balance is greater than the amount of judgment, below the amount of the judgment. United Seeds v. Eagle Green Corp., 223 Neb. 360, 389 N.W.2d 571 (1986).

This section not applicable when garnishee is a foreign insurance company which has complied with statutory provisions to obtain certificate of authority to do business. Pupkes v. Sailors, 183 Neb. 784, 164 N.W.2d 441 (1969).

25-1057 Repealed. Laws 1953, c. 68, § 2.

25-1058 Repealed. Laws 1953, c. 68, § 2.

25-1059 Repealed. Laws 1953, c. 68, § 2.

25-1060 Repealed. Laws 1953, c. 68, § 2.

25-1061 Repealed. Laws 1953, c. 68, § 2.

(c) INJUNCTIONS

25-1062 Injunction, defined.

The injunction provided by this code is a command to refrain from a particular act. It may be the final judgment in an action or may be allowed as a provisional remedy, subject to the provisions of sections 25-1062 to 25-1080, and when so allowed it shall be by order. The writ of injunction is abolished.

Source: R.S.1867, Code § 250, p. 435; R.S.1913, § 7791; C.S.1922, § 8735; C.S.1929, § 20-1062; Laws 1941, c. 29, § 2, p. 133; C.S.Supp.,1941, § 20-1062.

An injunction to stay proceedings at law is not properly directed against a court or statutory tribunal before which the matter is pending, but lies solely against the parties to such proceeding. Massman Constr. Co. v. Nebraska Workmen's Compensation Court, 141 Neb. 270, 3 N.W.2d 639 (1942).

An injunction is a command to refrain from a particular act. Conrad v. Kaup, 137 Neb. 900, 291 N.W. 687 (1940).

The term injunction includes restraining order. Behrens v. Smith Baking Co., 130 Neb. 651, 266 N.W. 61 (1936).

Order restrains only party against whom directed and subordinates. Boyd v. State, 19 Neb. 128, 26 N.W. 925 (1886).

Because injunctions are provided for in this section of Chapter 25, a suit for an injunction is an action and not a special proceeding. O'Connor v. Kaufman, 6 Neb. App. 382, 574 N.W.2d 513 (1998).

25-1062.01 Director of Natural Resources, defined; notice to appropriator; how given.

(1) The words Director of Natural Resources as used in this section and in sections 25-1064, 25-2159, and 25-2160 mean the Director of Natural Resources, State of Nebraska, his or her successor in office, or any agent, servant, employee, or officer of the State of Nebraska, now or hereafter exercising any powers or duties with respect to the administration of the irrigation water in the state, who may be a party in any court of the state in an action when the relief demanded involves the delivery of irrigation water.

(2) Whenever notice by either registered or certified letter to an appropriator is required in such sections, the address of the appropriator shall be that recorded in the office of the Department of Natural Resources under section 46-230.

Source: Laws 1941, c. 29, § 1, p. 133; C.S.Supp.,1941, § 20-10,111; R.S.1943, § 25-1062.01; Laws 1957, c. 242, § 14, p. 828; Laws 1957, c. 365, § 1, p. 1232; Laws 1986, LB 516, § 10; Laws 2000, LB 900, § 65.

25-1063 Temporary injunction; issuance; grounds.

When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act, subject to the limitations of sections 25-1062 to 25-1080. It may also be granted in any case specially authorized by statute.

Source: R.S.1867, Code § 251, p. 435; R.S.1913, § 7792; C.S.1922, § 8736; C.S.1929, § 20-1063; Laws 1941, c. 29, § 3, p. 134; C.S.Supp.,1941, § 20-1063; R.S.1943, § 25-1063; Laws 2002, LB 876, § 20.

1. Grounds
2. Miscellaneous

1. Grounds

Installment Loan Act specially provides for a temporary injunction. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

Where part of relief sought is to enjoin disposal of notes given for property, action may be brought in county where notes are held in escrow, and summons sent to other county. Bushee v. Keller, 96 Neb. 736, 148 N.W. 902 (1914).

Landowner will be enjoined from building fence without useful purpose, to annoy neighbor. Bush v. Mockett, 95 Neb. 552, 145 N.W. 1001 (1914).

Authorities should not ordinarily be enjoined from constructing necessary drains along highways. Wachter v. Lange, 94 Neb. 290, 143 N.W. 207 (1913).

Injunctions will be granted against repeated or continued acts of trespass. Ayers v. Barnett, 93 Neb. 350, 140 N.W. 634 (1913); Munger v. Yeiser, 80 Neb. 285, 114 N.W. 166 (1907); Jacobson v. Van Boening, 48 Neb. 80, 66 N.W. 993 (1896); Shaffer v. Stull, 32 Neb. 94, 48 N.W. 882 (1891).

Injunction is proper to protect enjoyment of easement. Ballinger v. Kinney, 87 Neb. 342, 127 N.W. 239 (1910).

Injunction is properly granted to restrain enforcement of void order taxing costs and remove cloud on title. Weiler v. Fischer, 86 Neb. 614, 126 N.W. 296 (1910).

Injunction will lie to restrain intruder interfering with incumbent of office. Hotchkiss v. Keck, 86 Neb. 322, 125 N.W. 509 (1910).

Injunction does not lie to prevent passage of city or village ordinance. Chicago, R. I. & P. Ry. Co. v. City of Lincoln, 85 Neb. 733, 124 N.W. 142 (1910).

Injunction is proper to restrain road overseer taking land for road prior to condemnation proceedings. Johnson v. Peterson, 85 Neb. 83, 122 N.W. 683 (1909).

Injunction is proper to prevent collection of exempt wages under order of garnishment. Jones v. Union P. R. R. Co., 84 Neb. 121, 120 N.W. 946 (1909).

Injunction is proper to restrain use of premises as disorderly house. Seifert v. Dillon, 83 Neb. 322, 119 N.W. 686 (1909).

Injunction will be granted against waste by tenant for years or by his servants. Hayman v. Rownd, 82 Neb. 598, 118 N.W. 328 (1908).

Injunction will not lie to restrain commission of single act of trespass. Cox v. Sheen, 82 Neb. 472, 118 N.W. 125 (1908).

Injunction lies to restrain public officer from illegally creating debt or obligation. Roberts v. Thompson, 82 Neb. 458, 118 N.W. 106 (1908).

Injunction will be granted to restrain illegal assessment of special taxes by city council. Barkley v. City of Lincoln, 82 Neb. 181, 117 N.W. 398 (1908).

Injunction is not proper to restrain breach of contract where terms are in doubt or uncertain. Platte County Independent Tel. Co. v. Leigh Independent Tel. Co., 80 Neb. 41, 113 N.W. 799 (1907).

Injunction will be allowed to prevent removal of buildings and fences. Lynch v. Egan, 67 Neb. 541, 93 N.W. 775 (1903); Pohlman v. Evangelical Lutheran Trinity Church, 60 Neb. 364, 83 N.W. 201 (1900).

Injunction lies to prevent the obstruction or interference with irrigation ditch. Castle Rock Irrig. Canal & Water Power Co. v. Jurisch, 67 Neb. 377, 93 N.W. 690 (1903); Park v. Ackerman, 60 Neb. 405, 83 N.W. 173 (1900).

Mandamus allowed in proper case to compel vacation. State ex rel. Cohn v. Jessen, 66 Neb. 515, 92 N.W. 584 (1902); Reynolds v. Graves, 66 Neb. 17, 92 N.W. 144 (1902).

Where plain and adequate remedy may be had by motion in original proceedings, injunction to stay proceedings will not lie. Carson v. Jansen, 65 Neb. 423, 91 N.W. 398 (1902).

Injunction will, in proper case, be allowed to prevent nuisance. Lowe v. Prospect Hill Cemetery Assn., 58 Neb. 94, 78 N.W. 488 (1899); Farrell v. Cook, 16 Neb. 483, 20 N.W. 720 (1884).

Injunction should not be allowed to restrain enforcement of judgment when plaintiff has negligently failed to make defense at law. Losey v. Neidig, 52 Neb. 167, 71 N.W. 1067 (1897).

Injunction is not proper remedy to test legality of municipal organization. Osborn v. Village of Oakland, 49 Neb. 340, 68 N.W. 506 (1896).

Injunction will be allowed against unlawful establishing of highway through plaintiff's land. Welton v. Dickson, 38 Neb. 767, 57 N.W. 559 (1894).

Injunction is not proper to restrain collection of taxes for mere irregularity. Touzalin v. City of Omaha, 25 Neb. 817, 41 N.W. 796 (1889).

Injunction cannot be used to control discretion of public officer. School Dist. No. 1 of Red Willow Co. v. Wheeler, 25 Neb. 199, 41 N.W. 143 (1888).

2. Miscellaneous

Injunction can issue against void occupation tax. Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N.W.2d 150 (1948).

Enforcement of rights should be sought by peaceable legal procedure, not by force or stealth. Wallace v. Kruzer, 95 Neb. 615, 146 N.W. 984 (1914).

Restraining order is in aid only, and not part of main action. State ex rel. Keefe v. Graves, 82 Neb. 282, 117 N.W. 717 (1908).

''Irreparable injury'' defined. Cole v. Manners, 76 Neb. 454, 107 N.W. 777 (1906); Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 60 N.W. 717 (1894).

Injunction does not lie to enforce bare legal right. Mohat v. Hutt, 75 Neb. 732, 106 N.W. 659 (1906).

Affidavits must set forth the acts constituting the violation; general allegation not sufficient. Back v. State, 75 Neb. 603, 106 N.W. 787 (1906).

Power of district court to punish for contempt discussed. Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85, 106 N.W. 429 (1905); Zimmerman v. State, 46 Neb. 13, 64 N.W. 375 (1895).

Order of court without jurisdiction, or in excess of powers is void. State ex rel. Ellingsworth v. Carlson, 72 Neb. 837, 101 N.W. 1004 (1904).

It is the duty of judge sitting at chambers to fix amount of supersedeas bond on entry of order of dissolution or modification. State ex rel. Plattsmouth Tel. Co. v. Baker, 62 Neb. 840, 88 N.W. 124 (1901); State ex rel. Downing v. Greene, 48 Neb. 327, 67 N.W. 162 (1896).

There is a distinction between order of injunction and temporary restraining order. State ex rel. Plattsmouth Tel. Co. v. Baker, 62 Neb. 840, 88 N.W. 124 (1901).

Petition should disclose with definiteness and particularity the threatened injury. Wabaska Elec. Co. v. City of Wymore, 60 Neb. 199, 82 N.W. 626 (1900); State Bank of Neb. of Seward v. Rohren, 55 Neb. 223, 75 N.W. 543 (1898).

One who knowingly disobeys injunction, though he would have been entitled to vacate order, is liable to punishment for contempt. Hydock v. State, 59 Neb. 296, 80 N.W. 902 (1899); Zimmerman v. State, 46 Neb. 13, 64 N.W. 375 (1895); Wilber v. Woolley, 44 Neb. 739, 62 N.W. 1095 (1895).

Adequate remedy at law discussed. Bankers Life Ins. Co. v. Robbins, 53 Neb. 44, 73 N.W. 269 (1897); Welton v. Dickson, 38 Neb. 767, 57 N.W. 559 (1894).

Order may be dissolved on security. State ex rel. Downing v. Greene, 48 Neb. 327, 67 N.W. 162 (1896); State ex rel. Beecher v. Wakeley, 28 Neb. 431, 44 N.W. 488 (1890).

Restraining order ceases to be operative on the expiration of the date fixed by its terms. State ex rel. Downing v. Greene, 48 Neb. 327, 67 N.W. 162 (1896).

Pleadings must state facts; threatened acts must be alleged. Blakeslee v. Missouri P. Ry. Co., 43 Neb. 61, 61 N.W. 118 (1894); Lininger v. Glenn, 33 Neb. 187, 49 N.W. 1128 (1891).

A mandatory injunction should not be granted except to prevent failure of justice, and only when right is clearly established. Buettgenbach v. Gerbig, 2 Neb. Unof. 889, 90 N.W. 654 (1902).

25-1064 Temporary injunctions and restraining orders; courts and judges empowered to issue; conditions; temporary restraining order granted without notice; requirements; actions involving irrigation water; notice, how given.

(1) The injunction may be granted at the time of commencing the action or at any time afterward before judgment by the Court of Appeals or the Supreme Court or any judge thereof. No restraining order or temporary injunction

should be granted at the time of the commencement of the action if the relief demanded involves the delivery of irrigation water and the Director of Natural Resources, as defined in section 25-1062.01, is a party except in accordance with the procedure prescribed in subsection (5) of this section.

(2) No temporary injunction may be granted without notice to the adverse party.

(3) Any judge of the district court, except when the relief demanded involves the delivery of irrigation water and the director is a party, may grant a temporary restraining order without notice to the adverse party or his or her attorney only if (a) it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his or her attorney can be heard in opposition and (b) the applicant or his or her attorney certifies to the court in writing the efforts, if any, which have been made to give such notice and the reasons supporting the applicant's claim that such notice shall not be required.

Every temporary restraining order granted without notice shall: (i) Be endorsed with the date and hour of issuance; (ii) be filed immediately in the office of the clerk of the district court and entered of record; (iii) define the injury and state why the injury is irreparable and why the order was granted without notice; and (iv) expire by its terms within such time after entry, not to exceed ten days, as the court fixes unless within such fixed time period the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents to an extension for a longer period. The reasons for the extension shall be entered of record. If a temporary restraining order is granted without notice, the motion for a temporary injunction shall be heard at the earliest possible time in the district court and shall take precedence over all matters except older matters of the same character. When the motion for a temporary injunction comes up for hearing, the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction, and if he or she does not do so, the district court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to such party as the district court may prescribe, the adverse party may appear and move for the dissolution or modification of the order, and in that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(4) In the absence from the county of the district judges, any judge of the county court, except when the relief demanded involves the delivery of irrigation water and the director is a party, may grant a temporary restraining order without notice to the adverse party or his or her attorney only if (a) it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his or her attorney can be heard in opposition and (b) the applicant or his or her attorney certifies to the court in writing the efforts, if any, which have been made to give such notice and the reasons supporting the applicant's claim that such notice shall not be required. The judge of the county court shall direct that reasonable notice be given to the party against whom the temporary restraining order is issued to attend at a specified time or place before the district court or any judge thereof to show cause why a temporary injunction should not be issued.

Every temporary restraining order granted without notice shall: (i) Be endorsed with the date and hour of issuance; (ii) be filed immediately in the office of the clerk of the district court and entered of record; (iii) define the injury and state why the injury is irreparable and why the order was granted without notice; and (iv) expire by its terms within such time after entry, not to exceed ten days, as the judge of the county court fixes unless within such fixed time period the order, for good cause shown, is extended by the district court for a like period or unless the party against whom the order is directed consents to an extension for a longer period. The reasons for the extension shall be entered of record.

(5) The Supreme Court or any judge thereof, the Court of Appeals or any judge thereof, the district court or any judge thereof, or a judge of the county court, if and when he or she has jurisdiction, shall have no power, when the relief demanded involves the delivery of irrigation water and the director is a party, to grant a restraining order or temporary injunction at the time of the commencement of the action, except when notice by either registered or certified letter has been mailed seventy-two hours prior to the time of hearing to the director and the division supervisor in the water division created by section 61-212 in which the action is brought and, in the manner provided in section 25-1062.01, to all appropriators whose rights to the delivery of irrigation water might in any manner be affected, of the time and place of the hearing. At the hearing on the restraining order or temporary injunction, the director, appropriators, or riparian owners shall be entitled to be heard, in person or by their attorney or attorneys, on the question of whether the restraining order should be granted and, if so, in what amount the bond or undertaking is to be fixed.

(6) Any person, natural or artificial, injured or likely to be injured by the granting of a restraining order may intervene in the action at any stage of the proceedings and become a party to the litigation if it involves the delivery of irrigation water and the director is a party.

Source: R.S.1867, Code § 252, p. 435; Laws 1913, c. 65, § 1, p. 198; R.S.1913, § 7793; C.S.1922, § 8737; C.S.1929, § 20-1064; Laws 1941, c. 29, § 4, p. 134; C.S.Supp.,1941, § 20-1064; R.S.1943, § 25-1064; Laws 1955, c. 87, § 1, p. 260; Laws 1957, c. 242, § 15, p. 828; Laws 1957, c. 365, § 2, p. 1232; Laws 1986, LB 516, § 11; Laws 1991, LB 732, § 44; Laws 2000, LB 900, § 66.

Notwithstanding section 24-517(5), the district court has jurisdiction in injunctive actions to enforce zoning ordinances. Village of Springfield v. Hevelone, 195 Neb. 37, 236 N.W.2d 811 (1975).

Supreme Court may grant a temporary injunction in proceedings by state under Installment Loan Act. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

District judge has power to allow temporary injunction, notwithstanding provisions of this section. State ex rel. Hahler v. Grimes, 96 Neb. 719, 148 N.W. 942 (1914).

Affidavit not stating Supreme Judges were absent is sufficient to allow county judge to act, latter cannot issue perpetual injunction. State ex rel. Minden-Edison Light & Power Co. v. Dungan, 89 Neb. 738, 132 N.W. 305 (1911).

County judge may grant temporary restraining order if district judge is absent. State ex rel. Downing v. Greene, 48 Neb. 327, 67 N.W. 162 (1896).

Violation of injunction allowed by county judge is contempt for district court. Wilber v. Woolley, 44 Neb. 739, 62 N.W. 1095 (1895).

County judge cannot punish for contempt of violation of restraining order. Johnson v. Bouton, 35 Neb. 898, 53 N.W. 995 (1892).

Judge of Supreme Court may grant temporary injunction. Calvert v. State, 34 Neb. 616, 52 N.W. 687 (1892).

District judge cannot grant injunction out of district unless judge therein is absent or unable to act; injunction void. Ellis v. Karl, 7 Neb. 381 (1878).

Order granted by county judge before petition filed is valid, where both filed forthwith. Commercial State Bank of Crawford v. Ketcham, 3 Neb. Unof. 839, 92 N.W. 998 (1902).

25-1064.01 Order granting an injunction; restraining order; requirements.

Every order granting an injunction and every restraining order shall: (1) Set forth the reasons for its issuance; (2) be specific in terms; (3) describe in reasonable detail, and not by reference to the pleading or other document, the act or acts sought to be restrained; and (4) be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Source: Laws 1986, LB 516, § 12; Laws 2002, LB 876, § 21.

25-1064.02 Sections, how construed.

Sections 25-1062.01 and 25-1064 to 25-1064.02 shall in no way limit a person's right to an injunction or temporary restraining order if such remedies are specifically authorized by statute.

Source: Laws 1986, LB 516, § 13.

25-1065 Repealed. Laws 1986, LB 516, § 17.

25-1066 Repealed. Laws 1986, LB 516, § 17.

25-1067 Injunctions; security.

No injunction, unless provided by special statute, shall operate until the party obtaining the same shall give an undertaking, executed by one or more sufficient sureties, who shall justify as provided in sections 25-2222 and 25-2223. The undertaking shall be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure to the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to have been granted.

Source: R.S.1867, Code § 255, p. 435; R.S.1913, § 7796; C.S.1922, § 8740; C.S.1929, § 20-1067; Laws 1941, c. 29, § 7, p. 136; C.S.Supp.,1941, § 20-1067.

Cross References

State officers and departments, not required to give injunction bond, see section 25-21,216.

1. Filing and approval of bond
2. Effect of order
3. Dissolution of order
4. Suit on bond
5. Miscellaneous

1. Filing and approval of bond

Injunction is not effective for any purpose until bond is given and approved. Johnson v. Bouton, 35 Neb. 898, 53 N.W. 995 (1892).

If bond is not given, adverse party may disregard order. Baker v. Meisch, 29 Neb. 227, 45 N.W. 685 (1890).

2. Effect of order

Dissolution of injunction is adjudication that same ought not to have been granted; sureties cannot complain that order is broader than application. Gibson v. Reed, 54 Neb. 309, 75 N.W. 1085 (1898).

3. Dissolution of order

Where injunction against collection of judgment was dissolved, measure of damages in suit on bond was reduction in amount collectible, not amount of judgment. Stull Bros. v. Beddeo, 78 Neb. 119, 112 N.W. 315 (1907).

When order is dissolved, action accrues on bond; striking cause from files for failure to revive, dissolves. Humfeldt v. Moles, 63 Neb. 448, 88 N.W. 655 (1902).

Expenses of unsuccessful attempt to dissolve injunction are not recoverable. Pollock v. Whipple, 57 Neb. 82, 77 N.W. 355 (1898).

Attorney's fees for dissolution of restraining order are generally not recoverable. Carnes v. Heimrod, 45 Neb. 364, 63 N.W. 809 (1895).

4. Suit on bond

A party enjoined may recover damages on a temporary injunction bond only if it be finally decided that the injunction ought not to have been granted. State ex rel. Douglas v. Ledwith, 204 Neb. 6, 281 N.W.2d 729 (1979).

In absence of statute authorizing court to assess damages resulting to defendant from issuance of restraining order on dissolving such order, defendant must resort to independent action on plaintiff's bond. Higgins v. Adelson, 131 Neb. 820, 270 N.W. 502 (1936).

Voluntary dismissal entitles defendant to sue on bond. Gyger v. Courtney, 59 Neb. 555, 81 N.W. 437 (1900).

5. Miscellaneous

Attorneys' fees cannot be recovered as damages in suit on bond where injunction proceedings are only auxiliary to main case. Williams v. Hallgren, 149 Neb. 621, 31 N.W.2d 737 (1948).

Attorney's fees in trial of case are not recoverable on bond where injunction is ancillary; limited to fees for dissolving injunction. Darling v. McBride, 86 Neb. 481, 125 N.W. 1088 (1910).

No action can be maintained on temporary injunction bond until final decree in cause wherein bond is given. Johnson v. Bouton, 56 Neb. 626, 77 N.W. 57 (1898).

25-1068 Service of order of injunction; when not required.

The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be issued by the clerk. Where the injunction is allowed at the commencement of the action, the clerk shall endorse upon the summons injunction allowed, and it shall not be necessary to issue the order of injunction; nor shall it be necessary to issue the same where notice of the application therefor has been given to the party enjoined. The service of the summons so endorsed, or the notice of the application for an injunction, shall be notice of its allowance.

Source: R.S.1867, Code § 256, p. 436; R.S.1913, § 7797; C.S.1922, § 8741; C.S.1929, § 20-1068.

Cross References

For endorsement by sheriff showing time he or she received the summons, see section 23-1701.05.

Summons endorsed, injunction allowed, is sufficient notice of order. State ex rel. Minden-Edison Light & Power Co. v. Dungan, 89 Neb. 738, 132 N.W. 305 (1911).

25-1069 Service of order; return.

Where the injunction is allowed during litigation and without notice of the application therefor, the order of injunction shall be issued, and the sheriff shall forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof without delay.

Source: R.S.1867, Code § 257, p. 436; R.S.1913, § 7798; C.S.1922, § 8742; C.S.1929, § 20-1069.

25-1070 Injunctions; when binding.

An injunction binds the party from the time he has notice thereof and the undertaking required of the applicant therefor is executed.

Source: R.S.1867, Code § 258, p. 436; R.S.1913, § 7799; C.S.1922, § 8743; C.S.1929, § 20-1070.

25-1071 Injunctions not granted; when.

No injunction shall be granted by a judge, after a motion therefor has been overruled on the merits of the application by this court; and where it has been refused by the court in which the action is brought, or a judge thereof, it shall not be granted to the same applicant by a court of inferior jurisdiction or any judge thereof.

Source: R.S.1867, Code § 259, p. 436; R.S.1913, § 7800; C.S.1922, § 8744; C.S.1929, § 20-1071.

25-1072 Enforcement; disobedience; punishment.

An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or

by any judge who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirements, or be otherwise legally discharged.

Source: R.S.1867, Code § 260, p. 436; R.S.1913, § 7801; C.S.1922, § 8745; C.S.1929, § 20-1072.

1. Enforcement
2. Miscellaneous

1. Enforcement

A party who disobeys an injunction may be required, in the discretion of the court, to make immediate restitution to the party injured. Kasparek v. May, 178 Neb. 425, 133 N.W.2d 614 (1965).

Violation of injunction against unlawful practice of law could be punished as contempt of court. State ex rel. Beck v. Lush, 170 Neb. 376, 103 N.W.2d 136 (1960).

Operators of motion picture theatres who had been enjoined from operating lottery referred to as ''bank night'' were guilty of contempt by carrying on similar scheme known as ''prosperity night.'' State ex rel. Hunter v. Omaha Motion Picture Exhibitors Assn., 139 Neb. 312, 297 N.W. 547 (1941).

Disobedience of an injunction must be willful before a breach thereof may be punished as a contempt. Whipple v. Nelson, 138 Neb. 514, 293 N.W. 382 (1940).

Information must be specific; court may fine and imprison; judge at chambers cannot imprison. Back v. State, 75 Neb. 603, 106 N.W. 787 (1906).

Judge in vacation may punish for contempt. Nebraska Children's Home Society v. State, 57 Neb. 765, 78 N.W. 267 (1899).

Void injunction is not enforceable by contempt proceedings; is only voidable contra. Wilber v. Woolley, 44 Neb. 739, 62 N.W. 1095 (1895).

2. Miscellaneous

This section is invalid and unenforceable as a limitation upon the inherent power of the court to punish for contempt. State ex rel. Beck v. Frontier Airlines, Inc., 174 Neb. 172, 116 N.W.2d 281 (1962).

Procedure is authorized for punishment for violation of mandatory injunction. Meier v. Nelsen, 156 Neb. 666, 57 N.W.2d 273 (1953).

One who is in privity with party enjoined and has knowledge of the injunction is bound thereby. Wilcox v. Ashford, 131 Neb. 338, 268 N.W. 81 (1936).

Conviction under contempt proceedings can be reviewed in Supreme Court only by filing petition in error. Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N.W. 574 (1931).

Contempt proceeding is in nature of criminal action; reviewable on error. Zimmerman v. State, 46 Neb. 13, 64 N.W. 375 (1895).

A county judge has no power to commit for contempt a party who has violated an injunction allowed by him in an action in district court. Johnson v. Bouton, 35 Neb. 898, 53 N.W. 995 (1892).

25-1073 Motion for additional security; vacation.

A party enjoined may, at any time before judgment, upon reasonable notice to the party who has obtained the injunction, move the court for additional security; and if it appears that the surety in the undertaking has removed from the state, or is insufficient, the court may vacate the injunction, unless in a reasonable time sufficient security be given.

Source: R.S.1867, Code § 261, p. 436; R.S.1913, § 7802; C.S.1922, § 8746; C.S.1929, § 20-1073.

25-1074 Hearings; affidavits.

On the hearing of an application for an injunction, each party may read affidavits. All affidavits shall be filed.

Source: R.S.1867, Code § 262, p. 437; R.S.1913, § 7803; C.S.1922, § 8747; C.S.1929, § 20-1074.

This section permits affidavits on application for injunction, but not on final hearing. Francisco v. Furry, 82 Neb. 754, 118 N.W. 1102 (1908).

25-1075 Injunction without notice; vacation; modification; notice.

If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice, to the court in which the action is brought or

any judge thereof, to vacate or modify the same. The application may be made upon the complaint or petition and affidavits upon which the injunction is granted, or upon affidavits on the part of the party enjoined, with or without answer. The order of the judge allowing, dissolving, or modifying an injunction shall be returned to the office of the clerk of the court in which the action is brought and recorded and obeyed as if made by the court.

Source: R.S.1867, Code § 263, p. 437; R.S.1913, § 7804; C.S.1922, § 8748; C.S.1929, § 20-1075; R.S.1943, § 25-1075; Laws 2002, LB 876, § 22.

Judge at chambers cannot dispose of main case. Browne v. Edwards & McCullough Lumber Co., 44 Neb. 361, 62 N.W. 1070 (1895).

25-1076 Injunction without notice; showing and counter-showing; affidavits.

If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to that on which the injunction was granted.

Source: R.S.1867, Code § 264, p. 437; R.S.1913, § 7805; C.S.1922, § 8749; C.S.1929, § 20-1076.

Plaintiff should be allowed reasonable time to procure counter affidavits. Armstrong v. Sweeney, 65 Neb. 676, 91 N.W. 570 (1902).

25-1077 Counterclaim; injunction upon.

A defendant may obtain an injunction upon an answer in the nature of a counterclaim. He shall proceed in the manner prescribed in sections 25-1062 to 25-1080.

Source: R.S.1867, Code § 265, p. 437; R.S.1913, § 7806; C.S.1922, § 8750; C.S.1929, § 20-1077.

25-1078 Temporary injunction; modification; dissolution; supersedeas bond.

In case of the dissolution or modification by any court, or any judge at chambers, of any temporary order of injunction which has been or may hereafter be granted, the court or judge so dissolving or modifying said order of injunction shall, at the same time, fix a reasonable sum as the amount of a supersedeas bond, which the person or persons applying for said injunction may give, and prevent the doing of the act or acts, the commission of which was, or may be sought to be restrained by the injunction so dissolved and modified.

Source: Laws 1889, c. 27, § 1, p. 373; R.S.1913, § 7807; C.S.1922, § 8751; C.S.1929, § 20-1078.

Temporary restraining order cannot be continued in effect by supersedeas bond after denial of permanent injunction. Harbin v. Love, 119 Neb. 76, 227 N.W. 145 (1929).

Supersedeas is allowable on dissolution of temporary injunction. State ex rel. Minden-Edison Light & Power Co. v. Dungan, 89 Neb. 738, 132 N.W. 305 (1911).

Supersedeas should not be allowed on dissolution of temporary restraining order. State ex rel. Beecher v. Wakeley, 28 Neb. 431, 44 N.W. 488 (1890).

Order dissolving injunction is appealable only after final judgment in action. Horst v. Board of Supervisors of Dodge County, 5 Neb. Unof. 410, 98 N.W. 822 (1904).

Order which does not render first less effective does not modify injunction. State ex rel. Plattsmouth Telephone Co. v. Fawcett, 2 Neb. Unof. 503, 89 N.W. 273 (1902).

25-1079 Temporary injunction; modification; dissolution; supersedeas bond; when executed; form; contents.

Such supersedeas bond shall be executed on or before twenty days from the time of the order dissolving or modifying such injunction, shall be signed by one or more sufficient sureties to be approved by the clerk of the court, and shall be conditioned that the party or parties who obtained such injunction shall pay to the defendant, or defendants, all damages, which he or they shall sustain by reason of said injunction, if it be finally decided that such injunction ought not to have been granted.

Source: Laws 1889, c. 27, § 2, p. 374; R.S.1913, § 7808; C.S.1922, § 8752; C.S.1929, § 20-1079.

25-1080 Temporary injunction; modification; dissolution; supersedeas bond; effect.

Such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined by the judgment, decree or final order of the court in term time.

Source: Laws 1889, c. 27, § 3, p. 374; R.S.1913, § 7809; C.S.1922, § 8753; C.S.1929, § 20-1080.

(d) RECEIVERS

25-1081 Appointment of receiver; grounds.

A receiver may be appointed by the district court (1) in an action by a vendor to vacate a fraudulent purchase of property, by a creditor to subject any property or fund to his or her claim, or between partners, limited liability company members, or others jointly owning or interested in any property or fund on the application of any party to the suit when the property or fund is in danger of being lost, removed, or materially injured, (2) in an action for the foreclosure of a mortgage or in an action to foreclose a trust deed as a mortgage when the mortgaged property or property subject to the trust deed is in danger of being lost, removed, or materially injured or is probably insufficient to discharge the mortgage debt secured by the mortgage or trust deed, (3) in connection with the exercise of the power of sale under a trust deed and following the filing of a notice of default under the Nebraska Trust Deeds Act when the property subject to the trust deed is in danger of being lost, removed, or materially injured or is probably insufficient to discharge the debt secured by the trust deed, (4) in an action brought pursuant to section 52-1705 to enforce a written assignment of rents provision contained in any agreement and the agreement provides for the appointment of a receiver, (5) in any other case in which a mortgagor or trustor has agreed in writing to the appointment of a receiver, (6) after judgment or decree to carry the judgment into execution, to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal, (7) in all cases provided for by special statutes, and (8) in all other cases when receivers have heretofore been appointed by the usages of courts of equity.

Source: R.S.1867, Code § 266, p. 437; R.S.1913, § 7810; C.S.1922, § 8754; C.S.1929, § 20-1081; R.S.1943, § 25-1081; Laws 1991, LB 732, § 45; Laws 1993, LB 121, § 170; Laws 1994, LB 884, § 53; Laws 2007, LB99, § 1.

Cross References

Attachment, receiver appointed, when, see sections 25-1018 to 25-1022.
Foreclosure of mortgages, see sections 25-2137 to 25-2155.
Judgment debtor, receiver of property, when, see section 25-1573.
Nebraska Trust Deeds Act, see section 76-1018.

1. Power to appoint

Pursuant to subsection (2) of this section, district court did not abuse its discretion when it denied a request to appoint a receiver for under-secured debt in the absence of other evidence that the party's interest in the property were in jeopardy. McCook Nat. Bank v. Myers, 243 Neb. 853, 503 N.W.2d 200 (1993).

Appointment of receiver during pendency of foreclosure action sustained as warranted by the facts and was not an abuse of the court's discretion. O'Neill Production Credit Assn. v. Putnam Ranches, Inc., 198 Neb. 145, 251 N.W.2d 884 (1977).

Supreme Court may appoint a receiver in proceedings by state under Installment Loan Act. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

District court cannot appoint receiver to carry out mandatory injunction. Frese v. Michalec, 151 Neb. 57, 36 N.W.2d 494 (1949).

Request for appointment of receiver is addressed to sound, equitable discretion of court. Cressman v. Bonham, 129 Neb. 201, 260 N.W. 818 (1935).

Receivership is provisional and ancillary; generally dependent upon main action. Smiley v. Sioux Beet Syrup Co., 71 Neb. 586, 101 N.W. 253 (1904).

Petition for receiver is addressed to sound discretion of court. McKenzie v. Beaumont, 70 Neb. 179, 97 N.W. 225 (1903).

Appointment of receiver is in nature of equitable execution. Sanford v. Anderson, 69 Neb. 249, 95 N.W. 632 (1903).

Judge at chambers may appoint. Morris v. Linton, 62 Neb. 731, 87 N.W. 958 (1901).

Section is merely declaratory of power existing in court; no receiver in ejectment. Smith v. White, 62 Neb. 56, 86 N.W. 930 (1901).

Application usually should be made to district court and not to Supreme Court. Eastman v. Cain, 45 Neb. 48, 63 N.W. 123 (1895).

Grounds should exist at time of appointment; should not appoint in final decree. Chadron Banking Co. v. Mahoney, 43 Neb. 214, 61 N.W. 594 (1895).

Plaintiff may have receiver appointed, pending appeal from part of decree. Benedict v. T. L. V. Land & Cattle Co., 4 Neb. Unof. 471, 94 N.W. 962 (1903).

Authority of receiver appointed by court of competent jurisdiction cannot be collaterally attacked. Miller v. Brown, 1 Neb. Unof. 754, 95 N.W. 797 (1901).

2. Mortgage foreclosure

Where receiver is appointed in mortgage foreclosure proceedings, rents and profits collected from the mortgaged premises by receiver may be applied to satisfaction of mortgage debt. Federal Farm Mortgage Corporation v. Ganser, 146 Neb. 635, 20 N.W.2d 689 (1945).

Where mortgage was in excess of reasonable value of land, appointment of receiver was justified. Modisett v. Campbell, 144 Neb. 222, 13 N.W.2d 126 (1944).

Ordinarily a receiver will not be appointed in foreclosure suit when mortgaged property is homestead of mortgagor. First Trust Co. of Lincoln v. Bauer, 128 Neb. 725, 260 N.W. 194 (1935).

Receiver in mortgage foreclosure proceeding is appointed for the purpose only of conserving the mortgaged property and applying the rents and profits to the satisfaction of the debt. Wells v. Farmers State Bank of Overton, 124 Neb. 386, 246 N.W. 714 (1933).

Appointment of receiver in foreclosure action hereunder is ancillary to main action and such appointment must be made in the foreclosure proceeding by the court having jurisdiction thereof. Prudential Ins. Co. v. Bliss, 123 Neb. 578, 243 N.W. 842 (1932).

Court is not authorized to appoint receiver in foreclosure action for property of mortgagor bank already in custody of another receiver in control of bank's entire assets. Wells v. Farmers' State Bank of Overton, 121 Neb. 462, 237 N.W. 402 (1931), overruled in part in Prudential Ins. Co. v. Bliss, 123 Neb. 578, 243 N.W. 842 (1932).

Where land is insufficient to pay mortgage, and security is endangered by unpaid taxes, appointment of receiver is justified. Lackey v. Yekel, 113 Neb. 382, 203 N.W. 542 (1925); Philadelphia Mortgage & Trust Co. v. Oyler, 61 Neb. 702, 85 N.W. 899 (1901).

Mortgagee in possession under agreement to manage premises may not apply for receiver. Hayes v. Christiansen, 105 Neb. 586, 181 N.W. 379 (1921).

Court may appoint receiver to collect rents for some mortgagees in action and not for others. Goddard v. Clarke, 81 Neb. 373, 116 N.W. 41 (1908).

Appointment may be made pending appeal from confirmation of sale. Buck v. Stuben, 63 Neb. 273, 88 N.W. 483 (1901).

Solvency of mortgagor is immaterial, where property insufficient to pay mortgage debt; mortgagee entitled to collect out of his security, and not to be forced to other remedies. Waldron v. First Nat. Bank of Greenwood, 60 Neb. 245, 82 N.W. 856 (1900); Philadelphia M. & T. Co. v. Goos, 47 Neb. 804, 66 N.W. 843 (1896).

Appointment of receiver is only method of reaching rents and profits pending foreclosure. Huston v. Canfield, 57 Neb. 345, 77 N.W. 763 (1899).

Receiver should not be granted against widow of mortgagor of homestead, under statute relating to homestead rights of survivor. Joslin v. Williams, 3 Neb. Unof. 194, 93 N.W. 701 (1903).

Receiver should be denied where mortgaged property is homestead. Johnson v. Young, 1 Neb. Unof. 28, 95 N.W. 497 (1901).

3. Insolvent corporation

This section was incorporated by reference in procedure for liquidation of insolvent bank. State ex rel. Sorensen v. Nebraska State Bank of Bloomfield, 124 Neb. 449, 247 N.W. 31 (1933).

Where receiver of insolvent bank was appointed pursuant to notice, and receiver qualified and performed legal duties, validity of appointment cannot be collaterally questioned. Brownell v. Adams, 121 Neb. 304, 236 N.W. 750 (1931).

Court of equity has power to appoint receiver for corporation operating at loss with insufficient assets to pay preferred stockholders in full. Miller v. M. E. Smith Bldg. Co., 118 Neb. 5, 223 N.W. 277 (1929).

May appoint receiver for insurance company dissolved under statute. State ex rel. Barton v. Farmers & Merchants Ins. Co., 90 Neb. 664, 134 N.W. 284 (1912).

Receiver for corporation should not be appointed on complaint of minority stockholder, who alleges mismanagement by corporate officers. Miller v. Kitchen, 73 Neb. 711, 103 N.W. 297 (1905).

Court may appoint receiver for insolvent corporation where receivers have been so appointed by the usages of courts of equity. Williams v. Turner, 63 Neb. 575, 88 N.W. 668 (1902).

Where fraudulent mismanagement of property of corporation by its officers is shown, receiver may be appointed. Ponca Mill Co. v. Mikesell, 55 Neb. 98, 75 N.W. 46 (1898).

4. Miscellaneous

Appointment of receiver upon application of a simple contract creditor who has not reduced his claim to judgment is void. Gentsch, Inc. v. Burnett, 173 Neb. 820, 115 N.W.2d 446 (1962).

Word ''creditor'' does not apply to holder of tax certificate. Walker v. Fitzgerald, 69 Neb. 52, 95 N.W. 32 (1903).

Defendant liable for deficiency judgment may apply for receiver. Philadelphia Mortgage & Trust Co. v. Oyler, 61 Neb. 702, 85 N.W. 899 (1901).

Injunction is not a bar to appointment of receiver by another court where parties are not the same. Carter v. Dime Savings Bank, 61 Neb. 587, 86 N.W. 29 (1901).

A receiver for a partnership may be appointed in cases of insolvency, dissention, probability of waste, or when dissolution is necessary. Veith v. Ress, 60 Neb. 52, 82 N.W. 116 (1900).

Receivers should not be allowed for insolvency of debtor where property is then sufficient. Laune v. Hauser, 58 Neb. 663, 79 N.W. 555 (1899).

Ill will and hostility between joint owners is insufficient. Lamaster v. Elliott, 53 Neb. 424, 73 N.W. 925 (1898).

25-1082 Notice of application for appointment; service.

No receiver shall be appointed except in a suit actually commenced and pending, and after notice to all parties to be affected thereby, of the time and place of the application, the names of the proposed receiver, and of his or her proposed sureties, and of the proposed sureties of the applicant. Such notice shall state upon what papers the application is based, and be served at least five days before the proposed hearing upon the adverse party in the manner provided for service of a summons in a civil action or upon the adverse party's attorney in the manner provided for service of a notice on an attorney.

Source: R.S.1867, Code § 267, p. 438; R.S.1913, § 7811; C.S.1922, § 8755; Laws 1927, c. 49, § 1, p. 199; C.S.1929, § 20-1082; Laws 1939, c. 17, § 1, p. 96; C.S.Supp.,1941, § 20-1082; R.S. 1943, § 25-1082; Laws 1983, LB 447, § 40.

1. Notice
2. Miscellaneous

1. Notice

Validity of order of appointment of bank receiver cannot be collaterally questioned, where receiver was appointed pursuant to notice and qualified and performed legal duties. Brownell v. Adams, 121 Neb. 304, 236 N.W. 750 (1931).

Where action for foreclosure of mortgage and application for receiver combined in one petition, and defendant joins issue, no other notice is required. Lackey v. Yekel, 113 Neb. 382, 203 N.W. 542 (1925).

Court is without power to appoint even temporary receiver for solvent corporation without notice to stockholders, where officers, who were the only parties notified, are charged with misuse of corporate powers. Furrer v. Nebraska Bldg. & Inv. Co., 108 Neb. 698, 189 N.W. 359 (1922).

Where record shows judge made appointment prior to date set in notice it is void. Gibson v. Sexson, 82 Neb. 475, 118 N.W. 77 (1908).

Appointment without notice is void. Smiley v. Sioux Beet Syrup Co., 71 Neb. 581, 99 N.W. 263 (1904); Johnson v. Powers, 21 Neb. 292, 32 N.W. 62 (1887).

Service of notice may be made on attorney of record, who may waive time required by statute, and authorize court to proceed to immediate hearing. Murphy v. Fidelity Mutual Fire Ins. Co., 69 Neb. 489, 95 N.W. 1022 (1903).

Statutory notice may be waived. Veith v. Ress, 60 Neb. 52, 82 N.W. 116 (1900).

Notice is waived where appointment is opposed on other grounds. Farmers & Merchants Bank of Holstein v. German Nat. Bank of Lincoln, 59 Neb. 229, 80 N.W. 820 (1899).

2. Miscellaneous

This section contains conditions precedent to valid appointment of a receiver. Gentsch, Inc. v. Burnett, 173 Neb. 820, 115 N.W.2d 446 (1962).

It is error for a trial court in a foreclosure action to appoint a receiver for defendant's homestead interest in real estate. Federal Credit Co. v. Reynolds, 132 Neb. 495, 272 N.W. 397 (1937).

This section applies to appointment of receivers for banks. Holcomb v. Tierney, 79 Neb. 660, 113 N.W. 204 (1907).

Action must be one in which main relief sought is independent of receivership. Mann v. German-American Investment Co., 70 Neb. 454, 97 N.W. 600 (1903).

Court may permit amendments of pleading upon notice. McCord, Brady & Co. v. Weil, 29 Neb. 682, 46 N.W. 152 (1890).

''Parties to be affected'' means those having interest in possession or immediate custody of property or immediate disposition of rents and profits therefrom. Chambers v. Barker, 2 Neb. Unof. 523, 89 N.W. 388 (1902).

Petition need not propose name of person as receiver. Defects in notice are waived by appearance. Robertson v. Ostrom, 1 Neb. Unof. 200, 95 N.W. 469 (1901).

25-1083 Property; possession by sheriff; when authorized; restitution.

Should the delay occasioned by the giving of the notice provided for in section 25-1082 be hazardous to the rights of any party, the court or judge may,

by order, direct the sheriff of the county in which such action is pending to take temporary possession of the property, and shall appoint an early day for the hearing of the application, and if at such hearing the application is refused, restitution shall be made of the property to the party from whom the same was taken.

Source: R.S.1867, Code § 268, p. 438; R.S.1913, § 7812; C.S.1922, § 8756; C.S.1929, § 20-1083.

Levy of attachment on portion of property without leave of court is not void in absence of objection by sheriff as custodian. Ackerman v. Ackerman, 50 Neb. 54, 69 N.W. 388 (1896).

25-1084 Applicants for receiver; bonds required; contents; filing.

Every order appointing a receiver shall require the applicant to give a good and sufficient bond, conditioned to pay all damages which the other parties to the suit or any of them may sustain by reason of the appointment of a receiver, in case it shall be finally decided that the order ought not to have been granted, and shall also require the receiver to give a bond conditioned to faithfully discharge his duties as receiver and obey all orders of the court. The bonds shall each run to the defendant and all adverse parties in interest, shall be for the use of any party to the suit, shall be in a penal sum to be fixed by the court, but not, however, to be in excess of a sum equal to double the value of the property in question, shall be executed by one surety where such surety is an incorporated surety company authorized by the laws of this state to transact such business, and by two or more sureties where such sureties are natural persons, to be approved by the court or judge making the appointment, and shall be filed in the office of the clerk of the district court; nor shall the same be considered executed until they are so filed.

Source: R.S.1867, Code § 269, p. 438; Laws 1875, § 1, p. 36; Laws 1897, c. 89, § 1, p. 370; R.S.1913, § 7813; C.S.1922, § 8757; Laws 1923, c. 102, § 1, p. 257; C.S.1929, § 20-1084.

Cross References

Other bond provisions, see section 25-1018.
State officers, departments, or receivers appointed on application of state, not required to give bond, see section 25-21,216.
Trust companies, see section 8-211.

Defect in or total failure to approve bond does not invalidate it. Modisett v. Campbell, 144 Neb. 222, 13 N.W.2d 126 (1944).

Action will lie against receiver for deceit for making false statements in purchasing claims of creditors. State v. Merchants Bank, 81 Neb. 710, 120 N.W. 157 (1909).

Measure of damages for wrongful appointment is rental value of premises and counsel fees on vacation of order. Joslin v. Williams, 76 Neb. 594, 107 N.W. 837 (1906), affirmed on rehearing, 76 Neb. 602, 112 N.W. 343 (1907).

25-1085 Application; form; content.

If a complainant desires the appointment of a receiver at the commencement of the action, the complainant shall request such appointment in the complaint. If the occasion for a receiver arises while the suit is pending, the application shall be made by a motion setting forth the facts and circumstances making such appointment necessary or proper.

Source: R.S.1867, Code § 270, p. 438; R.S.1913, § 7814; C.S.1922, § 8758; C.S.1929, § 20-1085; R.S.1943, § 25-1085; Laws 2002, LB 876, § 23.

Appointment of receiver is purely ancillary remedy and cannot be maintained in proceeding instituted solely for that purpose. Cressman v. Bonham, 129 Neb. 201, 260 N.W. 818 (1935).

Verification is not jurisdictional, and may be waived. Farmers & Merchants Bank of Holstein v. German Nat. Bank of Lincoln, 59 Neb. 229, 80 N.W. 820 (1899).

25-1086 Qualifications of receiver; sureties; objections; nomination by other parties.

Any party to the suit may, upon the hearing of the application, show, by affidavit or otherwise, objections to the proposed sureties and to the proposed receiver, and what is the value of the property to be taken possession of, and that a receiver ought not to be appointed. He may also nominate a person to be receiver, giving at the same time the names of his proposed sureties. No person shall be appointed receiver who is party, solicitor, counsel, or in any manner interested in the suit.

Source: R.S.1867, Code § 271, p. 439; R.S.1913, § 7815; C.S.1922, § 8759; C.S.1929, § 20-1086.

Attorney for party is not proper counsel for receiver. Veith v. Ress, 60 Neb. 52, 82 N.W. 116 (1900).

25-1087 Order of appointment; special directions.

Every order appointing a receiver shall contain special directions in respect to his powers and duties, and upon application of any party to the suit, after due notice thereof, such further directions may be made in that behalf by the court or judge as may in the further progress of the cause become proper.

Source: R.S.1867, Code § 272, p. 439; R.S.1913, § 7816; C.S.1922, § 8760; C.S.1929, § 20-1087.

Order appointing receiver should contain special directions with respect to his powers and duties. Frese v. Michalec, 151 Neb. 57, 36 N.W.2d 494 (1949).

A judicial order appointing a receiver to liquidate affairs of insolvent state bank includes power of receiver to sue executive officer of bank and surety on his bond to recover losses sustained by bank for acts in violation of the bond. Luikart v. Flannigan, 130 Neb. 901, 267 N.W. 165 (1936).

This section was incorporated by reference in procedure for liquidation by court of affairs of insolvent bank. State ex rel. Sorensen v. Nebraska State Bank of Bloomfield, 124 Neb. 449, 247 N.W. 31 (1933).

Orders will not be modified unless abuse of discretion is shown. State v. Bank of Rushville, 57 Neb. 608, 78 N.W. 281 (1899).

Receiver may sue for and collect unpaid stock subscriptions that are called for by the directors of the corporation before it is put in the hands of a receiver. Wyman v. Williams, 53 Neb. 670, 74 N.W. 48 (1898).

25-1088 Receivers; extent of representation.

Every receiver shall be considered the receiver of any party to the suit, and no others.

Source: R.S.1867, Code § 273, p. 439; R.S.1913, § 7817; C.S.1922, § 8761; C.S.1929, § 20-1088.

Court has no power to appoint even temporary receiver for solvent corporation without notice to stockholders, where officers, who were the only parties notified, were charged with misuse of corporate powers. Furrer v. Nebraska Bldg. & Inv. Co., 108 Neb. 698, 189 N.W. 359 (1922).

Parties are not liable for receiver's wrongful acts. City Savings Bank v. Carlon, 87 Neb. 266, 127 N.W. 161 (1910).

Bond holders who are not parties to suit are not bound by acts of receiver. Smiley v. Sioux Beet Syrup Co., 71 Neb. 581, 99 N.W. 263 (1904).

25-1089 Appointment of receiver without notice; void.

Every order appointing a receiver without the notice provided for herein shall be void, and every such order heretofore made, under which the appointee has not possessed himself of the property in question, shall be suspended until an order shall have been made and the bonds executed and filed in accordance with the provisions of sections 25-1081 to 25-1092.

Source: R.S.1867, Code § 274, p. 439; R.S.1913, § 7818; C.S.1922, § 8762; C.S.1929, § 20-1089.

Requirement of giving of notice of application for receiver is mandatory, but may be waived. Modisett v. Campbell, 144 Neb. 222, 13 N.W.2d 126 (1944).

Statutory notice to interested parties is jurisdictional. Furrer v. Nebraska Bldg. & Inv. Co., 108 Neb. 698, 189 N.W. 359 (1922).

Where record shows receiver was appointed before day set in notice, it is void and may be collaterally attacked. Gibson v. Sexson, 82 Neb. 475, 118 N.W. 77 (1908).

Taking possession of bank by receiver is sufficient notice to protect from collateral attack. Holcomb v. Tierney, 79 Neb. 660, 113 N.W. 204 (1907).

Appointment without notice is void not voidable. Smiley v. Sioux Beet Syrup Co., 71 Neb. 581, 99 N.W. 263 (1904); Johnson v. Powers, 21 Neb. 292, 32 N.W. 62 (1887).

Notice may be waived by resisting appointment on other grounds; court may appoint one not named, without further notice. Farmers & Merchants Bank of Holstein v. German Nat. Bank of Lincoln, 59 Neb. 229, 80 N.W. 820 (1899).

Order, regular on its face, is prima facie valid, and protects receiver. Edee v. Strunk, 35 Neb. 307, 53 N.W. 70 (1892).

25-1090 Inconclusive decree; appointment of master; disposition of property; orders; appeal.

When a decree is rendered in a suit in which a receiver has been appointed and such decree does not finally determine the rights of the parties, any one of them may apply to the court for the possession of the property and proceeds thereof in the receiver's hands. If such application is resisted, the matter may be referred to a master to take and report to the court the testimony of the parties. Upon the filing of the report, the court shall, by its order, award the possession of the property and the proceeds thereof to the party entitled thereto, and thereupon the receiver shall surrender the property and the proceeds thereof to such party. All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees.

Source: R.S.1867, Code § 275, p. 439; R.S.1913, § 7819; C.S.1922, § 8763; C.S.1929, § 20-1090; R.S.1943, § 25-1090; Laws 1991, LB 732, § 46.

Cross References

For appeals to Court of Appeals, see section 25-1911 et seq.

1. Appeal
2. Supersedeas

1. Appeal

The appointment of a receiver may be treated as a final order. Robertson v. Southwood, 233 Neb. 685, 447 N.W.2d 616 (1989).

An order confirming a sale by a receiver is a final order from which an appeal can be taken. Lewis v. Gallemore, 173 Neb. 441, 113 N.W.2d 595 (1962).

This section was incorporated by reference in procedure for liquidation of insolvent banks. State ex rel. Sorensen v. Nebraska State Bank of Bloomfield, 124 Neb. 449, 247 N.W. 31 (1933).

Order of court appointing receiver is final and appealable hereunder. State ex rel. Sorensen v. State Bank of Minatare, 123 Neb. 109, 242 N.W. 278 (1932).

Statute authorizes appeal from order appointing receiver; appointment of receiver sustained. Howell v. Poff, 122 Neb. 793, 241 N.W. 548 (1932).

Order to receiver to sell real estate is appealable. State ex rel. German Sav. Bank v. Fawcett, 58 Neb. 371, 78 N.W. 636 (1899).

Objections are available on appeal from final decree. Seeds Dry-Plate Co. v. Heyn Photo-Supply Co., 57 Neb. 214, 77 N.W. 660 (1898).

Bank may appeal from order directing suit against its stockholders. State v. German Savings Bank, 50 Neb. 734, 70 N.W. 221 (1897).

Appointment is final order; appealable before final judgment. McCord, Brady & Co. v. Weil, 33 Neb. 868, 51 N.W. 300 (1892).

2. Supersedeas

Whether order may be superseded is discretionary with court, and court may fix terms and conditions thereof. Lowe v. Riley, 57 Neb. 252, 77 N.W. 758 (1898).

Order appointing receiver cannot be superseded pending appeal, as matter of right. State ex rel. Heinzelman v. Stull, 49 Neb. 739, 69 N.W. 101 (1896).

25-1091 Receivers; disobedience of orders; punishment; sheriff may act.

Whenever, in the exercise of their authority, the court or judge shall have ordered the deposit or delivery of money or other things, and the order is disobeyed, the court or judge, in addition to punishing such disobedience as for contempt, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it, in conformity with the direction of the court or judge.

Source: R.S.1867, Code § 276, p. 439; Laws 1899, c. 82, § 1, p. 337; R.S.1913, § 7820; C.S.1922, § 8764; C.S.1929, § 20-1091.

25-1092 Receivers; compensation.

Receivers shall receive for their services such compensation as the court may award, subject to the following restrictions:

(1) Receivers appointed for the purpose of preserving and protecting property pending litigation, or for the purpose of continuing the business of the debtor or corporation pending litigation, or when financially embarrassed, may be awarded a salary or lump sum;

(2) Receivers appointed for the purpose of winding up the affairs of a debtor or corporation, reducing the assets to cash and distributing them, shall be awarded as compensation for such services a percentage upon the cash received and properly accounted for by them, which percentage may be increased where extraordinary services have been performed, and correspondingly reduced where the services have not been meritoriously performed.

Source: Laws 1899, c. 33, § 1, p. 169; R.S.1913, § 7821; C.S.1922, § 8765; C.S.1929, § 20-1092.

Allowance to receiver of lump sum rather than percentage of cash received was proper where receiver was primarily appointed to conserve assets. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N.W.2d 55 (1959).

Exercise of power to appoint receiver for winding up affairs of corporation was contemplated by this section. State ex rel. Sorensen v. Nebraska State Bank, 124 Neb. 449, 247 N.W. 31 (1933).

Compensation is in discretion of court; and order will not be modified unless discretion was abused. State v. Nebraska Savings & Exchange Bank, 61 Neb. 496, 85 N.W. 391 (1901).

(e) REPLEVIN

25-1093 Replevin; delivery of property; notice, when required.

The plaintiff in an action to recover the possession of specific personal property may, at the commencement of the suit, or any time before answer, request the delivery of such property as provided by sections 25-1093 to 25-1098, 25-10,109, and 25-10,110. In a replevin action under the Grain Warehouse Act, notice shall be given as provided in section 88-547.02.

Source: R.S.1867, Code § 181, p. 421; R.S.1913, § 7822; C.S.1922, § 8766; C.S.1929, § 20-1093; R.S.1943, § 25-1093; Laws 1973, LB 474, § 1; Laws 2005, LB 492, § 1.

Cross References

Grain Warehouse Act, see section 88-525.

Where both parties contemplated that payment for cattle would be made by draft drawn on the buyer by the seller, the transaction was a cash sale and seller could properly reclaim the cattle from the buyer following buyer's dishonor of the draft drawn on buyer by seller pursuant to the parties' agreement. Peck v. Augustine Bros. Co., 203 Neb. 574, 279 N.W.2d 397 (1979).

Action of replevin is in part a proceeding in rem, and trial de novo is authorized in district court on appeal. Lemer v. Hunyak, 104 Neb. 2, 175 N.W. 605 (1919).

Replevin action may proceed to trial and judgment without the property being delivered to the plaintiff. Hudelson v. First Nat. Bank of Tobias, 56 Neb. 247, 76 N.W. 570 (1898).

Replevin cannot be had for exempt property until inventory and selection by debtor. Mann v. Welton, 21 Neb. 541, 32 N.W. 599 (1887).

25-1093.01 Request delivery of property; affidavit; contents.

The plaintiff may request the delivery of property as specified in section 25-1093 by filing in the office of the clerk of the court in which the action is filed an affidavit of the plaintiff or his or her agent or attorney showing (1) a description of the property claimed, (2) that the plaintiff is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he or she is entitled to the possession of the same, (3)

that the property is wrongfully detained by the defendant, and (4) that it was not taken in execution on any order or judgment against such plaintiff, or for the payment of any fine, tax, or amercement assessed against him or her or by virtue of an order of delivery issued under Chapter 25, or any other mesne or final process issued against him or her, except that such affidavit may omit the first and last clause of this subdivision and, in lieu thereof, show that the property was taken on execution on a judgment or order other than an order of delivery in replevin, and that the same is exempt from such execution or attachment under the laws of this state. The provisions of Chapter 25, article 10, shall extend to and apply as well to proceedings in replevin had before county courts. Attached to such affidavit shall be a specific request for the delivery of the property and the issuance of an order by the court to that effect.

Source: Laws 1973, LB 474, § 2; Laws 1984, LB 13, § 38.

Replevin properly lies to recover chattels unlawfully detained, regardless of whether the original taking was wrongful. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc., 197 Neb. 421, 249 N.W.2d 489 (1977).

25-1093.02 Affidavit; filing; service; temporary order; effect; hearing; when.

Upon the filing of such affidavit and request for delivery, if the defendant with full knowledge of the allegations and effect of the plaintiff's request agrees that such delivery in replevin be had, he may execute a voluntary, intelligent, and knowing waiver under oath of his rights to notice and hearing, in which event the court shall order that all further proceedings shall be suspended and the property being replevied delivered to the plaintiff forthwith, otherwise upon the filing of such affidavit and request for delivery required by section 25-1093.01, the court shall issue a temporary order addressed to the defendant that he shall hold the property described in the affidavit in his possession, unimpaired and unencumbered, and in all respects in the same state and condition as at the time of receipt of the order, until further order of the court. The temporary order shall also notify such defendant that if he fails to comply with the temporary order he shall be subject to the full contempt powers of the court. Attached to such temporary order shall be a notice that a hearing will be had and specifying the date, time, and place of such hearing, at which hearing will be determined plaintiff's right to possession of the goods described in plaintiff's affidavit and request for delivery, pending final determination of the merits. At such hearing the defendant shall be required to show cause why the possession of the goods should not be delivered to the plaintiff. Unless otherwise determined and ordered by the court, the date of such hearing shall be seven days after service of the order upon the defendant, but in no event later than fourteen days after service.

Source: Laws 1973, LB 474, § 3; Laws 1976, LB 859, § 1.

A temporary order entered pursuant to this provision, which requires the defendant in replevin action to hold the property unimpaired and unencumbered until hearing which must take place within fourteen days after service and at which court determines plaintiff's right to possession pending final resolution on the merits, results in a deprivation of property rights sufficient to trigger due process protection. Lewis Service Center, Inc. v. Mack Financial Corp., 696 F.2d 66 (8th Cir. 1982).

25-1093.03 Affidavit; temporary order; notice; hearing.

If filed at the commencement of suit, such affidavit and request for delivery and such temporary order containing the notice of hearing shall be served by the sheriff or other officer with the summons. If filed after the commencement of suit but before answer, they shall be served separately from the summons, but as soon after their filing and issuance as practicable.

Source: Laws 1973, LB 474, § 4.

25-1093.04 Order for delivery of property.

If the court finds at such hearing that the plaintiff is entitled to possession of the property, it shall order the clerk to issue an order for delivery of the property to the plaintiff, and deliver such order for delivery to the sheriff or other officer to be served and returned according to sections 25-1096 and 25-1097. The order of the court required by this section shall conform to the content requirements of section 25-1094.

Source: Laws 1973, LB 474, § 5.

25-1094 Order for delivery; contents.

An order for the delivery of personal property to the plaintiff shall be made by the clerk of the court in which the action is brought only upon the filing in his office of an order of the court showing (1) a description of the property claimed; (2) that the plaintiff has raised a bona fide issue as to whether he is the owner of the property, or whether he has a special ownership or interest therein, but that it appears sufficiently probable to the court that the plaintiff will prevail on the merits; and (3) that there is a bona fide issue as to whether the property is wrongfully detained by the defendant and that the plaintiff is entitled to the immediate delivery of the property.

Source: R.S.1867, Code § 182, p. 421; Laws 1877, § 1, p. 9; R.S.1913, § 7823; C.S.1922, § 8767; C.S.1929, § 20-1094; R.S.1943, § 25-1094; Laws 1972, LB 1032, § 128; Laws 1973, LB 474, § 6.

1. Affidavit

Affidavit used as evidence in district court cannot be considered on appeal unless preserved in and made a part of the bill of exceptions. Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N.W.2d 789 (1957).

Affidavit in replevin must show that plaintiff is the owner of the property or has a special interest therein, that he is entitled to the immediate possession thereof, and that the property is wrongfully detained by the defendant. Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N.W.2d 813 (1950).

Action, without delivery of property, may proceed without affidavit. Racine-Sattley Co. v. Meinen, 79 Neb. 33, 114 N.W. 602 (1908).

Affidavit is prerequisite to order of delivery; order nullity otherwise, and set aside on motion. Case Threshing Machine Co. v. Rosso, 78 Neb. 184, 110 N.W. 686 (1907).

May permit amendment of affidavit to allegation of ownership in amended petition. Tackaberry v. Gilmore, 57 Neb. 450, 78 N.W. 32 (1899).

Writ issued on petition containing necessary allegations of affidavit, sworn to upon belief, is voidable, not void. Lewis v. Connolly, 29 Neb. 222, 45 N.W. 622 (1890).

Affidavit does not take place of petition or bill of particulars. School Dist. No. 36 in York Co. v. McIntie, 14 Neb. 46, 14 N.W. 656 (1883).

Filing affidavit is a proceeding, not a pleading; amendable even after motion to dismiss. Wilson v. Macklin, 7 Neb. 50 (1878).

2. Ownership

To maintain an action for conversion of personal property, a party must have had actual possession of the property or the right of possession. Coulter v. Cummings, 93 Neb. 646, 142 N.W. 109 (1913).

Mortgagee must allege facts showing special ownership and right to possession. Pennington County Bank v. Bauman, 81 Neb. 782, 116 N.W. 669 (1908); Paxton v. Learn, 55 Neb. 459, 75 N.W. 1096 (1898).

Averment of agency is not one of the conditions upon which clerk is authorized to issue order of delivery. Hudelson v. First Nat. Bank of Tobias, 56 Neb. 247, 76 N.W. 570 (1898).

Allegation of special ownership is not sustained by proof of general ownership. Suckstorf v. Butterfield, 54 Neb. 757, 74 N.W. 1076 (1898).

Allegation of general ownership is not sustained by proof of special ownership. Wilson v. City Nat. Bank of Kearney, 51 Neb. 87, 70 N.W. 501 (1897).

Petition must show facts creating special ownership. Griffing v. Curtis, 50 Neb. 334, 69 N.W. 968 (1897).

3. Detention

Where plaintiff did not file a security agreement or lien and did not simultaneously have legal title and physical possession as required by section 60-105, R.R.S.1943, it did not meet its burden of proof for a replevin action. The Cornhusker Bank of Omaha v. McNamara, 205 Neb. 504, 288 N.W.2d 287 (1980).

One having custody of property in dispute is proper defendant. Engel v. Dado, 66 Neb. 400, 92 N.W. 629 (1902).

Wrongful detention is essential. Affidavit may be aided by petition, and is amendable. Hudelson v. First Nat. Bank of Tobias, 51 Neb. 557, 71 N.W. 304 (1897).

Replevin will not lie against one not in possession. Depriest v. McKinstry, 38 Neb. 194, 56 N.W. 806 (1893).

4. Miscellaneous

The United States Supreme Court Fuentes v. Shevin, 407 U.S. 67, decision concerning the validity of prejudgment replevin statutes will not be applied retroactively to a replevin action commenced in 1967. Peck v. Augustine Bros. Co., 203 Neb. 574, 279 N.W.2d 397 (1979).

Property held under void judgment may be replevined. Muller v. Plue, 45 Neb. 701, 64 N.W. 232 (1895).

Allegation that property was not taken on execution, etc., is not sustained by proof that property was exempt. Eikenbary v. Clifford, 34 Neb. 607, 52 N.W. 377 (1892).

Replevin cannot be maintained for property levied upon and claimed to be exempt until after inventory is filed and appraisement and selection made. Mann v. Welton, 21 Neb. 541, 32 N.W. 599 (1887).

25-1095 Order for delivery; contents.

The order for the delivery of the property to the plaintiff shall be addressed and delivered to the sheriff. It shall state the names of the parties, the court in which the action is brought, and command the sheriff to take the property, describing it, and deliver it to the plaintiff, and to make return of the order on a day to be named therein.

Source: R.S.1867, Code § 183, p. 422; R.S.1913, § 7824; C.S.1922, § 8768; C.S.1929, § 20-1095.

Where writ is made returnable on holiday or Sunday, succeeding day is return day. Ostertag v. Galbraith, 23 Neb. 730, 37 N.W. 637 (1888).

25-1096 Order for delivery; when returnable.

The return day for the order of delivery shall be twenty days after its issuance.

Source: R.S.1867, Code § 184, p. 422; R.S.1913, § 7825; C.S.1922, § 8769; C.S.1929, § 20-1096; R.S.1943, § 25-1096; Laws 1973, LB 474, § 7.

25-1097 Order for delivery; how executed.

The sheriff shall execute the order of delivery by taking the property therein mentioned. He shall also deliver a copy of the order of delivery to the person charged with the unlawful detention of the property or leave such copy at his usual place of residence.

Source: R.S.1867, Code § 185, p. 422; R.S.1913, § 7826; C.S.1922, § 8770; C.S.1929, § 20-1097; R.S.1943, § 25-1097; Laws 1973, LB 474, § 8.

Cannot seize property in possession of third party claiming ownership in good faith. Singer Sewing Machine Co. v. Robertson, 87 Neb. 542, 127 N.W. 866 (1910).

Seizure on Sunday is void. Bryant v. State, 16 Neb. 651, 21 N.W. 406 (1884).

Leaving copy at usual place of business is insufficient. Aultman & Taylor Co. v. Steinan, 8 Neb. 109 (1879).

Failure to serve copy is mere irregularity. Baker v. Daily, 6 Neb. 464 (1877).

25-1098 Delivery of property to plaintiff; bond; contents; return; redelivery bond.

The sheriff, or other officer, shall not deliver to the plaintiff, his agent or attorney, the property so taken, until there has been executed by one or more sufficient sureties of the plaintiff a written undertaking to the defendant, in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him, and return the property to the defendant, in case judgment for a return of such property is rendered against him. The undertaking shall be returned with the order.

If, before the actual delivery to the plaintiff, the defendant executes within twenty-four hours from the time of the levy, by one or more sufficient sureties a

written undertaking to the plaintiff, in at least double the value of the property, to the effect that the defendant shall duly defend the action and pay all costs and damages which may be awarded against him, and deliver the property to the plaintiff, in case judgment for delivery of such property is rendered against him, the undertaking shall be returned with the order by the officer, who shall return the property to the defendant.

Source: R.S.1867, Code § 186, p. 422; G.S.1873, c. 57, § 186, p. 553; R.S.1913, § 7827; C.S.1922, § 8771; C.S.1929, § 20-1098; R.S. 1943, § 25-1098; Laws 1965, c. 119, § 1, p. 452.

In forma pauperis status does not excuse the litigant from paying the cost of a premium for a replevin bond pursuant to this section. Jacob v. Schlichtman, 261 Neb. 169, 622 N.W.2d 852 (2001).

A successful plaintiff in replevin is entitled to recover the reasonable cost of the bond required of it by this section. Barelmann v. Fox, 239 Neb. 771, 478 N.W.2d 548 (1992).

Bond runs to defendant alone. Singer Sewing Machine Co. v. Robertson, 87 Neb. 542, 127 N.W. 866 (1910).

Bond entitles plaintiff to property pending action. Jenkins v. State, 60 Neb. 205, 82 N.W. 622 (1900).

Sureties liable to defendant for whom judgment is rendered. Pilger v. Marder, 55 Neb. 113, 75 N.W. 559 (1898).

After obtaining property plaintiff cannot refuse to prosecute and enjoin defendant from prosecuting. Kinkaid v. Hiatt, 24 Neb. 562, 39 N.W. 600 (1888).

Bond omitting requirement to "return the property," is binding as to other provisions. Hicklin v. Nebr. City National Bank, 8 Neb. 463, 1 N.W. 135 (1879).

25-1099 Bond; amount; determination; appraisal.

For the purpose of fixing the amount of the undertaking, the value of the property taken shall be ascertained by the oath of two or more responsible persons, whom the sheriff or other officer shall swear truly to assess the value thereof.

Source: R.S.1867, Code § 187, p. 422; R.S.1913, § 7828; C.S.1922, § 8772; C.S.1929, § 20-1099.

Testimony as to valuation placed on property in appraisement was incompetent. Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege, 49 Neb. 321, 68 N.W. 477 (1896).

Appraisement is not admissible as evidence generally. Barlass v. Braash, 27 Neb. 212, 42 N.W. 1028 (1889).

25-10,100 Failure to furnish bond; duty and liability of officer; return of property to defendant.

If the undertaking required by section 25-1098 is not given within twenty-four hours from the taking of the property under said order, the sheriff or other officer shall return the property to the defendant. If the sheriff or other officer delivers any property so taken to the plaintiff, his agent or attorney, or keeps the same from the defendant, without taking such security within the time aforesaid, or if he takes insufficient security, he shall be liable to the defendant in damages.

Source: R.S.1867, Code § 188, p. 422; R.S.1913, § 7829; C.S.1922, § 8773; C.S.1929, § 20-10,100.

Where bond is not given in twenty-four hours, it is duty of officer to return property to defendant. Barlass v. Braash, 27 Neb. 212, 42 N.W. 1028 (1889).

Officer need not accept nonresidents of county as sureties. State ex rel. Sornborger v. Wait, 23 Neb. 166, 36 N.W. 380 (1888).

25-10,101 Bond; objections to sureties; waiver; liability of officer.

The defendant may, within twenty-four hours from the time the undertaking referred to in section 25-10,100 is given by the plaintiff, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he must be deemed to have waived all objections to them. When the defendant excepts, the sureties must justify upon notice as in the case of bail on arrest. The sheriff or other officer shall be responsible for the sufficiency of the

sureties, until the objection to them is waived as above provided or until they justify. The property shall be delivered to the plaintiff when the undertaking required by section 25-1098 has been given.

Source: R.S.1867, Code § 189, p. 423; R.S.1913, § 7830; C.S.1922, § 8774; C.S.1929, § 20-10,101.

Objection must be made within forty-eight hours from time property was seized. Where objections are waived, officer's good faith in accepting sureties is immaterial. Barton v. Shull, 70 Neb. 324, 97 N.W. 292 (1903).

Subsequent seizure by plaintiff on execution is defense pro tanto. Shull v. Barton, 67 Neb. 311, 93 N.W. 132 (1903).

Where objection is made, officer, failing to have sureties justify, is liable for insufficiency. Barton v. Shull, 62 Neb. 570, 87 N.W. 322 (1901).

Surety, whose want of power to sign is palpable, is not estopped because property was delivered to plaintiff. Sturdevant v. Farmers & Merchants Bank of Rushville, 62 Neb. 472, 87 N.W. 156 (1901).

This section was not rendered inoperative by repeal of legislation providing for release of debtor from arrest. Shull v. Barton, 58 Neb. 741, 79 N.W. 732 (1899).

Constable is liable for taking insufficient bond though objections were not made thereto. Busch v. Moline, Milburn & Stoddard Co., 52 Neb. 83, 71 N.W. 947 (1897).

Provision requiring notice of insufficiency of sureties is inapplicable to action before justice of the peace. Thomas v. Edgerton, 40 Neb. 25, 58 N.W. 551 (1894).

Defendant must except to sufficiency of sureties on replevin bond within time specified. Haynes v. Aultman, Miller & Co., 36 Neb. 257, 54 N.W. 511 (1893).

25-10,102 Judgment against plaintiff upon dismissal; failure of plaintiff to prosecute; procedure.

If the property has been delivered to the plaintiff, and he suffers a voluntary or involuntary dismissal, or if he otherwise fails to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant.

Source: R.S.1867, Code § 190, p. 423; R.S.1913, § 7831; C.S.1922, § 8775; C.S.1929, § 20-10,102; R.S.1943, § 25-10,102; Laws 1959, c. 103, § 1, p. 427.

1. Failure to prosecute
2. Burden of proof
3. Miscellaneous

1. Failure to prosecute

Upon failure of plaintiff to prosecute appeal, defendant has right to have title to and right of possession of property adjudicated. Rice v. McGrath, 162 Neb. 511, 76 N.W.2d 428 (1956).

Failing to prosecute by refusing to amend, defendant is entitled to judgment and trial to assess damages. Pennington County Bank v. Bauman, 87 Neb. 25, 126 N.W. 654 (1910).

2. Burden of proof

Burden rests on plaintiff in replevin to establish facts necessary to recover. Alliance Loan & Inv. Co. v. Morgan, 154 Neb. 745, 49 N.W.2d 593 (1951).

Party cannot be substituted for plaintiff. Meyer v. Omaha Furniture & Carpet Co., 76 Neb. 405, 107 N.W. 767 (1906).

3. Miscellaneous

An action in replevin is properly triable to a jury. First State Bank of Scottsbluff v. Bear, 172 Neb. 504, 110 N.W.2d 83 (1961).

Where action is dismissed for want of jurisdiction, judgment for return of property or value cannot be given. Reid, Murdoch & Co. v. Panska, 56 Neb. 195, 78 N.W. 534 (1898).

Plaintiff cannot dismiss and defeat defendant's right to possession, without trial. Vose v. Muller, 48 Neb. 602, 67 N.W. 598 (1896).

Defendant is entitled to judgment, unless plaintiff proves title. Garber v. Palmer, Blanchard & Co., 47 Neb. 699, 66 N.W. 656 (1896).

Requirement that judgment be in the alternative is mandatory. Singer Mfg. Co. v. Dunham, 33 Neb. 686, 50 N.W. 1122 (1892).

Plaintiff may not dismiss without prejudice. Aultman & Co. v. Reams, 9 Neb. 487, 4 N.W. 81 (1880).

Plaintiff cannot dismiss to escape liability to defendant. Cook v. Vaughn, 1 Neb. Unof. 244, 95 N.W. 333 (1901).

25-10,103 Verdict for defendant; further findings required; damages.

In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether

the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which with costs of suit, the court shall render judgment for the defendant.

Source: R.S.1867, Code § 191, p. 423; R.S.1913, § 7832; C.S.1922, § 8776; C.S.1929, § 20-10,103.

1. Right of property
2. Right of possession
3. Damages
4. Miscellaneous

1. Right of property

Facts necessary to entitle plaintiff to recover in replevin action must exist at time action is commenced. Alliance Loan & Inv. Co. v. Morgan, 154 Neb. 745, 49 N.W.2d 593 (1951).

Section is mandatory; court must determine rights as they existed at time action was commenced. Brown v. Hogan, 49 Neb. 746, 69 N.W. 100 (1896).

Where verdict and judgment are silent as to ownership of property, question remains unadjudicated. Fuller v. Brownell, 48 Neb. 145, 67 N.W. 6 (1896).

Finding of general value is unnecessary where defendant claimed special interest only. Earle v. Burch, 21 Neb. 702, 33 N.W. 254 (1887).

2. Right of possession

Failure of plaintiff to prosecute action cannot deprive defendant of right to have the right to possession of the property determined. Rice v. McGrath, 162 Neb. 511, 76 N.W.2d 428 (1956).

Where defendant's right of possession arose by virtue of a lien for truck repairs, judgment should provide for return of property or value of possession. Jackson v. Arndt-Snyder Motor Co., 122 Neb. 276, 240 N.W. 279 (1932).

Where defendant is entitled to possession only, value of same and not of property should be assessed. Tyson v. Bryan, 84 Neb. 202, 120 N.W. 940 (1909).

Failure to find right to possession does not render judgment void. Ayres v. Duggan, 57 Neb. 750, 78 N.W. 296 (1899).

Failure to find value of defendant's right of possession is not an error of which plaintiff can complain. Jameson v. Kent, 42 Neb. 412, 60 N.W. 879 (1894).

Under chattel mortgage, value of possession is amount of lien not exceeding value of property. Cruts v. Wray, 19 Neb. 581, 27 N.W. 634 (1886).

Under execution, value of right of possession is amount of execution and costs. Welton v. Beltezore, 17 Neb. 399, 23 N.W. 1 (1885).

Right to possession entitles defendant to nominal damages at least. Frey v. Drahos, 7 Neb. 194 (1878).

3. Damages

Where there is a wrongful taking in replevin of property held by sheriff under attachment, measure of damages is sale value at time, considering manner in which officer could have sold same. Merchants' Nat. Bank of Omaha v. McDonald, 63 Neb. 363, 88 N.W. 492 (1901), rehearing denied, 63 Neb. 377, 89 N.W. 770 (1902).

Measure of damages for detention of property is the value of the use, where in excess of interest. Schrandt v. Young, 62 Neb. 254, 86 N.W. 1085 (1901).

Party must recover all damages for unlawful detention in replevin actions. Teel v. Miles, 51 Neb. 542, 71 N.W. 296 (1897).

In estimating damages to defendant, jury should be permitted to take into consideration length of time intervening between levy and restoration to possession. Schars v. Barnd, 27 Neb. 94, 42 N.W. 906 (1889).

Where property is ordered returned to defendant, and plaintiff, pending appeal, again converts property by lien and sale, the conversion may be shown as a means of estimating damages. Deck v. Smith, 12 Neb. 389, 11 N.W. 852 (1882).

Measure of damages is amount of writ where value of goods exceeds that sum. Kersenbrock v. Martin, 12 Neb. 374, 11 N.W. 462 (1882).

4. Miscellaneous

An action in replevin is properly triable to a jury. First State Bank of Scottsbluff v. Bear, 172 Neb. 504, 110 N.W.2d 83 (1961).

Verdict for defendant in replevin case is basis for entry of judgment in alternative. Clark v. Oldham, 166 Neb. 672, 90 N.W.2d 329 (1958).

When property is not returned in reasonable time, and depreciates, defendant may refuse same and sue for value, costs and interest. Wallace v. Cox, 92 Neb. 354, 138 N.W. 578 (1912).

General finding for defendant, without finding as to value, is error. Foss v. Marr, 40 Neb. 559, 59 N.W. 122 (1894).

Section is mandatory, whether defendant pleads general denial, new matter, or prays for damages. School Dist. No. 2 of Merrick County v. Shoemaker, 5 Neb. 36 (1876).

Defendant may recover judgment for return, under general denial without prayer for return. Voorheis, Miller & Co. v. Leisure, 1 Neb. Unof. 601, 95 N.W. 676 (1901).

25-10,104 Judgment for defendant; irregularity in process or jurisdictional defect; restoration of status quo.

(1) The judgment in the cases mentioned in sections 25-10,102 and 25-10,103 shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit.

(2) In all instances wherein a trial of the merits of an action is prevented by reason of irregularity in process or for any jurisdictional reason, the court upon a proper showing shall be empowered to place the parties in status quo by

ordering a return of the property replevied. A defendant whose property has been replevied shall be entitled to seek such relief without submitting his person to the jurisdiction of the court.

Source: G.S.1873, c. 57, § 7, p. 713; R.S.1913, § 7833; C.S.1922, § 8777; C.S.1929, § 20-10,104; R.S.1943, § 25-10,104; Laws 1959, c. 103, § 2, p. 428.

1. Return of property or value thereof
2. Value of possession
3. Damages
4. Miscellaneous

1. Return of property or value thereof

Property which cannot be returned in a replevin action is to be valued as of time of trial. Community Credit Co. v. Gillham, 191 Neb. 198, 214 N.W.2d 384 (1974).

Where plaintiff did not identify replevied cows to contract of purchase, judgment was reversed and remanded with directions to order return of cows to defendant and determine his damages. Putnam Ranches, Inc. v. Corkle, 189 Neb. 533, 203 N.W.2d 502 (1973).

Judgment that ''defendant recover property replevined, or the sum of seven hundred ninety-four dollars and further sum of thirty-nine dollars and ninety-nine cents as damages,'' is in thereof in case a return cannot be had. Clark v. Oldham, 166 Neb. 672, 90 N.W.2d 329 (1958).

Judgment for return of property only was erroneous. Rice v. McGrath, 162 Neb. 511, 76 N.W.2d 428 (1956).

The alternative money judgment affords a measure of relief only when the property cannot be returned. Barstow v. Wolff, 148 Neb. 14, 26 N.W.2d 390 (1947).

Where verdict in replevin is for defendant, judgment should be entered in the alternative for the return of the property or its value if it cannot be returned and damages for detention. Landis Machine Co. v. Omaha Merchants Transfer Co., 142 Neb. 397, 9 N.W.2d 198 (1943).

Where property has been taken under writ of replevin and delivered to plaintiff and verdict is in favor of defendant, judgment must be in alternative for return of property or for its value, or for value of defendant's possession if it cannot be returned, and for damages for illegal detention. Securities Inv. Corp. v. Krejci, 128 Neb. 763, 260 N.W. 396 (1935).

''Value thereof'' is instead of return, when return cannot be made, and is equivalent of the property as it was at time of trial. If judgment is affirmed on appeal and property returned to defendant pursuant thereto, he cannot recover on appeal bond for damages occurring prior to original judgment. Wallace v. Cox, 100 Neb. 601, 160 N.W. 992 (1916).

Judgment for defendant in replevin case must be in the alternative for a return of the property or the value thereof. Sullivan v. Hansen, 95 Neb. 779, 146 N.W. 983 (1914); Jameson v. Kent, 42 Neb. 412, 60 N.W. 879 (1894).

Judgment for return of property is unnecessary where evidence shows property cannot be returned. Ulrich v. McConaughey, 63 Neb. 10, 88 N.W. 150 (1901).

Election to return or pay value is left practically to plaintiff. Schrandt v. Young, 62 Neb. 254, 86 N.W. 1085 (1901).

Judgment where verdict does not fix value of property is erroneous. Brownell & Co. v. Fuller, 57 Neb. 368, 77 N.W. 775 (1899).

Section is mandatory; judgment must be in the alternative. Martin v. Foltz, 54 Neb. 162, 74 N.W. 418 (1898).

Where verdict does not find value of property, no judgment can be entered. Goodwin v. Potter, 40 Neb. 553, 58 N.W. 1128 (1894).

County judge cannot commit for contempt of district court. Johnson v. Bouton, 35 Neb. 898, 53 N.W. 995 (1892).

Provision for form of judgment is for benefit of plaintiff as well as defendant. Manker v. Sine, 35 Neb. 746, 53 N.W. 734 (1892).

Where plaintiff made tender of chattels at place replevined, collection of money judgment could be enjoined. Reavis v. Horner, 11 Neb. 479, 9 N.W. 643 (1881).

Before plaintiff can complain of omission he must show that property can be returned. Goodman v. Kennedy, 10 Neb. 270, 4 N.W. 987 (1880).

Doubts should be resolved against remedy by injunction. Stone v. Snell, 4 Neb. Unof. 430, 94 N.W. 525 (1903).

If there is no alternative judgment for value, and property cannot be returned, plaintiff cannot complain of the alternative. Skow v. Locke, 3 Neb. Unof. 176, 91 N.W. 204 (1902).

2. Value of possession

Where judgment is for right of possession only, judgment amount should be value of such possession in case a return of property cannot be had, together with damages for withholding property, and costs. Jackson v. Arndt-Snyder Motor Co., 122 Neb. 276, 240 N.W. 279 (1932).

Verdict for defendant claiming under lien, failing to find value of possession, is erroneous. Creighton v. Haythorn, 49 Neb. 526, 68 N.W. 934 (1896).

3. Damages

Damages for depreciation in value of property may only be recovered if property is returned. Alliance Loan & Inv. Co. v. Morgan, 154 Neb. 745, 49 N.W.2d 593 (1951).

Plaintiff cannot complain that judgment for defendant was rendered only for damages for withholding property. Scott v. Burrill, 44 Neb. 755, 62 N.W. 1093 (1895).

Where verdict is silent on amount of damages, courts cannot render judgment therefor. Search v. Miller, 9 Neb. 26, 1 N.W. 975 (1879).

Where action proceeds as one for damages, it is not necessary for judgment to provide for return of property. McCarty v. Morgan, 2 Neb. Unof. 274, 96 N.W. 489 (1902).

4. Miscellaneous

Verdict held sufficient. Heffley v. Hunger, 54 Neb. 776, 75 N.W. 53 (1898).

Case will be remanded to have proper judgment entered on verdict. Roberson v. Reiter, 38 Neb. 198, 56 N.W. 877 (1893).

25-10,105 Judgment for plaintiff; damages; costs.

In all cases when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages

upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which with costs of suit, the court shall render judgment for plaintiff.

Source: R.S.1867, Code § 192, p. 423; R.S.1913, § 7834; C.S.1922, § 8778; C.S.1929, § 20-10,105.

1. Damages
2. Costs
3. Miscellaneous

1. Damages

The owner of personal property in a replevin action has the duty to mitigate damages the same as any other litigant. Ordinarily, the plaintiff in a replevin action may recover the interest on the value of the property during the period it was wrongfully detained; however, where the value of the loss of use of the property during such period exceeds the amount of such interest, then, instead of interest, the plaintiff may recover the value of the loss of use of the property. Where special damages are not shown, damages for wrongful detention are limited to the extent of interest on the value of the property during the time it was wrongfully detained. Allemang v. Kearney Farm Ctr., 251 Neb. 68, 554 N.W.2d 785 (1996).

Under this section, where a plaintiff in a replevin action recovers his property, the finder of fact must assess adequate damages to the plaintiff, including damages for loss of use of the wrongfully withheld property, if such property has value for use. Morfeld v. Bernstrauch, 216 Neb. 234, 343 N.W.2d 880 (1984).

Plaintiff entitled to damages based on the depreciated and deteriorated value of a chattel during detention, where defendant unlawfully detained a chattel in which plaintiff held a superior security interest. White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc., 197 Neb. 421, 249 N.W.2d 489 (1977).

Where defendant has disposed of property in bad faith, plaintiff may recover damages. Singer Sewing Machine Co. v. Robertson, 87 Neb. 542, 127 N.W. 866 (1910).

Where verdict is for plaintiff, need only assess adequate damages for illegal detention, and costs. Mueller v. Parcel, 71 Neb. 795, 99 N.W. 684 (1904).

Cannot recover damages if defendant was not in possession when issued. Burr v. McCallum, 59 Neb. 326, 80 N.W. 1040 (1899).

Where no finding as to damages, judgment therefor is erroneous. Gordon v. Little, 41 Neb. 250, 59 N.W. 783 (1894).

Where finding is for plaintiff, only judgment provided is for damages for detention and costs. Nollkamper v. Wyatt, 27 Neb. 565, 43 N.W. 357 (1889).

2. Costs

Defendant is not liable for costs where he came into possession rightly and no demand was made before action started. Peters v. Parsons, 18 Neb. 191, 24 N.W. 687 (1885).

3. Miscellaneous

An action in replevin is properly triable to a jury. First State Bank of Scottsbluff v. Bear, 172 Neb. 504, 110 N.W.2d 83 (1961).

Demand is waived where defendant asserts right of possession. Tilden v. Stilson, 49 Neb. 382, 68 N.W. 478 (1896).

Demand is unnecessary where defendant came into possession wrongfully. Wilcox v. Beitel, 43 Neb. 457, 61 N.W. 722 (1895).

General denial does not waive demand. Littlefield v. Wilson, 1 Neb. Unof. 581, 95 N.W. 677 (1901).

Verdict finding right of possession in plaintiff and damages, need not find value of property or special interest. Keller v. Van Brunt, 1 Neb. Unof. 301, 95 N.W. 668 (1901).

25-10,106 Property not taken or returned to defendant; judgment for plaintiff; nature and amount.

When the property claimed has not been taken, or has been returned to the defendant by the sheriff for want of the undertaking required by section 25-1098, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper; but if the property be returned for want of the undertaking required by such section, the plaintiff shall pay all costs made by taking the same.

Source: R.S.1867, Code § 193, p. 423; R.S.1913, § 7835; C.S.1922, § 8779; C.S.1929, § 20-10,106.

1. Possession
2. Damages
3. Miscellaneous

1. Possession

While there can be no recovery of damages for property of which defendant had no possession or control when action was instituted, evidence of possession prior to commencement may be presumed to continue and form basis for judgment. Tesar v. Bartels, 149 Neb. 889, 32 N.W.2d 911 (1948).

Damages cannot be awarded where property has passed into the lawful possession of a trustee in bankruptcy, unless actual possession of the property remained in the defendant or had been returned to him at time replevin action was brought. Omaha U. S. Employees' Federal Credit Union v. Brunson, 147 Neb. 439, 23 N.W.2d 717 (1946).

Action is not changed to trover; recovery depends on rights at commencement of action. Wilkins v. Redding, 70 Neb. 182, 97 N.W. 238 (1903).

In replevin the plaintiff cannot recover damages for property which was not in defendant's possession, or under his control, at the beginning of the suit. Heidiman-Benoist Saddlery Co. v. Schott, 59 Neb. 20, 80 N.W. 47 (1899).

2. Damages

If property is not returned, the measure of damages is the value of the property together with interest from the date of the unlawful taking. Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N.W.2d 813 (1950).

In an action properly commenced this section provides a remedy where the property has not been taken under the writ. Singer Sewing Machine Co. v. Robertson, 87 Neb. 542, 127 N.W. 866 (1910).

Where property cannot be found, taken, and delivered to plaintiff, or where bond is not given, action may proceed for damages. Hopkins v. State ex rel. Omaha Cooperage Co., 64 Neb. 10, 89 N.W. 401 (1902).

Measure of damages is market value and interest from time taken. Honaker v. Vesey, 57 Neb. 413, 77 N.W. 1100 (1899).

Where defendant parts with possession of property before suit is brought, action can proceed for damages. Lininger & Metcalf Co. v. Mills, 29 Neb. 297, 45 N.W. 463 (1890).

Where plaintiff fails to give bond, measure of damages is value of property at time taken with seven percent interest; judgment for return of property is error without prejudice. Sloan v. Fist, 2 Neb. Unof. 664, 89 N.W. 760 (1902).

3. Miscellaneous

Plaintiff may dismiss action without prejudice. Saussay v. Lemp Brewing Co., 52 Neb. 627, 72 N.W. 1026 (1897).

25-10,107 Order for delivery of property; directed to other counties; successive orders; taxation of costs.

An order may be directed to any other county than the one in which the action is brought, for the delivery of the property claimed. Several orders may issue at the same time, or successively, at the option of the plaintiff; but only one of them shall be taxed in the costs, unless otherwise ordered by the court.

Source: R.S.1867, Code § 194, p. 424; R.S.1913, § 7836; C.S.1922, § 8780; C.S.1929, § 20-10,107.

Order may be enforced by mandamus against warden of penitentiary. Hopkins v. State ex rel. Omaha Cooperage Co., 64 Neb. 10, 89 N.W. 401 (1902).

25-10,108 Order of delivery; execution; powers of officer.

The sheriff or other officer, in the execution of the order of delivery, may break open any building or enclosure in which the property claimed, or any part thereof, is concealed; but not until he has been refused an entrance into said building or enclosure and the delivery of the property, after having demanded the same.

Source: R.S.1867, Code § 195, p. 424; R.S.1913, § 7837; C.S.1922, § 8781; C.S.1929, § 20-10,108.

There is no place, office or institution where officers of law cannot go to make service of order. Hopkins v. State ex rel. Omaha Cooperage Co., 64 Neb. 10, 89 N.W. 401 (1902).

25-10,109 Suits on undertakings; when brought.

No suit shall be instituted on the undertaking given under section 25-1098 before an execution issued on a judgment in favor of the plaintiff or defendant in the action shall have been returned, that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county.

Source: R.S.1867, Code § 196, p. 424; R.S.1913, § 7836; C.S.1922, § 8782; C.S.1929, § 20-10,109; R.S.1943, § 25-10,109; Laws 1972, LB 1049, § 4.

It is sufficient that plaintiff fails to return property and execution on money judgment is returned unsatisfied. Eickhoff v. Eikenbary, 52 Neb. 332, 72 N.W. 308 (1897).

Return of execution unsatisfied is prerequisite to action and petition must so allege. Hershiser v. Jordan, 25 Neb. 275, 41 N.W. 147 (1888).

Judgment against sureties on bond cannot be rendered in replevin action. Lininger v. Raymond, 9 Neb. 40, 2 N.W. 359 (1879).

25-10,110 Order for delivery of property; issuance without court order; effect; taxation of costs.

Any order for the delivery of property issued under section 25-1094 without the order of the court required thereby shall be set aside at the cost of the clerk

issuing the same, and such clerk, as well as the plaintiff, shall also be liable in damages to the party injured.

Source: R.S.1867, Code § 197, p. 424; R.S.1913, § 7839; C.S.1922, § 8783; C.S.1929, § 20-10,110; R.S.1943, § 25-10,110; Laws 1973, LB 474, § 9.

If order of delivery is issued without affidavit, the order may be set aside. Racine-Sattley Co. v. Meinen, 79 Neb. 33, 114 N.W. 602 (1908).

Affidavit is prerequisite; without it, order is nullity and may be set aside on proper application. Case Threshing Machine Co. v. Rosso, 78 Neb. 184, 110 N.W. 686 (1907).

ARTICLE 11

TRIAL

Cross References

Constitutional provisions:
Justice shall be administered without delay, see Article I, section 13, Constitution of Nebraska.
Practice of all courts shall be uniform, see Article V, section 19, Constitution of Nebraska.
Right to trial by jury, see Article I, section 6, Constitution of Nebraska.
Limitation of actions, trial procedure, see section 25-221.
Natural resources districts, no bond required, see section 2-3281.
Trial docket, how kept by clerks of courts, see section 25-2211.

(a) ISSUES, HOW FORMED AND TRIED

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(d) TRIAL BY COURT

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Section

(e) TRIAL BY REFEREE

(f) EXCEPTIONS

(g) NEW TRIAL

(h) GENERAL PROVISIONS

(i) SUMMARY JURY TRIAL

(a) ISSUES, HOW FORMED AND TRIED

25-1101 Issues; kinds.

Issues arise on the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds: (1) Of law; (2) of fact.

Source: R.S.1867, Code § 277, p. 440; R.S.1913, § 7840; C.S.1922, § 8784; C.S.1929, § 20-1101.

The pleadings before the trial court at the time of decision form the issues of the case. State ex rel. Douglas v. Schroeder, 212 Neb. 562, 324 N.W.2d 391 (1982).

25-1102 Issue of fact; how formed.

An issue of fact arises upon a material allegation in a pleading that is denied by a responsive pleading or that is considered as denied or avoided because no responsive pleading is required or permitted.

Source: R.S.1867, Code § 278, p. 440; R.S.1913, § 7841; C.S.1922, § 8785; C.S.1929, § 20-1102; R.S.1943, § 25-1102; Laws 2002, LB 876, § 24.

A general denial in answer puts in issue only such pleaded facts as are necessary to enable plaintiff to recover. Luikart v. Bank of Benkelman, 132 Neb. 501, 272 N.W. 324 (1937).

Party is as much entitled to be heard in trial court upon questions of law as upon issues of fact. Wagener v. Whitmore, 79 Neb. 558, 113 N.W. 238 (1907).

Where facts, though not conflicting, would cause impartial minds to draw different conclusions, question to be determined is not one of law for court, but one of fact. Southern Pine Lumber Co. v. Fries, 1 Neb. Unof. 691, 96 N.W. 71 (1901).

25-1103 Trial, defined.

A trial is a judicial examination of the issues, whether of law or of fact in an action.

Source: R.S.1867, Code § 279, p. 440; R.S.1913, § 7842; C.S.1922, § 8786; C.S.1929, § 20-1103.

Hearing on a motion to dissolve an attachment is a trial. J. R. Watkins Co. v. Sorenson, 166 Neb. 364, 88 N.W.2d 902 (1958).

A trial is a judicial examination of the issues, whether of law or fact. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N.W.2d 533 (1949).

Where court decides case upon merits, after introduction of evidence, it is a trial. Shipley v. McNeel, 149 Neb. 790, 32 N.W.2d 639 (1948).

Hearing of motion to dissolve an attachment is a trial. Gibson v. Sidney, 50 Neb. 12, 69 N.W. 314 (1896).

Trial of an impeachment does not include preferring of charges. State v. Hill, 37 Neb. 80, 55 N.W. 794 (1893).

25-1104 Issues; how tried generally; court and jury.

Issues of law must be tried by the court, unless referred as provided in section 25-1129. Issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided.

Source: R.S.1867, Code § 280, p. 440; R.S.1913, § 7843; C.S.1922, § 8787; C.S.1929, § 20-1104.

1. Trial to jury
2. Trial to court
3. Waiver of jury trial
4. Miscellaneous

1. Trial to jury

Cited in determining that material issues of fact in contested garnishment proceedings are triable to jury. Christiansen v. Moore, 184 Neb. 818, 172 N.W.2d 620 (1969).

The value of an attorney's services is a jury question. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N.W.2d 667 (1956).

Ejectment is law action and triable to a jury, unless waived, notwithstanding equitable defenses are interposed. Foltz v. Brakhage, 151 Neb. 216, 36 N.W.2d 768 (1949).

Trial by jury is mandatory only when the inherent nature of the issues to be determined, or the express terms of statutes which may be involved, so require. In re Guardianship of Warner, 137 Neb. 25, 288 N.W. 39 (1939).

In cases in equity and those involving both law and equity, court may submit all issues of fact to jury, but it is not error to refuse to separate legal from equitable and try former to jury and latter to court. Rath v. Wilgus, 110 Neb. 810, 195 N.W. 115 (1923); Alter v. Bank of Stockham, 53 Neb. 223, 73 N.W. 667 (1897).

A law action is not triable without a jury because there are issues incidental to main one which are equitable in their nature. Alter v. Skiles, 93 Neb. 597, 141 N.W. 187 (1913).

Action on account of waste and conversion of property was triable to jury. Gandy v. Wiltse, 79 Neb. 280, 112 N.W. 569 (1907).

Prosecutions under search and seizure law are not within the provisions of this section requiring jury trial. Sothman v. State, 66 Neb. 302, 92 N.W. 303 (1902).

In suit on county treasurer's bond, to recover money embezzled, defendant was entitled to jury trial, although accounting was asked. Kuhl v. Pierce County, 44 Neb. 584, 62 N.W. 1066 (1895).

2. Trial to court

An action to enforce an attorney's charging lien is equitable in nature and will not be tried before a jury. Barber v. Barber, 207 Neb. 101, 296 N.W.2d 463 (1980).

Where a cause of action for equitable relief is stated and the plaintiff prays for equitable relief, a jury trial cannot be demanded as a matter of right by the defendant, even if defendant pleads legal defenses or has made a counterclaim for damages. Kuhlman v. Cargile, 200 Neb. 150, 262 N.W.2d 454 (1978).

Where mortgage foreclosure proceeding is properly brought, questions of title arising therein can be litigated without a jury. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N.W.2d 545 (1943).

Party cannot demand jury on adverse possession issue in quiet title suit. Krumm v. Pillard, 104 Neb. 335, 177 N.W. 171 (1920).

Issues raised by equitable counterclaim in law action are triable to court. Hotaling v. Tecumseh Nat. Bank, 55 Neb. 5, 75 N.W. 242 (1898).

When a cause of action for equitable relief is stated, a jury cannot be demanded as a matter of right. Sharmer v. McIntosh, 43 Neb. 509, 61 N.W. 727 (1895).

Cannot demand jury in mechanic's lien foreclosure. Dohle v. Omaha Foundry & Machine Co., 15 Neb. 436, 19 N.W. 644 (1884).

Party is not entitled to general jury trial in actions quia timet. Roggencamp v. Converse, 15 Neb. 105, 17 N.W. 361 (1883); Harral & Uhl v. Gray, 10 Neb. 186, 4 N.W. 1040 (1880).

Charge of contempt of court is not for jury. Gandy v. State, 13 Neb. 445, 14 N.W. 143 (1882).

3. Waiver of jury trial

A jury trial is not required by this section in an action to foreclose a mortgage on personal property and for a deficiency judgment. State Securities Co. v. Corkle, 191 Neb. 578, 216 N.W.2d 879 (1974).

Where the constitutional right to a trial by jury exists, the cause cannot be referred in the absence of waiver of that right. Yager v. Exchange Nat. Bank of Hastings, 52 Neb. 321, 72 N.W. 211 (1897).

Waiver of jury is presumed to be general and not for a particular term. Boslow v. Shenberger, 52 Neb. 164, 71 N.W. 1012 (1897).

Form in which issues are made up is waived, unless objected to. Hay v. Miller, 48 Neb. 156, 66 N.W. 1115 (1896); Downie v. Ladd, 22 Neb. 531, 35 N.W. 388 (1887).

Where issues of fact are tried by court without objection appearing of record, presumption is that jury was waived. Davis v. Snyder, 45 Neb. 415, 63 N.W. 789 (1895).

4. Miscellaneous

This section fails to specify that a school district reorganization case is entitled to jury trial. Schroeder v. Oeltjen, 184 Neb. 8, 165 N.W.2d 81 (1969).

Appeal from action of county superintendents in reorganization of school districts was triable de novo. Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N.W.2d 119 (1957).

After overruling of motion for summary judgment, case is retained for trial as in any other civil action. Rehn v. Bingaman, 157 Neb. 467, 59 N.W.2d 614 (1953).

Practice of nonsuiting plaintiff at close of opening statements to jury disapproved. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N.W. 349 (1934).

Nature of action is determined from pleadings. Lett v. Hammond, 59 Neb. 339, 80 N.W. 1042 (1899).

25-1105 Issues of fact triable to court.

All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this code.

Source: R.S.1867, Code § 281, p. 441; R.S.1913, § 7844; C.S.1922, § 8788; C.S.1929, § 20-1105.

Claims brought under this section may be equitable in nature, and in such case the court may submit questions of fact to the jury, but the jury's determination is only an advisory one. In re Estate of Layton, 212 Neb. 518, 323 N.W.2d 817 (1982).

Appeals in guardianship matters are heard de novo in Supreme Court. Cass v. Pense, 155 Neb. 792, 54 N.W.2d 68 (1952).

Contest over sufficiency of election by widow to take under statute was triable de novo in Supreme Court. In re Estate of Bergren, 154 Neb. 289, 47 N.W.2d 582 (1951).

In suits not triable by jury as of right, a verdict of a jury is advisory only. In re Guardianship of Warner, 137 Neb. 25, 288 N.W. 39 (1939).

Jury cannot be demanded on adverse possession issue in suit to quiet title. Krumm v. Pillard, 104 Neb. 335, 177 N.W. 171 (1920).

Verdict in equity case on issue of fact is advisory only. Bank of Stockham v. Alter, 61 Neb. 359, 85 N.W. 300 (1901).

Issues in equity causes are triable to the court without a jury. Smith v. Perry, 52 Neb. 738, 73 N.W. 282 (1897).

Power of court of equity to obtain verdict of jury on issues of fact is preserved by the code. Omaha Fire Ins. Co. v. Thompson, 50 Neb. 580, 70 N.W. 30 (1897).

(b) TRIAL BY JURY

25-1106 Formation of jury; applicability of law.

The general mode of summoning, impaneling, challenging and swearing the jury is not changed by this code.

Source: R.S.1867, Code § 282, p. 441; R.S.1913, § 7845; C.S.1922, § 8789; C.S.1929, § 20-1106.

Peremptory challenges and challenges for cause are provided to safeguard constitutional right of trial by jury in criminal case. Oden v. State, 166 Neb. 729, 90 N.W.2d 356 (1958).

In examination of venireman upon voir dire, he will not be deemed to have deceived counsel as to relations with opposing counsel, when he admits relations and answers questions truthfully. Blakely v. Omaha & C. B. St. Ry. Co., 94 Neb. 119, 142 N.W. 525 (1913).

Error cannot be predicated upon overruling of challenge to juror for cause when record does not show that complaining party has exhausted all his peremptory challenges. Olmstead v. Noll, 82 Neb. 147, 117 N.W. 102 (1908).

That juror has served on another case growing out of same state of facts does not necessarily disqualify him. Granite State Fire Ins. Co. v. Buckstaff Bros. Mfg. Co., 53 Neb. 123, 73 N.W. 544 (1897).

The improper excusing of a juror will not work a reversal unless all peremptory challenges are used. Smith v. Meyers, 52 Neb. 70, 71 N.W. 1006 (1897).

Selection of talesmen is entrusted to the discretion of the sheriff. Pflueger v. State, 46 Neb. 493, 64 N.W. 1094 (1895).

25-1107 Order of trial.

When the jury has been sworn the trial shall proceed in the following order, unless the court for special reasons otherwise directs:

(1) The plaintiff must briefly state his claim, and may briefly state the evidence by which he expects to sustain it.

(2) The defendant must then briefly state his defense, and may briefly state the evidence he expects to offer in support of it.

(3) The party who would be defeated if no evidence were given on either side must first produce his evidence; the adverse party will then produce his evidence.

(4) The parties will then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice, permits them to offer evidence in their original case.

(5) When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be refused or given by the court; which instructions shall be reduced to writing if either party requires it.

(6) The parties may then submit or argue the case to the jury. In argument, the party required first to produce his evidence shall have the opening and conclusion. If several defendants have separate defenses and appear by different counsel, the court shall arrange their relative order.

(7) The court may again charge the jury after the argument is concluded.

Source: R.S.1867, Code § 283, p. 441; R.S.1913, § 7846; C.S.1922, § 8790; C.S.1929, § 20-1107.

1. Opening statements
2. Production of evidence
3. Instructions
4. Closing arguments
5. Miscellaneous

1. Opening statements

Statute does not require plaintiff's attorney to state a ''cause of action'' in opening statement to jury, nor a statement of all evidence intended to be relied on. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N.W. 349 (1934).

Counsel is allowed considerable latitude in opening statement; mere fact that he fails to prove all that he expected does not mean statement intentionally false. Yechout v. Tesnohlidek, 97 Neb. 387, 150 N.W. 199 (1914).

2. Production of evidence

Party required first to produce evidence has the right to open argument. Redman Industries, Inc. v. Morgan Drive Away, Inc., 179 Neb. 406, 138 N.W.2d 708 (1965).

Burden of proving damage in eminent domain proceedings rests on landowner. Rath v. Sanitary District No. One of Lancaster County, 156 Neb. 444, 56 N.W.2d 741 (1953).

Party on whom rests burden of proof must first produce evidence and rest; contrary rule by trial court was not prejudicial error in principal case. Olson v. Hansen, 122 Neb. 492, 240 N.W. 551 (1932).

Party who would be defeated if no evidence produced has burden. Grosvenor v. Fidelity & Cas. Co., 102 Neb. 629, 168 N.W. 596 (1918).

Party having burden of proof first produces evidence and opens; no discretion in court. Sheibley v. Fales, 81 Neb. 795, 116 N.W. 1035 (1908).

Right to open and close evidence and arguments follows burden of proof. Refusal is prejudicial error. Brumback v. American Bank of Beatrice, 53 Neb. 714, 74 N.W. 264 (1898).

If party having burden of proof permits others to first introduce evidence, he waives right to open and close. Brooks v. Dutcher, 22 Neb. 644, 36 N.W. 128 (1888).

3. Instructions

Proper time to submit requested instructions is as early in trial as possible; not later than close of evidence. Whitehall v. Commonwealth Casualty Co., 125 Neb. 16, 248 N.W. 692 (1933).

4. Closing arguments

In jury trial, the party who, by the pleadings, is required to first produce evidence is entitled to open and close argument to jury. J. I. Case Co. v. Hrubesky, 125 Neb. 588, 251 N.W. 169 (1933).

Party who, by pleadings, is first required to produce evidence is entitled to opening and closing arguments. Bennington State Bank v. Petersen, 114 Neb. 420, 207 N.W. 673 (1926).

Improper argument, rebuked by trial court, will not justify reversal, unless Supreme Court believes statement prejudicially influenced jury. Court on own motion should interfere to prevent improper appeal to jury. Krum v. Sullivan & Schaberg Transfer & Fuel Co., 97 Neb. 491, 150 N.W. 640 (1915); Cowan v. Ertel, 95 Neb. 380, 145 N.W. 841 (1914).

Whether defendant can deprive plaintiff of reply by refusing to argue is discretionary with court. Henry v. Dussell, 71 Neb. 691, 99 N.W. 484 (1904).

The right to open and close is determined by an inspection of the pleadings. Zweibel v. Myers, 69 Neb. 294, 95 N.W. 597 (1903).

If any material facts in petition are not admitted, but denied, directly or argumentatively, plaintiff opens. Sorensen v. Sorensen, 68 Neb. 483, 94 N.W. 540 (1903).

Denial of damage alone, plaintiff opens. Summers v. Simms, 58 Neb. 579, 79 N.W. 155 (1899).

Waiver of right to open is not waiver of right to reply to defendant's argument. Hickman v. Layne, 47 Neb. 177, 66 N.W. 298 (1896).

On trial by court, denial of right to open is not error, if party is not prejudiced thereby. Citizens State Bank v. Baird, 42 Neb. 219, 60 N.W. 551 (1894); See Olds Wagon Co. v. Benedict, 25 Neb. 372, 41 N.W. 254 (1889).

Where insanity was pleaded as defense to suit on note, defendant had right to open and close. Rea v. Bishop, 41 Neb. 202, 59 N.W. 555 (1894).

Denial of right to open and close is prejudicial error. Johnson v. Nelson, 3 Neb. Unof. 260, 91 N.W. 526 (1902).

5. Miscellaneous

Suggestion of amount of recovery was not improper. Yount v. Seager, 181 Neb. 665, 150 N.W.2d 245 (1967).

Order of trial presented by this section controls reading of testimony taken at former trial. Mills v. Mills, 130 Neb. 881, 266 N.W. 759 (1936).

Aggravated misconduct of counsel in argument may require reversal. Hansen v. Mallett, 101 Neb. 339, 163 N.W. 145 (1917).

Where both parties move for directed verdict, finding of court takes place of verdict. Krecek v. Supreme Lodge of F. U. A., 95 Neb. 428, 145 N.W. 859 (1914).

Order of trial is governed by state of pleadings at beginning of trial, not by admissions in trial. Kraus v. Clark, 81 Neb. 575, 116 N.W. 164 (1908).

An action, including a counterclaim, should be tried as an entirety, and not as separate suits. Miller v. McGannon, 79 Neb. 609, 113 N.W. 170 (1907).

To review ruling on misconduct of attorney, parties must object and except to ruling. Chicago, B. & Q. R. R. Co. v. Kellogg, 54 Neb. 127, 74 N.W. 454 (1898).

25-1107.01 Jurors; permitted to take notes; use; destruction.

Jurors shall be permitted, but not required, to take notes. The notes may be used during the jury's deliberations, but not preserved for review on appeal. The notes shall be treated as confidential between the juror making them and the other jurors. The trial judge shall ensure the confidentiality of the notes during the course of the trial and the jury's deliberations and shall cause the notes to be destroyed immediately upon return of the verdict.

Source: Laws 2008, LB1014, § 71.
Operative date April 17, 2008.

25-1108 View of property or place by jury.

Whenever, in the opinion of the court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

Source: R.S.1867, Code § 284, p. 442; R.S.1913, § 7847; C.S.1922, § 8791; C.S.1929, § 20-1108.

1. Propriety
2. Effect
3. Miscellaneous

1. Propriety

A motion to inspect the premises under this section is, by the terms of the statute, left to the discretion of the trial court. Kopecky v. National Farms, Inc., 244 Neb. 846, 510 N.W.2d 41 (1994).

A trial judge has the same power to view the premises as a jury, and such inspection is entitled to same effect in both cases. Birdwood Irr. Dist. v. Brodbeck, 148 Neb. 824, 29 N.W.2d 621 (1947).

Statute implies that trial judge may examine the premises involved in any case where a view would have been warranted had the case been tried before a jury. Taxpayer's League of Wayne County v. Wightman, 139 Neb. 212, 296 N.W. 886 (1941).

This section is merely confirmatory of power generally recognized as existing in trial court apart from any statute. Carter v. Parsons, 136 Neb. 515, 286 N.W. 696 (1939).

It is proper for the jury, properly cautioned, to view the mechanism of a street car for closing the rear door. Denison v. Omaha & C. B. St. Ry. Co., 135 Neb. 307, 280 N.W. 905 (1938).

Refusal to allow jury to view the place where a material fact occurred, in absence of abuse of discretion, is not reversible error hereunder. Large v. Johnson, 124 Neb. 821, 248 N.W. 400 (1933).

Court may require jury to view property. Beck v. Staats, 80 Neb. 482, 114 N.W. 633 (1908).

2. Effect

Jury may take into account the result of their observations at the locus in quo and make it, in connection with the other evidence, the basis of their verdict. Rundall v. Grace, 132 Neb. 490, 272 N.W. 398 (1937).

Where jury is permitted to view the premises, the result of its observations is evidence which, in arriving at a verdict, it may consider only in connection with other competent evidence. Stull v. Department of Roads and Irrigation, 129 Neb. 822, 263 N.W. 148 (1935).

Jury is to take into account result of observations at the locus in quo, in connection with other evidence. Chicago, R. I. & P. Ry. Co. v. Farwell, 60 Neb. 322, 83 N.W. 71 (1900).

View of premises in dispute by jury is evidence, and not merely means of enabling jury to better connect evidence. Chicago, R. I. & P. Ry. Co. v. Farwell, 59 Neb. 544, 81 N.W. 440 (1900), reversed on rehearing, 60 Neb. 322, 83 N.W. 71 (1900).

3. Miscellaneous

View of premises must be made in presence of person appointed by the court. Larsen v. Omaha Transit Co., 168 Neb. 205, 95 N.W.2d 554 (1959).

Where there was a change in conditions, view of premises was properly denied. Pospichal v. Wiley, 163 Neb. 236, 79 N.W.2d 275 (1956).

Where abuse of discretion is not shown, refusal to view premises is not error. Ricenbaw v. Kraus, 157 Neb. 723, 61 N.W.2d 350 (1953).

Language of court in sending jury to inspect premises was in compliance with statute. Drollinger v. Hastings & N. W. R. R. Co., 98 Neb. 520, 153 N.W. 619 (1915).

Viewing of property may, in discretion of court, be made before all evidence has been introduced. Alberts v. Husenetter, 77 Neb. 699, 110 N.W. 657 (1906).

25-1109 Cause submitted; action and conduct of jury.

When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict, or are discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night and at their meals. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

Source: R.S.1867, Code § 285, p. 442; R.S.1913, § 7848; C.S.1922, § 8792; C.S.1929, § 20-1109.

Where bailiff in charge of jury learned that certain juror was voting for acquittal and thereupon went into jury room and by his attitude and statements influenced juror, a new trial was required. Bramlett v. State, 129 Neb. 180, 261 N.W. 166 (1935).

Allowing jury to separate temporarily during the night is a salutary provision for comfort of jury and permissible at discretion of trial judge. Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N.W. 298 (1932).

Fact that there were law reports, with markers therein at cases similar to the case in trial, in jury room, was not error in absence of showing that some juror read them. In re Estate of Wilson, 114 Neb. 593, 208 N.W. 961 (1926).

It is duty of jury to follow instructions given by court. Union State Bank v. Hutton, 62 Neb. 664, 87 N.W. 533 (1901); Barton v. Shull, 62 Neb. 570, 87 N.W. 322 (1901).

It was error for juror to state to fellow jurors facts within his own knowledge. Ewing v. Hoffine, 55 Neb. 131, 75 N.W. 537 (1898).

It is not reversible error to leave jury in charge of deputy sheriff not specially sworn for that purpose. Deranlieu v. Jandt, 37 Neb. 532, 56 N.W. 299 (1893).

25-1110 Jury; separation; admonition of court.

If the jury are permitted to separate either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, and that it is their duty not to form or express any opinion thereon until the cause is finally submitted to them.

Source: R.S.1867, Code § 286, p. 442; R.S.1913, § 7849; C.S.1922, § 8793; C.S.1929, § 20-1110.

This section does not apply to criminal prosecutions. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951).

25-1111 Instructions by court; requested instructions; requirements.

It shall be the duty of the judges of the several district courts, in all cases, both civil and criminal, to reduce their charges or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived by the counsel in the case in open court, and so entered in the record of said case; and either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked shall be in writing.

Source: Laws 1875, § 1, p. 77; R.S.1913, § 7850; C.S.1922, § 8794; C.S.1929, § 20-1111.

1. Duty to give
2. Failure to instruct
3. Oral instructions
4. Waiver
5. Directed verdict
6. Written instructions
7. Miscellaneous

1. Duty to give

In criminal prosecution where evidence connecting defendant with offense is circumstantial, court should, upon request, give a proper instruction to guide jury in determining the sufficiency of circumstantial evidence to warrant conviction. Vinciquerra v. State, 127 Neb. 541, 256 N.W. 78 (1934).

It is error to refuse requested instruction warranted by evidence and correctly stating law, unless principles involved covered by other instructions. Hyndshaw v. Mills, 108 Neb. 250, 187 N.W. 780 (1922).

2. Failure to instruct

It is not error to fail to instruct on contributory negligence, where no such instruction requested, nor evidence offered. Wilson v. Morris & Co., 108 Neb. 255, 187 N.W. 805 (1922).

3. Oral instructions

Where the record clearly shows an oral request for a jury instruction, and there is a full understanding of the requested instruction by the court, review of the court's ruling on the instruction will not be precluded by a failure to reduce the request to writing. State v. Hegwood, 202 Neb. 379, 275 N.W.2d 605 (1979).

Oral explanation on effect of unavoidable accident was erroneous. Owen, Admr. v. Moore, 166 Neb. 226, 88 N.W.2d 759 (1958).

Oral instruction as to manner of preparing a verdict and effect thereof was reversible error. Anderson v. Evans, 164 Neb. 599, 83 N.W.2d 59 (1957).

Giving oral instructions on law applicable is reversible error, where written instructions are not waived. Dow v. Legg, 120 Neb. 271, 231 N.W. 747 (1930), 74 A.L.R. 5 (1930).

It is error to give or modify instructions orally, if exception is taken. Hartwig v. Gordon, 37 Neb. 657, 56 N.W. 324 (1893).

4. Waiver

Waiver in civil case by stipulation filed. Kuhn v. Nelson, 61 Neb. 224, 85 N.W. 56 (1901); Burns v. City of Fairmont, 28 Neb. 866, 45 N.W. 175 (1890).

Entry of waiver should be made upon record. Fitzgerald v. Fitzgerald, 16 Neb. 413, 20 N.W. 269 (1884).

5. Directed verdict

Mandatory instruction to return a verdict in favor of one of the parties need not be in writing. Alloway v. Aiken, 146 Neb. 714, 21 N.W.2d 495 (1946).

It is error to refuse defendant's request for directed verdict, where evidence is insufficient to support verdict for plaintiff. Hoxie v. Chicago & N.W. Ry. Co., 102 Neb. 442, 167 N.W. 557 (1918); Halsted v. Shackelton, 98 Neb. 13, 151 N.W. 954 (1915); Shlik v. Armour & Co., 97 Neb. 101, 149 N.W. 308 (1914); Schmidt v. Williamsburgh City Fire Ins. Co., 95 Neb. 43, 144 N.W. 1044 (1914).

Court is not required to make special findings when directing verdict. First Nat. Bank of Sutton v. Schiermeyer, 99 Neb. 704, 157 N.W. 617 (1916).

Where both parties request directed verdict, court may pronounce judgment without submission to jury. Fairbanks, Morse & Co. v. Austin, 96 Neb. 137, 147 N.W. 126 (1914); Schmidt v. Williamsburgh City Fire Ins. Co., 95 Neb. 43, 144 N.W. 1044 (1914).

Direction to return verdict for party may be oral. Salisbury v. Press Pub. Co., 76 Neb. 849, 108 N.W. 136 (1906).

6. Written instructions

Although this section directs that a requested instruction be in writing, when the record demonstrates that a trial court understood the nature of the orally requested jury instruction, an appellate court may review the trial court's refusal to give the orally requested instruction. State v. Grant, 242 Neb. 364, 495 N.W.2d 253 (1993).

Requested instructions must be submitted in writing. State v. Maxwell, 193 Neb. 807, 229 N.W.2d 195 (1975).

An instruction to the jury must be in writing unless the requirement is waived in open court. Omey v. Stauffer, 174 Neb. 247, 117 N.W.2d 481 (1962).

Statements of court on voir dire examination of jury are not instructions required to be in writing. Lee v. State, 147 Neb. 333, 23 N.W.2d 316 (1946).

7. Miscellaneous

Advising jury as to limited purpose for which testimony was introduced was not violation of this section. Grandsinger v. State, 161 Neb. 419, 73 N.W.2d 632 (1955).

Explanatory statements on voir dire examination were not instructions. Rakes v. State, 158 Neb. 55, 62 N.W.2d 273 (1954).

Issues and facts should not be involved, confused or incumbered by recital of unnecessary pleadings or surplusage, in instructions. Lang v. Omaha & C. B. Str. Railway Co., 96 Neb. 740, 148 N.W. 964 (1914).

25-1112 Requested instruction; how modified.

If the court refuses a written instruction, as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined and shall follow some such characterizing words as ''changed thus,'' which words shall themselves indicate that the same was refused as demanded.

Source: Laws 1875, § 2, p. 77; R.S.1913, § 7851; C.S.1922, § 8795; C.S.1929, § 20-1112.

Where trial court refuses to give a proffered instruction, and so indicates on the margin thereof, it is not interlineation or erasure to embody statements therefrom in one of the court's instructions. Merritt v. Ash Grove Lime & Portland Cement Co., 136 Neb. 52, 285 N.W. 97 (1939).

Modification of requested instruction; exception must be noted, not to modification merely, but to manner of making same. Hunt v. Chicago, B. & Q. R. R. Co., 95 Neb. 746, 146 N.W. 986 (1914).

Action of trial court in modifying instruction may not be reviewed in absence of exception. Denise v. Omaha, 49 Neb. 750, 69 N.W. 119 (1896).

25-1113 Given or refused instructions; how indicated; requirements.

The court must read over all the instructions which it intends to give, and none others, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words given, or refused, as the case may be, on the margin of each instruction.

Source: Laws 1875, § 3, p. 77; R.S.1913, § 7852; C.S.1922, § 8796; C.S.1929, § 20-1113.

Endorsement on instruction ''given as modified'' was not in accord with statute, but was not prejudicial. Asher v. Coca Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961).

Instructions given should be so endorsed by trial judge. Segebart v. Gregory, 160 Neb. 64, 69 N.W.2d 315 (1955).

Giving of oral instruction was reversible error. Dow v. Legg, 120 Neb. 271, 231 N.W. 747 (1930), 74 A.L.R. 5 (1930).

Instructions must be read to jury in open court. Taulborg v. Andresen, 119 Neb. 273, 228 N.W. 528 (1930), 67 A.L.R. 642 (1930).

Failure to write word ''given'' on instruction read to jury is not ground for reversal when not prejudicial. Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); McClellan v. Hein, 56 Neb. 600, 77 N.W. 120 (1898); Home Fire Ins. Co. v. Decker, 55 Neb. 346, 75 N.W. 841 (1898).

Instructions must be considered together. To review alleged errors in refusing instructions they must be called to attention of trial court by motion for new trial. Schmitt & Bros. Co. v. Mahoney, 60 Neb. 20, 82 N.W. 99 (1900).

Disregard of provisions is ground of reversal if excepted to. Tracey v. State, 46 Neb. 361, 64 N.W. 1069 (1895); Omaha & Florence L. & T. Co. v. Hansen, 32 Neb. 449, 49 N.W. 456 (1891); Gillen v. Riley, 27 Neb. 158, 42 N.W. 1054 (1889).

Record must show ruling on instruction, or action of court will not be reviewed. It is not error to fail to mark ''given'' or ''refused.'' Jolly v. State, 43 Neb. 857, 62 N.W. 300 (1895); City of Chadron v. Glover, 43 Neb. 732, 62 N.W. 62 (1895).

Failure to read instructions to jury is reversible error. McDuffie v. Bentley, 27 Neb. 380, 43 N.W. 123 (1889).

25-1114 Instructions; paragraphing; numbering; filing; record.

If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded, as well as all instructions given to the jury by the court on its own motion, must be plainly and legibly written in consecutively numbered paragraphs, and filed by the clerk before being read to the jury by the court; and such instructions shall be preserved as part of the record of the cause in which they were given.

Source: Laws 1875, § 4, p. 77; R.S.1913, § 7853; C.S.1922, § 8797; C.S.1929, § 20-1114.

1. Writing and filing
2. Tender
3. Objections and exceptions
4. Miscellaneous

1. Writing and filing

Instructions must be filed before being read to the jury. Segebart v. Gregory, 160 Neb. 64, 69 N.W.2d 315 (1955).

Statute requires all instructions to be in writing and filed by the clerk before being read to the jury. Whitehall v. Commonwealth Casualty Co., 125 Neb. 16, 248 N.W. 692 (1933).

That instructions were not filed before read is not available error unless excepted to. Minzer v. William Mercantile Co., 59 Neb. 410, 81 N.W. 307 (1899); Fire Assn. of Philadelphia v. Ruby, 58 Neb. 730, 79 N.W. 723 (1899).

2. Tender

Before error can be based upon failure to instruct, proper instruction must be prepared and tendered by court. Weber Bros. v. Whetstone, 53 Neb. 371, 73 N.W. 695 (1898).

3. Objections and exceptions

Where instruction did not fully state law, but did not misstate it, attention of trial court must be called to omission, or not reversible error. Edwards & Bradford Lumber Co. v. Lamb, 95 Neb. 263, 145 N.W. 703 (1914).

Under former statute instructions were not reviewed where no exceptions taken during trial. Acme Harvesting Machine Co. v. Brigham, 95 Neb. 62, 144 N.W. 1035 (1914); Union P. R. R. Co. v. Meyer, 76 Neb. 549, 107 N.W. 793 (1906).

Party not objecting to instructions is presumed to be satisfied therewith. Beckwith v. Dierks Lumber & Coal Co., 75 Neb. 349, 106 N.W. 442 (1905).

Errors in ruling on instructions must be separately assigned in motion for new trial. Globe Oil Co. v. Powell, 56 Neb. 463, 76 N.W. 1081 (1898); Kloke v. Martin, 55 Neb. 554, 76 N.W. 168 (1898); McCormick Harvesting Machine Co. v. Courtright, 54 Neb. 18, 74 N.W. 418 (1898); Karnes v. Dovey, 53 Neb. 725, 74 N.W. 311 (1898).

Objections to instructions must be presented to the trial court by motion for new trial. Hake v. Woolner, 55 Neb. 471, 75 N.W. 1087 (1898); Hanover Fire Ins. Co. v. Schellak, 35 Neb. 701, 53 N.W. 605 (1892).

Error in giving oral instructions is not reversible unless excepted to. Elliott v. Carter White-Lead Co., 53 Neb. 458, 73 N.W. 948 (1898).

Failure to except to instruction does not waive exception taken to evidence on same point. Rosenthal v. Ogden, 50 Neb. 218, 69 N.W. 779 (1897).

4. Miscellaneous

Instructions should cover issues where supported by evidence. Hessig-Ellis Drug Co. v. Harley Drug Co., 95 Neb. 267, 145 N.W. 716 (1914).

Refusal to direct verdict against plaintiff at close of his case is waived by introduction of evidence by defendant. Mack v. Parkieser, 53 Neb. 528, 74 N.W. 38 (1898).

Instructions based on evidence cannot be reviewed in absence of bill of exceptions. Sunday Creek Coal Co. v. Burnham, 52 Neb. 364, 72 N.W. 487 (1897).

25-1115 Instructions; oral explanation prohibited; failure to reduce instructions to writing; failure of court to perform duty; effect.

No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instructions, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case, and sufficient cause for the reversal of the judgment rendered therein.

Source: Laws 1875, § 5, p. 77; R.S.1913, § 7854; C.S.1922, § 8798; C.S.1929, § 20-1115.

1. Error
2. Miscellaneous

1. Error

A directive from the court to a deadlocked jury to keep deliberating which is given orally without notice to the parties or their counsel violates this section and section 25-1116 and is improper. State v. Thomas, 262 Neb. 985, 637 N.W.2d 632 (2002).

An oral explanation of an instruction is not allowed. Omey v. Stauffer, 174 Neb. 247, 117 N.W.2d 481 (1962).

Oral explanation of instruction in negligence action was error. Owen, Admr. v. Moore, 166 Neb. 226, 88 N.W.2d 759 (1958).

To predicate error on giving of oral instruction, objection must be made at the time of giving thereof. Danze v. Stange, 165 Neb. 227, 85 N.W.2d 295 (1957).

The giving of oral instructions in regard to principles of law applicable is reversible error. Anderson v. Evans, 164 Neb. 599, 83 N.W.2d 59 (1957).

Trial court's oral statement to jury out of presence of counsel that negligence of defendant must be concurrent, and that the jury could not apportion damages, was erroneous as ''oral instruction.'' Dow v. Legg, 120 Neb. 271, 231 N.W. 747 (1930), 74 A.L.R. 5 (1930).

At conclusion of charge, court said ''The instruction asked by defendant is refused''; this was not prejudicial. McMartin v. State, 95 Neb. 292, 145 N.W. 695 (1914).

2. Miscellaneous

Directing a jury to reread properly given instructions is not an instruction as contemplated by this section. In re Petition of Omaha Pub. Power. Dist., 268 Neb. 43, 680 N.W.2d 128 (2004).

Court may orally advise jury as to limited purpose for which testimony is received. Grandsinger v. State, 161 Neb. 419, 73 N.W.2d 632 (1955).

Prohibition against oral instructions was not violated. Segebart v. Gregory, 160 Neb. 64, 69 N.W.2d 315 (1955).

Trial court's explanation of legal term on voir dire examination of jury was not required to be in writing. Rakes v. State, 158 Neb. 55, 62 N.W.2d 273 (1954).

Statements of court herein were not oral modifications of instructions. Grammer v. State, 103 Neb. 325, 172 N.W. 41 (1919).

Section is mandatory; applies to both civil and criminal cases. Ehrlich v. State, 44 Neb. 810, 63 N.W. 35 (1895).

Where giving of written instructions is waived, objection will not be considered on appeal. Fitzgerald v. Fitzgerald, 16 Neb. 413, 20 N.W. 269 (1884).

Judge should not make oral statement to jury during trial. Republican Valley R. R. Co. v. Arnold, 13 Neb. 485, 14 N.W. 478 (1882).

If a judge delivers to a jury an Allen charge orally and without notice to the parties or their counsel, then the State bears the

burden of proving that the defendant was not prejudiced by the improper communication between judge and jury. State v. Owen, 1 Neb. App. 1060, 510 N.W.2d 503 (1993).

25-1116 Instructions after retirement.

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

Source: R.S.1867, Code § 287, p. 442; R.S.1913, § 7855; C.S.1922, § 8799; C.S.1929, § 20-1116.

1. Testimony or instructions
2. Presence of parties or counsel
3. Miscellaneous

1. Testimony or instructions

Reading by court reporter of portions testimony requested was compliance with statute. Graves v. Bednar, 171 Neb. 499, 107 N.W.2d 12 (1960).

Court may permit reading of testimony by official court reporter. Shiers v. Cowgill, 157 Neb. 265, 59 N.W.2d 407 (1953).

If trial judge substantially misstates the testimony in giving his recollection, it is error, but to predicate error on failure to make a complete statement, request should be made for a further or fuller statement. Barton v. Shull, 70 Neb. 324, 97 N.W. 292 (1903).

At request of jury, court may give its recollection of evidence; if misstated, it is error. Official reporter may, at request of jury, and in presence of court read testimony. Darner v. Daggett, 35 Neb. 695, 53 N.W. 608 (1892); Stephens & Roberts v. Patterson, 29 Neb. 697, 46 N.W. 154 (1890).

Trial court on its own motion may recall jury and give additional instruction. Jessen v. Donahue, 4 Neb. Unof. 838, 96 N.W. 639 (1903).

2. Presence of parties or counsel

If it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. State v. Jackson, 264 Neb. 420, 648 N.W.2d 282 (2002).

A directive from the court to a deadlocked jury to keep deliberating which is given orally without notice to the parties or their counsel violates section 25-1115 and this section and is improper. State v. Thomas, 262 Neb. 985, 637 N.W.2d 632 (2002).

When it becomes necessary for the court to give further instruction to the jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. Nebraska Depository Inst. Guar. Corp. v. Stastny, 243 Neb. 36, 497 N.W.2d 657 (1993).

Although trial court technically violated section by giving written reply to jury's request for definition out of presence of counsel, appellant could not show prejudice and thus error was harmless error. In re Estate of Corbett, 211 Neb. 335, 318 N.W.2d 720 (1982).

The reading by an official court reporter, after the jury has retired for deliberation, of testimony of a witness examined on trial is proper so long as such action is in the presence of or after notice to the parties or their counsel. Bakhit v. Thomsen, 193 Neb. 133, 225 N.W.2d 860 (1975).

Further instructions to or communications with jury after it has retired should be in open court in presence of parties or counsel. Taulborg v. Andresen, 119 Neb. 273, 228 N.W. 528 (1930), 67 A.L.R. 642 (1930).

If a judge delivers to a jury an Allen charge orally and without notice to the parties or their counsel, then the State bears the burden of proving that the defendant was not prejudiced by the improper communication between judge and jury. State v. Owen, 1 Neb. App. 1060, 510 N.W.2d 503 (1993).

3. Miscellaneous

If, in answer to request, further instructions are sent to jury room, record should show consent. Martin v. Martin, 76 Neb. 335, 107 N.W. 580 (1906).

25-1117 Jury; when discharged.

The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

Source: R.S.1867, Code § 288, p. 442; R.S.1913, § 7856; C.S.1922, § 8800; C.S.1929, § 20-1117.

25-1118 Jury; retrial on discharge.

In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately or at a future time as the court may direct.

Source: R.S.1867, Code § 289, p. 442; R.S.1913, § 7857; C.S.1922, § 8801; C.S.1929, § 20-1118.

(c) VERDICT

25-1119 Assessment of amount of recovery.

When, by the verdict, either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery.

Source: R.S.1867, Code § 295, p. 443; R.S.1913, § 7858; C.S.1922, § 8802; C.S.1929, § 20-1119.

Verdict for the plaintiff in amount of "no money" is in effect no verdict at all. Bushey v. French, 171 Neb. 809, 108 N.W.2d 237 (1961).

Where jury finds for plaintiff on its cause of action, and also for defendant on its counterclaim or setoff, verdict must show amount of each finding. Horse Shoe Lake Drainage Dist. v. Crane Co., 112 Neb. 323, 199 N.W. 526 (1924).

Court cannot disregard verdict and enter such judgment as evidence warrants; if verdict is not sustained by evidence, remedy is by motion for new trial. Kenesaw Mill & E. Co. v. Aufdenkamp, 106 Neb. 246, 183 N.W. 294 (1921).

Court may in action of debt add interest when such appears from verdict to be so intended by jury. Wiruth v. Lashmett, 85 Neb. 286, 123 N.W. 427 (1909).

Verdict may assess different amounts against different defendants. Lininger & Metcalf Co. v. Webb, 51 Neb. 10, 70 N.W. 519 (1897).

Failure to include in judgment interest allowed by jury on verdict was not prejudicial to defendant. Wiseman v. Ziegler, 41 Neb. 886, 60 N.W. 320 (1894).

25-1120 Special verdict; controls general verdict.

When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

Source: R.S.1867, Code § 294, p. 443; R.S.1913, § 7859; C.S.1922, § 8803; C.S.1929, § 20-1120.

1. Construction
2. Inconsistency
3. Miscellaneous

1. Construction

Special findings that testatrix was incompetent and that will was procured by undue influence do not invalidate a general verdict denying validity of will. Anderson v. Claussen, 196 Neb. 787, 246 N.W.2d 586 (1976).

Special finding of facts controls verdict. Carlson v. Hanson, 166 Neb. 96, 88 N.W.2d 140 (1958).

Court will, when possible, construe special findings as consistent with general verdict. Havlik v. St. Paul Fire & Marine Ins. Co., 87 Neb. 427, 127 N.W. 248 (1910).

Special findings, to be in conflict with general verdict, must be clearly so; special finding on irrelevant issue will be disregarded. Citizens National Bank of Grand Island v. Wedgwood, 45 Neb. 143, 63 N.W. 375 (1895).

2. Inconsistency

General verdict is not required where a special verdict is submitted. Baum v. County of Scotts Bluff, 172 Neb. 225, 109 N.W.2d 295 (1961).

Special verdict controls general verdict in case of conflict. Sohler v. Christensen, 151 Neb. 843, 39 N.W.2d 837 (1949).

Special finding of fact controls general verdict; if difference between two, it is proper and necessary to require remittitur of such difference as condition on which case affirmed. McGrew Machine Co. v. One Spring Alarm Clock Co., 124 Neb. 93, 245 N.W. 263 (1932).

Special findings control general verdict, where inconsistent as to liability of each of two defendants. Walker v. McCabe, 110 Neb. 398, 193 N.W. 761 (1923).

In equitable action judgment will be reversed if essential special findings are in conflict with general findings, and former are sufficiently supported by evidence. Carpenter Paper Co. v. News Pub. Co., 63 Neb. 59, 87 N.W. 1050 (1901).

Where special findings establish contributory negligence they are inconsistent with general verdict for plaintiff. Norfolk Beet-Sugar Co. v. Preuner, 55 Neb. 656, 75 N.W. 1097 (1898).

Special findings to warrant judgment, notwithstanding general verdict to contrary, must include all facts from which such judgment results as a necessary legal conclusion. Omaha Life Assn. v. Kettenbach, 55 Neb. 330, 75 N.W. 827 (1898).

General verdict will be set aside if in irreconcilable conflict with special findings on a material fact. Culbertson I. & W. P. Co. v. Olander, 51 Neb. 539, 71 N.W. 298 (1897).

Special findings control general verdict. Chicago, B. & Q. Ry. Co. v. McGinnis, 49 Neb. 649, 68 N.W. 1057 (1896); Johnston v. Milwaukee & Wyoming Inv. Co., 49 Neb. 68, 68 N.W. 383 (1896).

3. Miscellaneous

A general verdict cannot rectify improper or erroneous special findings. Wagner v. State, 176 Neb. 589, 126 N.W.2d 853 (1964).

It is error for court, after jury discharged, to vacate special finding and enter judgment on general verdict. Story v. Sramek, 108 Neb. 440, 187 N.W. 881 (1922).

Motion for judgment on special findings is not waiver of right to be heard on motion for new trial. Kafka v. Union Stock Yards Co. of Omaha, 87 Neb. 331, 127 N.W. 129 (1910).

New trial will not be allowed for failure of jury to answer questions not material to issues. Modlin v. Jones & Co., 84 Neb. 551, 121 N.W. 984 (1909).

Special findings, unsupported by evidence, will not support judgment. American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co., 52 Neb. 676, 72 N.W. 1047 (1897).

25-1121 Special verdicts; when allowed; procedure; filing; record.

In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other

cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal.

Source: R.S.1867, Code § 293, p. 443; R.S.1913, § 7860; C.S.1922, § 8804; C.S.1929, § 20-1121.

1. Special verdict
2. Trial court discretion
3. Miscellaneous

1. Special verdict

Under circumstances of case, rendition of special verdict was proper. Baum v. County of Scotts Bluff, 172 Neb. 225, 109 N.W.2d 295 (1961).

Special findings, based upon conflicting evidence, will not be disturbed. Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100, 80 N.W. 276 (1899).

2. Trial court discretion

Trial court may submit special verdict in negligence action. Carlson v. Hanson, 166 Neb. 96, 88 N.W.2d 140 (1958).

Court may direct submission of special issues to jury, or jury may render special verdict without direction from the court. McGrew Machine Co. v. One Spring Alarm Clock Co., 124 Neb. 93, 245 N.W. 263 (1932).

Submission of special findings is within the discretion of trial court. Buel v. Chicago, R. I. & P. Ry. Co., 81 Neb. 430, 116 N.W. 299 (1908); American Fire Ins. Co. v. Landfare, 56 Neb. 482, 76 N.W. 1068 (1898); Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N.W. 855 (1897); Hedrick v. Strauss, Uhlman & Guthman, 42 Neb. 485, 60 N.W. 928 (1894); Reed v. McRill, 41 Neb. 206, 59 N.W. 775 (1894).

3. Miscellaneous

This section has no application to criminal trials. State v. Bradley, 210 Neb. 882, 317 N.W.2d 99 (1982).

Quotient verdict is not void in absence of previous agreement that it should be controlling. Herbert v. Katzberg, 104 Neb. 395, 177 N.W. 650 (1920).

Objection that special findings are not signed is waived unless made before they are received and recorded. Thompson v. Thompson, 49 Neb. 157, 68 N.W. 372 (1896).

It is error for court to enter judgment on general verdict when material special findings are returned unanswered. Sandwich Enterprise Co. v. West, 42 Neb. 722, 60 N.W. 1012 (1894); Doom v. Walker, 15 Neb. 339, 18 N.W. 138 (1884).

In absence of abuse of discretion, refusal to submit special findings is not error. Atchison, T. & S. F. Ry. Co. v. Lawler, 40 Neb. 356, 58 N.W. 968 (1894).

25-1122 General and special verdicts; definitions; form of special verdicts generally.

The verdict of a jury is either general or special. A general verdict is that by which they pronounce, generally, upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law.

Source: R.S.1867, Code § 292, p. 443; R.S.1913, § 7861; C.S.1922, § 8805; C.S.1929, § 20-1122.

A special verdict is one by which the jury finds the facts only. Baum v. County of Scotts Bluff, 172 Neb. 225, 109 N.W.2d 295 (1961).

Where special verdict found that negligence of plaintiff was more than slight and negligence of defendant less than gross, dismissal of action was proper. Carlson v. Hanson, 166 Neb. 96, 88 N.W.2d 140 (1958).

Where jury finds amount of principal debt, court can compute interest thereon and render judgment for amount due. Wiruth v. Lashmett, 85 Neb. 286, 123 N.W. 427 (1909).

Error cannot be predicated, in absence of proper request, on failure to submit additional questions. Town v. Missouri Pac. Ry. Co., 50 Neb. 768, 70 N.W. 402 (1897).

Where special finding is a conclusion or an inference drawn from others, it may be disregarded. Johnston v. Milwaukee & Wyoming Inv. Co., 49 Neb. 68, 68 N.W. 383 (1896).

Where special findings do not cover entire case, court may refuse to submit same. First Nat. Bank of North Bend v. Miltonberger, 33 Neb. 847, 51 N.W. 232 (1892).

25-1123 Verdict; form; correction.

The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the

same may, with the assent of the jury before they are discharged, be corrected by the court.

Source: R.S.1867, Code § 291, p. 443; R.S.1913, § 7862; C.S.1922, § 8806; C.S.1929, § 20-1123.

1. Procedure
2. Irregularities
3. Amendment
4. Miscellaneous

1. Procedure

Provision that verdict be read by clerk to jury and inquiry made whether it is their verdict is directory merely. Bryan v. Manchester, 111 Neb. 748, 197 N.W. 425 (1924).

This section applies only to case where juror dissents when polled; it does not deprive court of power to send jury out again to reconsider verdict which erroneously attempts to apportion damages between defendants jointly liable. Forslund v. Swenson, 110 Neb. 188, 192 N.W. 649 (1923).

Court cannot disregard verdict and enter such judgment as the evidence warrants; where verdict is not sustained by evidence, remedy is motion for new trial. Kenesaw Mill & Elevator Co. v. Aufdenkamp, 106 Neb. 246, 183 N.W. 294 (1921).

Objection to form of verdict is to be taken when rendered, except when incomplete or material issues are ignored. Wiruth v. Lashmett, 85 Neb. 286, 123 N.W. 427 (1909).

It is not error for foreman to sign verdict in open court. Clough v. State, 7 Neb. 320 (1878).

Where the jurors are polled by the court and discovered to be in disagreement, a jury verdict form incorrectly signed by all 12 jurors is not a defect of form only. Bailey v. AMISUB, 1 Neb. App. 56, 489 N.W.2d 323 (1992).

2. Irregularities

The requirement that assent occur before a jury is discharged is to assure that the jury is assembled together and agrees that there was in fact a defect in the form of its verdict and is met by reassembly of the jury. Harmon Cable Communications v. Scope Cable Television, 237 Neb. 871, 468 N.W.2d 350 (1991).

Defects in a verdict which are matters of substance must be corrected before the jury is discharged; therefor, the trial court could not reassemble the jury, interrogate it as to its intended verdict, and then modify the amount of the verdict. Eich v. State Farm Mut. Automobile Ins. Co., 208 Neb. 714, 305 N.W.2d 621 (1981).

Mere irregularities, not objected to, are waived. Jones v. Driscoll, 46 Neb. 575, 65 N.W. 194 (1895).

A verdict, ''we the jury find for plaintiff,'' will not authorize judgment for any sum whatever. Bowers v. Rice, 19 Neb. 576, 27 N.W. 646 (1886).

Verdict need not be entitled. Morrissey v. Schindler, 18 Neb. 672, 26 N.W. 476 (1886).

Verdict is not to be rejected because jury adds provisions for costs; such words are mere surplusage. McEldon v. Patton, 4 Neb. Unof. 259, 93 N.W. 938 (1903).

3. Amendment

Defective verdict may be amended by jury or court with consent of jury. Davis v. Neligh, 7 Neb. 78 (1878).

4. Miscellaneous

In action by servant against master and foreman jointly, verdict against master alone will not be set aside because not also against foreman, where principal negligence was that of master. Usher v. American Smelting & Refining Co., 97 Neb. 526, 150 N.W. 814 (1915).

The verdict of a jury whose finding is based upon conjecture and not on evidence cannot be permitted to stand. Sovereign Camp of the Woodmen of the World v. Hruby, 70 Neb. 5, 96 N.W. 998 (1903).

25-1124 Rendition of verdict; polling of jury.

When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out for further deliberation.

Source: R.S.1867, Code § 290, p. 443; R.S.1913, § 7863; C.S.1922, § 8807; C.S.1929, § 20-1124.

Verdict of jury should be received only when judge is present and the court open for the transaction of business; objection to verdict on ground that it was irregularly received by trial court cannot be properly raised for first time in appellate court. In re Estate of Lodge, 123 Neb. 531, 243 N.W. 781 (1932).

Provision that names of jurors must be called by clerk is directory merely. Bryan v. Manchester, 111 Neb. 748, 197 N.W. 425 (1924).

This section does not apply to a criminal prosecution. Evers v. State, 84 Neb. 708, 121 N.W. 1005 (1909).

Mere statement by foreman in open court that jury has agreed, without stating nature of decision, is not a verdict. Union P. R. R. Co. v. Connolly, 77 Neb. 254, 109 N.W. 368 (1906).

Where upon reading of sealed verdict same is challenged by a juror and jury is subsequently unable to agree, it was properly discharged. Lincoln Trac. Co. v. Heller, 72 Neb. 127, 100 N.W. 197 (1904).

By agreement, jury may after agreeing, seal verdict and deliver to officer in charge; when opened in their presence, if defective, jury may be sent out to correct. Rogers v. Sample, 28 Neb. 141, 44 N.W. 86 (1889).

25-1125 Five-sixths verdict; jurors to sign.

In all trials in civil actions in any court in this state, a verdict shall be rendered if five-sixths or more of the members of the jury concur therein, and

such verdict shall have the same force and effect as though agreed to by all members of the jury; *Provided*, that a verdict concurred in by less than all members of the jury shall not be rendered until the jury shall have had an opportunity for deliberation and consideration of the case for a period of not less than six hours after the same is submitted to said jury. If a verdict be concurred in by all the members of the jury, the foreman alone may sign it, but if rendered by a less number, such verdict shall be signed by all the jurors who shall agree to the verdict.

Source: Laws 1921, c. 124, § 1, p. 534; C.S.1922, § 8808; C.S.1929, § 20-1125.

A juror is free to deliberate and vote on each issue presented to the jury, even if the juror has dissented from the majority on a previous issue. Gourley v. Nebraska Methodist Health Sys., 265 Neb. 918, 663 N.W.2d 43 (2003).

Even though a juror, who disagreed on the question of who was liable, provided the 10th vote necessary on the damages and apportionment questions, the verdict was valid. Gourley v. Nebraska Methodist Health Sys., 265 Neb. 918, 663 N.W.2d 43 (2003).

Length of time devoted to meals cannot be shown to prove that jury did not deliberate six hours. Cartwright & Wilson Constr. Co. v. Smith, 155 Neb. 431, 52 N.W.2d 274 (1952).

The presumption is in favor of the regularity of the proceeding of the district court and that the jury deliberated six hours before returning the verdict by ten jurors. Lovelace v. Boatsman, 113 Neb. 145, 202 N.W. 418 (1925).

(d) TRIAL BY COURT

25-1126 Jury trial; waiver.

The trial by jury may be waived by the parties in actions arising on contract, and with assent of the court in other actions (1) by the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney; (2) by written consent, in person or by attorney, filed with the clerk; and (3) by oral consent in open court entered on the journal.

Source: R.S.1867, Code § 296, p. 444; R.S.1913, § 7864; C.S.1922, § 8809; C.S.1929, § 20-1126.

A written waiver of jury trial signed by defense counsel in criminal case and acquiesced in by defendant is a valid waiver. State v. Klatt, 192 Neb. 219, 219 N.W.2d 761 (1974).

It is within discretion of trial court to permit a waiver of trial by jury to be withdrawn. McKinney v. County of Cass, 180 Neb. 685, 144 N.W.2d 416 (1966).

In a will contest in district court on appeal, contestant not appearing, proponent may waive jury trial. Shelby v. St. James Orphan Asylum, 66 Neb. 40, 92 N.W. 155 (1902).

Where jury trial is waived, order of argument is subject to discretion of court. Citizens State Bank v. Baird, 42 Neb. 219, 60 N.W. 551 (1894).

Waiver of jury trial may be made in replevin, with assent of court. Baker v. Daily, 6 Neb. 464 (1877).

25-1127 Trial by court; general finding; findings of fact; conclusions of law.

Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.

Source: R.S.1867, Code § 297, p. 444; R.S.1913, § 7865; C.S.1922, § 8810; C.S.1929, § 20-1127.

1. Request
2. Sufficiency
3. Refusal to give
4. Miscellaneous

1. Request

In the absence of a specific request by a party, a trial court is not required to make detailed findings of fact. Lange Indus. v. Hallam Grain Co., 244 Neb. 465, 507 N.W.2d 465 (1993).

In a case tried to the court without a jury, a motion for specific findings of fact must be made before final submission of the case to the court. Stuczynski v. Stuczynski, 238 Neb. 368, 471 N.W.2d 122 (1991).

Purpose of statute is to enable parties to question the rulings of the trial court upon legal questions involved. Such conclusions of fact and law are mandatory when requested in a law action, but are merely helpful in equity actions since the Supreme Court reviews the record de novo and reaches conclusions independent of the trial court. Under this section the court is not obliged to answer specific interrogatories propounded to it by a litigant. Fee v. Fee, 223 Neb. 128, 388 N.W.2d 122 (1986).

This section does not require the court to reply to specific interrogatories propounded to it by a litigant but only to provide, when requested, such findings of fact as the court concludes are appropriate and necessary to resolve the action. Lindgren v. City of Gering, 206 Neb. 360, 292 N.W.2d 921 (1980).

The court need only state its finding generally unless one of the parties timely requests conclusions of fact. Henkle & Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N.W.2d 772 (1976).

Special findings are unnecessary unless requested. Bailey v. McCoy, 187 Neb. 618, 193 N.W.2d 270 (1971).

After court has announced decision, request made for separate findings of fact and conclusions of law came too late. In re Estate of Wiley, 150 Neb. 898, 36 N.W.2d 483 (1949).

Special findings are not required when no request therefor is made. Mogil v. Maryland Casualty Co., 147 Neb. 1087, 26 N.W.2d 126 (1947).

When a request is properly made of the court for separate findings of fact and conclusions of law, the provisions of this section are mandatory. Dormer v. Dreith, 145 Neb. 742, 18 N.W.2d 94 (1945).

Where a jury is waived, request by one of the parties is a prerequisite to special findings of fact. Condon Co. v. Loup River Public Power Dist., 135 Neb. 284, 281 N.W. 31 (1938).

Request for special findings of fact and separate conclusions of law, in trial of a cause to the court without a jury, must be made before the final submission of the case to render compliance therewith compulsory. State ex rel. Sorensen v. Mitchell Irr. Dist., 129 Neb. 586, 262 N.W. 543 (1935).

Request for statement of court's conclusions of law and fact is effective if made within reasonable time before action is required thereon. Henley v. Live Stock Nat. Bank, 127 Neb. 857, 257 N.W. 244 (1934).

It is mandatory in law action, without jury, that court shall, on request, separately state conclusions of fact and of law. Carl v. Wentz, 116 Neb. 880, 219 N.W. 390 (1928); Lyman v. Waterman, 51 Neb. 283, 70 N.W. 921 (1897).

Purpose of requiring separate findings of fact and conclusions of law is to enable parties to question the rulings of the court upon legal questions involved. Modern Woodmen of America v. Lane, 62 Neb. 89, 86 N.W. 943 (1901).

Separate findings must be requested. Sheibley v. Dixon County, 61 Neb. 409, 85 N.W. 399 (1901).

Request must be made not later than final submission of case. Ross v. Barker, 58 Neb. 402, 78 N.W. 730 (1899).

Request to find separately as to certain matters is not request for separate findings. Axthelm v. Chicago, R. I. & P. Ry. Co., 2 Neb. Unof. 444, 89 N.W. 313 (1902).

2. Sufficiency

The failure by the trial court separately to state findings of fact or conclusions of law under this section is not reversible error where the record affirmatively shows that such failure worked no injury to appellant. D & R Realty v. Bender, 230 Neb. 301, 431 N.W.2d 920 (1988).

General finding is sufficient in absence of request for special findings. Mueller v. Keeley, 165 Neb. 243, 85 N.W.2d 309 (1957).

Where facts were not disputed and court made findings covering important points in case, failure to find additional facts was not reversible error. National Bond & Investment Co. v. Haas, 124 Neb. 631, 247 N.W. 563 (1933).

Omission of facts conclusively established, treated as found, on appeal. Lancaster County v. Fitzgerald, 86 Neb. 676, 126 N.W. 141 (1910).

Finding that ''all the equities are with plaintiff,'' is one of law and insufficient to support judgment. Ganow v. Denny, 68 Neb. 706, 94 N.W. 959 (1903).

If the court finds all of the facts from which the law will infer a fraudulent intent, a decree based thereon will not be reversed as contrary to law because the court failed to state in its finding that the fraudulent intent existed. Cochran v. Cochran, 62 Neb. 450, 87 N.W. 152 (1901).

When the court makes special findings of fact and they are silent as to a material issue, such omissions will be construed against the party on whom rested the burden of establishing such issue. Farrell v. Bouck, 61 Neb. 874, 86 N.W. 907 (1901).

General finding for plaintiff by justice of peace is sufficient to sustain judgment on error proceedings. Coad v. Read, 48 Neb. 40, 66 N.W. 1002 (1896).

General finding is in lieu of verdict, and need be no more specific. Rhodes v. Thomas, 31 Neb. 848, 48 N.W. 886 (1891).

In the absence of any special or general findings on issues properly presented, no judgment can stand. Foster v. Devinney, 28 Neb. 416, 44 N.W. 479 (1890).

This section does not require findings of fact to be separately stated but only separated from conclusions of law. Haller v. Blaco, 14 Neb. 195, 15 N.W. 348 (1883).

If finding be vague, uncertain, or indefinite, judgment is voidable but not void. Sprick v. Washington County, 3 Neb. 253 (1874).

3. Refusal to give

Court may refuse a request for separate findings of fact and conclusions of law which are improper in form. Donald v. Heller, 143 Neb. 600, 10 N.W.2d 447 (1943).

Where evidence is not in conflict upon any issue necessary to support judgment, a failure by the trial court to state separately findings of fact or conclusions of law, even though request is made therefor, is not a reversible error. In re Guardianship of Lyon, 140 Neb. 159, 299 N.W. 322 (1941).

Refusal of request for special findings made after judgment entered is not error. Austin v. Diffendaffer, 96 Neb. 747, 148 N.W. 907 (1914).

It is error for the court to refuse to make special findings, and the error is not cured by assigning findings on overruling a motion for a new trial. Wiley v. Shars, 21 Neb. 712, 33 N.W. 418 (1887).

4. Miscellaneous

This section does not apply to criminal cases. State v. Osborn, 250 Neb. 57, 547 N.W.2d 139 (1996).

This section does not apply to criminal cases. State v. Dake, 247 Neb. 579, 529 N.W.2d 46 (1995).

This section has no application to criminal proceedings. State v. Franklin, 241 Neb. 579, 489 N.W.2d 552 (1992).

As a judicial practice, a specific finding for the prevailing party is desirable; however, such is not required and, in the

absence of a request for such findings, we examine the judgment as recorded. Havelock Bank v. Woods, 219 Neb. 57, 361 N.W.2d 197 (1985).

Where neither party requested findings hereunder, the court presumes that controverted facts were decided by the trial court in favor of the successful party. Burgess v. Curly Olney's, Inc., 198 Neb. 153, 251 N.W.2d 888 (1977).

Judgment not based on general or specific findings is erroneous, but not necessarily void. Maryott v. Gardner, 50 Neb. 320, 69 N.W. 837 (1897).

It is error for court to enter decree annulling title without either a special or general finding against defendant. Edwards v. Reid, 39 Neb. 645, 58 N.W. 202 (1894).

This section applies to justice practice. Crossley v. Steele, 13 Neb. 219, 13 N.W. 175 (1882).

If there be a conflict between the general and special findings made by the trial court, the special findings will control. Citizens Bank of Humphrey v. Stockslager, 1 Neb. Unof. 799, 96 N.W. 591 (1901).

25-1128 Trial by the court; provisions for jury trials applicable.

The provisions of this Chapter respecting trials by jury, apply, so far as they are in their nature applicable, to trials by the court.

Source: R.S.1867, Code § 320, p. 448; R.S.1913, § 7866; C.S.1922, § 8811; C.S.1929, § 20-1128.

Trial court had authority to vacate judgment it had entered for plaintiff after trial to the court, and to then enter judgment for defendants on motion couched in terms of section 25-1315.02. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co., 196 Neb. 158, 241 N.W.2d 674 (1976).

In case tried to judge, handwriting may be compared by him with genuine writing of the same person. First Nat. Bank & Trust Co. v. Cutright, 189 Neb. 805, 205 N.W.2d 542 (1973).

Special findings of fact inconsistent with general findings of court control. Carl v. Wentz, 116 Neb. 880, 219 N.W. 390 (1928).

Procedure upon hearing is assimilated to equity practice; right to open and close is determined by pleadings. Citizens State Bank v. Baird, 42 Neb. 219, 60 N.W. 551 (1894).

(e) TRIAL BY REFEREE

25-1129 Reference by consent; when allowed.

All or any of the issues in the action, whether of fact or law, or both, may be referred to a referee upon the written consent of the parties or upon their oral consent in court entered upon the journal.

Source: R.S.1867, Code § 298, p. 444; R.S.1913, § 7867; C.S.1922, § 8812; C.S.1929, § 20-1129; Laws 2008, LB1014, § 10. Operative date January 1, 2009.

The question of the defendant's agency was within the issue of receivership and therefor within the authority given the referee, and the filing of a supplemental report which recommended appointment of a receiver was proper in this case. Beavers v. Graham, 209 Neb. 556, 308 N.W.2d 826 (1981).

Special master appointed by court is a referee. Gentsch, Inc. v. Burnett, 173 Neb. 820, 115 N.W.2d 446 (1962).

Supreme Court has inherent power to refer original cases. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

Party participating in proceedings before referee is estopped to deny consent to reference. Morris v. Haas, 54 Neb. 579, 74 N.W. 828 (1898).

Court will presume consent was given to action to a referee when record fails to show that objections were made. Hosford v. Stone, 6 Neb. 378 (1877).

25-1130 Reference by court order; when allowed.

When the parties do not consent, the court may, upon application of either, or of its own motion, direct a reference in any equity matter to a referee appointed by the court. The court shall direct a reference to a referee only when caseload and time constraints require such reference, and a referee shall not be appointed to conduct any hearing involving an issue of law and not equity that could result in the exercise of the right to a trial before a jury.

Source: R.S.1867, Code § 299, p. 444; R.S.1913, § 7868; C.S.1922, § 8813; C.S.1929, § 20-1130; Laws 2008, LB1014, § 11. Operative date January 1, 2009.

Trial court can make a reference of an accounting to a referee. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N.W.2d 845 (1961).

Interlocutory order that plaintiff is entitled to account is unnecessary. Bennett v. Baum, 90 Neb. 320, 133 N.W. 439 (1911).

Right to jury cannot be defeated because of issues as to equitable rights. Yager v. Exchange Nat. Bank of Hastings, 52 Neb. 321, 72 N.W. 211 (1897).

Purely legal action cannot be referred, except on consent of parties. Kinkaid v. Hiatt, 24 Neb. 562, 39 N.W. 600 (1888).

Court may refer in partition without consent for taking of account. Mills v. Miller, 3 Neb. 87 (1873).

Where equitable counterclaim is filed in legal action it is not error to overrule general objection to reference of whole cause. Brown v. Keith, 1 Neb. Unof. 649, 96 N.W. 59 (1901).

25-1131 Trial by referee; procedure; findings of fact; conclusions of law; effect.

The trial before referees is conducted in the same manner as a trial by the court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments, as the court upon such trial. They must state the facts found and the conclusions of law, separately, and their decision must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict.

Source: R.S.1867, Code § 300, p. 445; R.S.1913, § 7869; C.S.1922, § 8814; C.S.1929, § 20-1131.

1. Trial
2. Findings
3. Exceptions
4. Miscellaneous

1. Trial

Referee appointed solely to take testimony and report cannot rule on admissibility of evidence. Brotherton v. Brotherton, 14 Neb. 186, 15 N.W. 347 (1883).

Report cannot be set aside except for cause as in granting new trials. Tingley v. Dolby, 13 Neb. 371, 14 N.W. 146 (1882).

Referee cannot grant motion for new trial. Murray v. School Dist. No. 3 of Platte County, 11 Neb. 438, 9 N.W. 573 (1881).

Motion for new trial is necessary to review decision. Light v. Kennard, 11 Neb. 129, 7 N.W. 539 (1881).

2. Findings

The recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence. Larkin v. Ethicon, Inc., 251 Neb. 169, 556 N.W.2d 44 (1996).

Unchallenged findings cannot be disputed on appeal. Chicago Lumber Co. v. Bancroft, 64 Neb. 176, 89 N.W. 780 (1902).

The failure to state findings of fact or conclusions of law is an irregularity that may be waived. Burkland v. Johnson, 50 Neb. 858, 70 N.W. 388 (1897).

Findings like verdict may be set aside on motion for new trial. School Dist. No. 1 of Harlan County v. Bishop, 46 Neb. 850, 65 N.W. 902 (1896).

Referee must state facts and conclusions separately, must give his decision, shall sign any true exceptions taken, and return same with his report. Gibson v. Gibson, 24 Neb. 394, 39 N.W. 450 (1888).

Court has power to modify findings and enter judgment on special findings, where inconsistent with general. Gillespie v. Brown & Ryan Bros., 16 Neb. 457, 20 N.W. 632 (1884).

The report of a referee upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence. Brown v. O'Brien, 4 Neb. 195 (1876).

Findings on conflicting evidence are not disturbed on appeal. Creedon v. Patrick, 3 Neb. Unof. 459, 91 N.W. 872 (1902).

3. Exceptions

Where no exceptions are filed to findings of fact of a referee prior to confirmation, such findings are binding on all parties. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N.W.2d 845 (1961).

Where no exceptions are filed to report, judgment should be entered as on verdict. State v. Standard Oil Co. of Indiana, 63 Neb. 95, 88 N.W. 175 (1901).

4. Miscellaneous

Section applies to arbitrators. In re Arbitration of Johnson, 87 Neb. 375, 127 N.W. 133 (1910).

This section is applicable to arbitration proceedings. City of O'Neill v. Clark, 57 Neb. 760, 78 N.W. 256 (1899).

Referee's power expires at time set for filing report; but if filed later, is irregularity, and court may act thereon. Creedon v. Patrick, 3 Neb. Unof. 459, 91 N.W. 872 (1902).

Report has no judicial force until confirmed. Citizens Bank of Humphrey v. Stockslager, 1 Neb. Unof. 799, 96 N.W. 591 (1901).

25-1132 Referees; how chosen; number.

In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

Source: R.S.1867, Code § 301, p. 445; R.S.1913, § 7870; C.S.1922, § 8815; C.S.1929, § 20-1132.

Failure to object to qualifications of referee until after approval of report precluded attack on that ground. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N.W.2d 845 (1961).

25-1133 Repealed. Laws 2008, LB 1014, § 80.

(Operative date January 1, 2009.)

25-1134 Trial by referee; exceptions; report.

It shall be the duty of the referees to sign any true exceptions taken to any order or decision by them made in the case and return the same with their report to the court making the reference.

Source: R.S.1867, Code § 303, p. 445; R.S.1913, § 7872; C.S.1922, § 8817; C.S.1929, § 20-1134.

Referee, and not judge, must settle bill of exceptions. Bennett v. Baum, 90 Neb. 320, 133 N.W. 439 (1911).

This section confers authority upon a referee to sign a bill of exceptions. State ex rel. Dunterman v. Gaslin, 30 Neb. 651, 46 N.W. 917 (1890).

25-1135 Reference in vacation; written consent required.

A judge in vacation, upon the written consent of the parties, may make any order of reference which the court, of which he is a member, could make in term time. In such case, the order of reference shall be made on the written agreement of the parties to refer, and shall be filed with the clerk of the court with the other papers in the case.

Source: R.S.1867, Code § 304, p. 445; R.S.1913, § 7873; C.S.1922, § 8818; C.S.1929, § 20-1135.

25-1136 Referees; oath or affirmation.

The referees must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein according to the best of their understanding. The oath may be administered by any person authorized to take depositions.

Source: R.S.1867, Code § 305, p. 445; R.S.1913, § 7874; C.S.1922, § 8819; C.S.1929, § 20-1136.

Failure to take oath is an irregularity waived by proceeding to trial without objection. Lamaster v. Scofield and Cowperthwait, 5 Neb. 148 (1876).

25-1137 Referees; compensation.

The referees shall be allowed such compensation for their services as the court may deem just and proper, which shall be taxed as a part of the costs in the case.

Source: R.S.1867, Code § 306, p. 445; R.S.1913, § 7875; C.S.1922, § 8820; C.S.1929, § 20-1137.

Referee's fees are taxed as part of the costs. Corn Belt Products Co. v. Mullins, 172 Neb. 561, 110 N.W.2d 845 (1961).

(f) EXCEPTIONS

25-1138 Exception, defined.

An exception is an objection taken to a decision of the court upon a matter of law.

Source: R.S.1867, Code § 307, p. 445; R.S.1913, § 7876; C.S.1922, § 8821; C.S.1929, § 20-1138.

25-1139 Taking and noting of exceptions; unnecessary, when.

Every litigant in any court or in any proceeding to which he is a party before any judge, magistrate, referee, board or tribunal, shall be deemed and taken, both in the trial court and before such judge, magistrate, referee, board or tribunal as well on appeal or error therefrom, as excepting to any judgment, order or other ruling, including the giving or refusal of instructions to the jury, made by such court, judge, magistrate, referee, board or tribunal at any stage of the case or proceeding, that is material and prejudicial to the substantial rights of the litigant and he shall not be required in order to preserve his rights actually to take, or to cause to be noted upon the record, any such exception.

Source: R.S.1867, Code §§ 308, 309, 310, 312, and 313, p. 446; Laws 1877, § 1, p. 11; R.S.1913, § 7877; Laws 1915, c. 147, § 1, p. 317; C.S.1922, § 8822; C.S.1929, § 20-1139.

An instruction to which no exception is noted on the record when given may be reviewed on appeal, former rule having been changed by statute. Derr v. Gunnell, 127 Neb. 708, 256 N.W. 725 (1934).

Bill of exceptions was sufficient hereunder to protect rights of accused. Scott v. State, 121 Neb. 232, 236 N.W. 608 (1931).

Order of court in foreclosure suit, after evidence concluded, requiring defendant to file first brief, must be taken as excepted to, under this section. Quesner v. Novotny, 113 Neb. 827, 205 N.W. 566 (1925).

25-1140 Bill of exceptions; filing of request; further proceedings governed by rules of court.

Upon appeal from the district court, the party appealing may order a bill of exceptions by filing in the office of the clerk of the district court a praecipe therefor within the time allowed for filing a notice of appeal. The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court.

Source: R.S.1867, Code § 311, p. 446; Laws 1877, § 2, p. 11; Laws 1881, c. 27, § 2, p. 202; Laws 1895, c. 72, § 1, p. 311; R.S.1913, § 7880; C.S.1922, § 8823; Laws 1923, c. 114, § 1, p. 273; C.S.1929, § 20-1140; R.S.1943, § 25-1140; Laws 1947, c. 83, § 1(1), p. 257; Laws 1959, c. 104, § 1, p. 431; Laws 1991, LB 732, § 47; Laws 1992, LB 360, § 4.

1. Preparation and filing
2. Extension of time
3. Failure to obtain
4. Miscellaneous

1. Preparation and filing

Bill of exceptions was properly settled under statute in force at time of settlement. Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N.W.2d 599 (1960).

On appeal to Supreme Court from district court in workmen's compensation case, bill of exceptions must be prepared, served, settled and filed in accordance with this section. Adkisson v. Gamble, 143 Neb. 417, 9 N.W.2d 711 (1943).

Court reporter's transcript or certificate of affidavit on motion for new trial is not essential. State ex rel. Farmers Mut. Ins. Co. of Nebraska v. Colby, 107 Neb. 372, 186 N.W. 355 (1922).

Bill of exceptions is necessary to review action of board of equalization of metropolitan water district. McCague Inv. Co. v. Metropolitan Water Dist. of Omaha, 101 Neb. 820, 165 N.W. 158 (1917).

Bill of exceptions is required on error proceedings to review action of State Banking Board in granting or refusing bank charter. State ex rel. White v. Morehead, 101 Neb. 37, 161 N.W. 1040 (1917).

Where it was obvious that the word ''testimony'' was used with reference to the evidence, certificate signed by judge that bill of exceptions contained all the testimony was sufficient. Woolworth v. Parker, 57 Neb. 417, 77 N.W. 1090 (1899).

Procedure in law and equity actions is the same. Uhling v. Schellenberg, 12 Neb. 609, 12 N.W. 272 (1882).

2. Extension of time

Time allowed by extension by its terms covered both preparation and serving of bill of exceptions, and reduced time for preparation. Benedict v. State, 166 Neb. 295, 89 N.W.2d 82 (1958).

Party must apply to trial judge for extension though his term has expired; successor cannot grant. Hanscom v. Lantry, 48 Neb. 665, 67 N.W. 762 (1896).

3. Failure to obtain

Where the bill of exceptions was patently incomplete on appeal, the Supreme Court disregarded it and affirmed orders

of both lower courts on the basis that the pleadings supported the judgment granted below. Boosalis v. Horace Mann Ins. Co., 198 Neb. 148, 251 N.W.2d 885 (1977).

Where a municipal court judgment was reversed in district court, then appealed without a certified bill of exceptions, the Supreme Court limits its review to whether the pleadings support the judgment entered by the district court. Allgood v. Nebraska Humane Society, 197 Neb. 373, 248 N.W.2d 778 (1977).

In absence of bill of exceptions on a motion for new trial, judgment denying writ of habeas corpus will be affirmed where return to writ states a defense. McQueen v. Jones, 150 Neb. 853, 36 N.W.2d 271 (1949).

Where bill of exceptions is stricken because of failure to settle same, only question presented is whether or not the pleadings support the judgment. Dryden & Jensen v. Mach, 150 Neb. 629, 35 N.W.2d 497 (1949).

Where, upon appeal in a divorce case, the husband fails to comply with order to pay costs of appeal, resulting in failure to have bill of exceptions settled within time, decree may be reversed. Bonzo v. Bonzo, 138 Neb. 92, 292 N.W. 61 (1940).

Where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment, the judgment will be affirmed. Occidental Bldg. & Loan Assn. v. Carlson, 134 Neb. 574, 279 N.W. 162 (1938).

4. Miscellaneous

Statute places the burden on the appellant to file a praecipe identifying the matter to be contained in the bill of exceptions. State v. Blue, 223 Neb. 379, 391 N.W.2d 102 (1986).

Rule 7, Revised Rules of the Supreme Court 1974, enacted pursuant to this section, govern bills of exceptions on appeal from the district court to the Supreme Court. State v. Jacobsen, 194 Neb. 105, 230 N.W.2d 219 (1975).

The bill of exceptions is the only vehicle for bringing evidence before the Supreme Court on appeal. Everts v. School Dist. No. 16 of Fillmore County, 175 Neb. 310, 121 N.W.2d 487 (1963).

The preparation and certification of bill of exceptions are governed by rule of the Supreme Court. Leu v. Swenson, 174 Neb. 591, 119 N.W.2d 68 (1962).

Rules of Supreme Court for preparation of bill of exceptions are authorized by this section. Hilligas v. Farr, 171 Neb. 105, 105 N.W.2d 578 (1960).

Time for settling bill of exceptions provided by this section applies to proceedings in error in criminal case. Bryant v. State, 153 Neb. 490, 45 N.W.2d 169 (1950).

Affidavits used in district court in support of motion to set aside default judgment must be embodied in a bill of exceptions for purposes of review. Benson v. General Implement Corporation, 151 Neb. 234, 37 N.W.2d 223 (1949).

Sufficient exceptions were taken on behalf of accused. Scott v. State, 121 Neb. 232, 236 N.W. 608 (1931).

''Case stated,'' under Supreme Court rule is equivalent to bill of exceptions; must be certified by trial judge and filed with clerk. Bank of Benson v. Gordon, 101 Neb. 162, 162 N.W. 419 (1917).

Expense of bill of exceptions is taxable as costs in district court. Pettis v. Green River Asphalt Co., 71 Neb. 513, 99 N.W. 235, 101 N.W. 333 (1904).

Purpose is to bring into record matters that would not otherwise appear. Mandell v. Weldin, 59 Neb. 699, 82 N.W. 6 (1900).

A bill of exceptions settled in one case cannot be made the bill of exceptions in another case solely by stipulation. Murphy v. Warren, 55 Neb. 220, 75 N.W. 575 (1898).

Remedy for reporter's delay is motion for new trial. Mathews v. Mulford, 53 Neb. 252, 73 N.W. 661 (1898).

It is only in the exceptional cases enumerated that clerk of district court is authorized to sign and allow bill of exceptions. Glass v. Zutavern, 43 Neb. 334, 61 N.W. 579 (1895).

25-1140.01 Repealed. Laws 1959, c. 104, § 3.

25-1140.02 Repealed. Laws 1959, c. 104, § 3.

25-1140.03 Repealed. Laws 1959, c. 104, § 3.

25-1140.04 Repealed. Laws 1959, c. 104, § 3.

25-1140.05 Repealed. Laws 1959, c. 104, § 3.

25-1140.06 Repealed. Laws 1959, c. 104, § 3.

25-1140.07 Repealed. Laws 1959, c. 104, § 3.

25-1140.08 Bill of exceptions; boards and tribunals; filing of request; further proceedings governed by rules of court.

This section shall apply to all appeals and error proceedings where specific provision is not made by law for a bill of exceptions. Any reporter approved by the officer, board, or tribunal from which the appeal or error proceeding is taken may attend and record the trial or proceedings. Upon the filing of a praecipe therefor by any party within the time allowed for filing of notice of appeal or petition in error, the reporter shall prepare a bill of exceptions. The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment shall be regulated and governed by rules of practice prescribed by the Supreme Court.

Source: R.S.1867, Code § 311, p. 446; Laws 1877, § 2, p. 11; Laws 1881, c. 27, § 2, p. 202; Laws 1895, c. 72, § 1, p. 311; R.S.1913,

§ 7880; C.S.1922, § 8823; Laws 1923, c. 114, § 1, p. 273; C.S.1929, § 20-1140; R.S.1943, § 25-1140; Laws 1947, c. 83, § 1(9), p. 260; Laws 1959, c. 104, § 2, p. 431.

1. Workers' Compensation Court
2. Public Service Commission
3. County board
4. County court
5. Miscellaneous

1. Workers' Compensation Court

A bill of exceptions on appeal from the district court in a workmen's compensation case must be prepared, served, settled and filed in accordance with this section. Gilmore v. State, 148 Neb. 10, 26 N.W.2d 296 (1947); Ratay v. Wylie, 147 Neb. 201, 22 N.W.2d 622 (1946).

2. Public Service Commission

This section does not apply to bill of exceptions on appeals from the State Railway Commission. In re Application of Moritz v. State Railway Commission, 147 Neb. 400, 23 N.W.2d 545 (1946).

3. County board

A bill of exceptions may be preserved from the county court. State v. Allen, 159 Neb. 314, 66 N.W.2d 830 (1954).

In case before county board, bill of exceptions must be authenticated by county clerk. Union P. R. R. Co. v. Colfax County, 84 Neb. 778, 122 N.W. 29 (1909).

4. County court

Procedure in county court as to bill of exceptions is same as in justice court. Sedgwick v. Durham, 45 Neb. 86, 63 N.W. 142 (1895).

In term case in county court, judge may sign bill any time during term. Osborne v. Canfield, 33 Neb. 330, 50 N.W. 167 (1891).

5. Miscellaneous

Requirement of bill of exceptions is applicable to review action of State Board of Equalization. State ex rel. U. P. R. R. Co. v. State Board of Equalization & Assessment, 81 Neb. 139, 115 N.W. 789 (1908).

Bill of exceptions should be obtained to review ruling of county board of equalization. Field v. Nebraska Tel. Co., 74 Neb. 419, 104 N.W. 932 (1905).

Referee may certify, where trial before him; judge or clerk cannot. Disbrow & Co. v. McNish, 52 Neb. 309, 72 N.W. 216 (1897).

25-1140.09 Bill of exceptions; preparation; court reporter; fees; procedure for preparation; taxation of cost.

On the application of the county attorney or any party to a suit in which a record of the proceedings has been made, upon receipt of the notice provided in section 29-2525, or upon the filing of a praecipe for a bill of exceptions by an appealing party in the office of the clerk of the district court as provided in section 25-1140, the court reporter shall prepare a transcribed copy of the proceedings so recorded or any part thereof. The reporter shall be entitled to receive, in addition to his or her salary, a per-page fee as prescribed by the Supreme Court for the original copy and each additional copy, to be paid by the party requesting the same except as otherwise provided in this section.

When the transcribed copy of the proceedings is required by the county attorney, the fee therefor shall be paid by the county in the same manner as other claims are paid. When the defendant in a criminal case, after conviction, makes an affidavit that he or she is unable by reason of his or her poverty to pay for such copy, the court or judge thereof may, by order endorsed on such affidavit, direct delivery of such transcribed copy to such defendant, and the fee shall be paid by the county in the same manner as other claims are allowed and paid. When such copy is prepared in any criminal case in which the sentence adjudged is capital, the fees therefor shall be paid by the county in the same manner as other claims are allowed or paid.

The fee for preparation of a bill of exceptions and the procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of a bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court. The fee paid shall be taxed, by the clerk of the district court, to the party against whom the judgment or decree is rendered except as otherwise ordered by the presiding district judge.

Source: Laws 1879, § 49, p. 93; Laws 1907, c. 43, § 1, p. 182; R.S.1913, § 1200; C.S.1922, § 1123; Laws 1925, c. 67, § 1, p. 225; C.S.

1929, § 27-339; R.S.1943, § 24-342; Laws 1949, c. 45, § 1, p. 150; Laws 1957, c. 107, § 5, p. 380; Laws 1961, c. 104, § 1, p. 336; Laws 1961, c. 105, § 1, p. 337; Laws 1961, c. 106, § 1, p. 338; Laws 1971, LB 357, § 1; Laws 1973, LB 146, § 1; Laws 1973, LB 268, § 2; Laws 1974, LB 647, § 2; Laws 1978, LB 271, § 1; Laws 1982, LB 722, § 1; R.S.1943, (1985), § 24-342; Laws 1991, LB 37, § 1; Laws 2005, LB 348, § 3.

1. Poverty affidavit
2. Fees
3. Miscellaneous

1. Poverty affidavit

The determination of defendant's ability to pay for bill of exceptions is within discretion of trial court. State v. Eberhardt, 179 Neb. 843, 140 N.W.2d 802 (1966).

Poverty affidavit must be filed within same period of time as is provided by rule of court for ordering bill of exceptions. Kennedy v. State, 170 Neb. 348, 102 N.W.2d 620 (1960).

Affidavit of poverty must be filed in district court. Kennedy v. State, 170 Neb. 193, 101 N.W.2d 853 (1960).

Where poverty affidavit is filed, defendant is entitled to bill of exceptions at cost of county unless it is shown that affidavit is untrue or that inability to pay is occasioned by defendant's own willful act. Fisher v. State, 153 Neb. 226, 43 N.W.2d 600 (1950).

When affidavit of poverty, supported by oral evidence sufficient to meet requirements of statute, is filed, court must direct reporter to prepare bill of exceptions at county's expense. Rice v. State, 120 Neb. 641, 234 N.W. 566 (1931).

Request for bill of exceptions at county's expense should be denied where it is shown that the applicant's poverty is untrue or occasioned by own willful act. Altis v. State, 109 Neb. 776, 192 N.W. 327 (1923).

2. Fees

Cost of bill of exceptions is fixed by statute. Anderson v. Evans, 168 Neb. 373, 96 N.W.2d 44 (1959).

Where court reporter charges amount in excess of that authorized by statute, he may be directed to refund overcharge. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N.W.2d 55 (1959).

Charge for preparation of bill of exceptions was excessive. Young v. Young, 166 Neb. 532, 89 N.W.2d 763 (1958).

Cost of preparation of bill of exceptions is controlled by this section. Pueppka v. Iowa Mutual Ins. Co., 166 Neb. 203, 88 N.W.2d 657 (1958).

3. Miscellaneous

In criminal cases, bill of exceptions must be prepared within forty days of time petition in error is filed unless time is extended. Benedict v. State, 166 Neb. 295, 89 N.W.2d 82 (1958).

Time to settle bill of exceptions in criminal case commences to run upon filing of petition in error in Supreme Court. Bryant v. State, 153 Neb. 490, 45 N.W.2d 169 (1950).

Transcript of proceedings before Board of Equalization may be compelled by mandamus. Mockett v. State ex rel. Woods, 70 Neb. 518, 97 N.W. 588 (1903).

If transcript cannot be had, relief may be obtained in equity. Holland v. Chicago, B. & Q. R. R. Co., 52 Neb. 100, 71 N.W. 989 (1897).

Section is constitutional and amendment germane to title of original act. State ex rel. Carey v. Cornell, 50 Neb. 526, 70 N.W. 56 (1897).

Transcript will not be ordered by Supreme Court where party has not complied with or sought review of order below. Argabright v. State, 46 Neb. 822, 65 N.W. 886 (1896).

Reporter's notes are not public records and certified copy is inadmissible as evidence. Smith v. State, 42 Neb. 356, 60 N.W. 585 (1894); Jordan v. Howe, 4 Neb. Unof. 667, 95 N.W. 853 (1903).

Party is entitled to rely upon transcript being produced correctly and in time. Curran v. Wilcox, 10 Neb. 449, 6 N.W. 762 (1880).

25-1141 Testimony; repetition of objections unnecessary.

Where an objection has once been made to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.

Source: Laws 1915, c. 245, § 1, p. 566; C.S.1922, § 8824; C.S.1929, § 20-1141.

Where incompetent testimony is admitted, failure to object to substantially same incompetent testimony by another witness waives the error in admission of testimony of first witness. Shamburg v. Folkers, 187 Neb. 169, 188 N.W.2d 723 (1971).

Section has no application to testimony of same nature by other witnesses. Rakes v. State, 158 Neb. 55, 62 N.W.2d 273 (1954).

Where former objection was made and overruled it was unnecessary to repeat the same objection to the later testimony of the same nature by the same witness in order to save error, if any. In re House's Estate, 145 Neb. 866, 18 N.W.2d 500 (1945); Triplett v. Western Public Service Co., 129 Neb. 799, 263 N.W. 229 (1935).

If the question relates to the same identical transaction or conversation, and calls for testimony of the same nature, it is not necessary that the objection be repeated to save the error in the appellate court. In re Vanicek's Estate, 145 Neb. 531, 17 N.W.2d 477 (1945).

Objection to question as incompetent having been overruled, it is not necessary to repeat objection to other questions relating to the same subject. Zediker v. State, 114 Neb. 292, 207 N.W. 168 (1926); Daggett v. State, 114 Neb. 238, 206 N.W. 735 (1925).

(g) NEW TRIAL

25-1142 New trial, defined; grounds.

A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court. The former verdict, report, or decision shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: (1) Irregularity in the proceedings of the court, jury, referee, or prevailing party or any order of the court or referee or abuse of discretion by which the party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise, which ordinary prudence could not have guarded against; (4) excessive damages, appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small, if the action is upon a contract or for the injury or detention of property; (6) that the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law; (7) newly discovered evidence, material for the party applying, which the moving party could not, with reasonable diligence, have discovered and produced at the trial; and (8) error of law occurring at the trial and excepted to by the party making the application.

Source: R.S.1867, Code § 314, p. 446; R.S.1913, § 7883; C.S.1922, § 8825; C.S.1929, § 20-1142; R.S.1943, § 25-1142; Laws 2000, LB 921, § 5.

1. Irregularity
2. Misconduct
3. Accident or surprise
4. Excessive damages
5. Error in assessment
6. Contrary to evidence or law
7. Newly discovered evidence
8. Error of law
9. Miscellaneous

1. Irregularity

Motion for new trial was properly sustained. Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N.W.2d 813 (1950).

Granted on first ground only for irregularities specifically assigned. Risse v. Gasch, 43 Neb. 287, 61 N.W. 616 (1895); Spencer v. Thistle, 13 Neb. 201, 13 N.W. 208 (1882).

2. Misconduct

In a motion for new trial, allegations of misconduct by jurors must be substantiated by competent evidence, be related to a disputed matter that is relevant to the issues in the case, and have influenced the jurors in arriving at the verdict. Leavitt ex rel. Leavitt v. Magid, 257 Neb. 440, 598 N.W.2d 722 (1999).

Trial court's refusal to order juror to make affidavits as to occurrence in jury, not amounting to reversible misconduct, is not erroneous. Egan v. State, 97 Neb. 731, 151 N.W. 237 (1915).

Assertion of opinion or of expert knowledge by jurors in jury room inheres in verdict and is not misconduct; but otherwise as to statements by juror of material facts not in evidence but within his personal knowledge. Corn Exchange Nat. Bank v. Ochlare Orchards Co., 97 Neb. 536, 150 N.W. 651 (1915).

Misconduct without knowledge or consent of interested parties will not require reversal, unless verdict affected. Zancanella v. Omaha & C. B. St. Ry. Co., 96 Neb. 596, 148 N.W. 158 (1914).

It is misconduct for juror to base verdict upon independent personal knowledge. Falls City v. Sperry, 68 Neb. 420, 94 N.W. 529 (1903).

Misconduct of counsel in argument may be ground for new trial. Barr v. Post, 56 Neb. 698, 77 N.W. 123 (1898); Bullis v. Drake, 20 Neb. 167, 29 N.W. 292 (1886).

Where it is clear that a verdict of a jury is based on a compromise of the difference of opinion of its individual members and in disregard of the evidence, it is not error to set it aside. Meyer v. Shamp, 51 Neb. 424, 71 N.W. 57 (1897).

Misconduct does not necessarily imply evil or corrupt motive. Chicago, St. P., M. & O. R. R. Co. v. Deaver, 45 Neb. 307, 63 N.W. 790 (1895).

3. Accident or surprise

Motion to vacate default judgment was in legal effect a motion for new trial. Shipley v. McNeel, 149 Neb. 793, 32 N.W.2d 636 (1948).

A variance between the testimony of a witness at the present trial and at a former trial does not require a new trial on the ground of surprise, where the variance is immaterial. Riesland v. Dawson County Irr. Co., 134 Neb. 773, 279 N.W. 726 (1938).

New trial on third ground will be denied when based upon facts known to moving party during the trial. Matoushek v. Dutcher & Sons, 67 Neb. 627, 93 N.W. 1049 (1903).

In absence of abuse of discretion of trial court, denial of motion for new trial on ground of accident or surprise will not be disturbed. Zimmerer v. Fremont Nat. Bank, 59 Neb. 661, 81 N.W. 849 (1900).

4. Excessive damages

When an amount of recovery is excessive and the excess can be reasonably ascertained and a remittitur granted, the amount of the recovery is no longer too large and a new trial is not required. Barbour v. Jenson Commercial Distributing Co., 212 Neb. 512, 323 N.W.2d 824 (1982).

In order to grant a new trial because of excessive damages appearing to have been given under the influence of passion or prejudice in a personal injury case, the reviewing court must be able to say, as a matter of law, that the amount is excessive. Hickey v. Omaha & C. B. St. Ry. Co., 140 Neb. 665, 1 N.W.2d 304 (1941).

A verdict so clearly excessive as to induce the belief by the reviewing court that it must have been founded on passion and prejudice will be set aside and a new trial awarded. Heiden v. Loup River Public Power Dist., 139 Neb. 754, 298 N.W. 736 (1941).

New trial was properly granted on ground of excessive verdict resulting from passion and prejudice. Stewart v. Weiner, 108 Neb. 49, 187 N.W. 121 (1922); Hutchinson v. Western Bridge & Construction Co., 97 Neb. 439, 150 N.W. 193 (1914).

Passion or prejudice is not necessarily inferable from excessive verdict. Wainwright v. Satterfield, 52 Neb. 403, 72 N.W. 359 (1897); Omaha Fire Ins. Co. v. Thompson, 50 Neb. 580, 70 N.W. 30 (1897).

Verdict of $120,000 for injury to knee resulting in loss of kneecap does not shock the conscience where plaintiff adduced extensive evidence of pain and suffering. Bailey v. AMISUB, 1 Neb. App. 56, 489 N.W.2d 323 (1992).

5. Error in assessment

When the amount of the damages allowed by a jury is inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. Preston v. Farmers Irr. Dist., 134 Neb. 503, 279 N.W. 298 (1938).

New trial is not ordinarily granted in personal injury actions on ground of inadequacy of amount of verdict alone. Blakely v. Omaha & C. B. St. Ry. Co., 94 Neb. 119, 142 N.W. 525 (1913); O'Reilly v. Hoover, 70 Neb. 357, 97 N.W. 470 (1903).

Error in assessment of amount of recovery cannot be reviewed under assignment in motion of insufficiency of evidence to support verdict. Warner v. Sohn, 85 Neb. 571, 123 N.W. 1054 (1909).

Where amount of recovery awarded by verdict is too small, it may call for a reversal of judgment. Yager v. Exchange Nat. Bank of Hastings, 57 Neb. 310, 77 N.W. 768 (1899).

Error in assessment of amount of recovery must be specifically set forth. Beavers v. Missouri P. Ry. Co., 47 Neb. 761, 66 N.W. 821 (1896).

Assignment of error that verdict is not supported by sufficient evidence is insufficient to raise question of error in failing to allow interest. Riverside Coal Co. v. Holmes, 36 Neb. 858, 55 N.W. 255 (1893).

6. Contrary to evidence or law

If a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record. Crewdson v. Burlington Northern RR. Co., 234 Neb. 631, 452 N.W.2d 270 (1990).

A trial court may grant a motion for new trial on the ground that the verdict is not sustained by sufficient evidence even though no motion for a directed verdict is made. In re Estate of Kinsey, 152 Neb. 95, 40 N.W.2d 526 (1949).

New trial should be granted where verdict is so clearly wrong as to induce belief that it must have resulted from passion, prejudice, mistake, or something not apparent. Burge v. C. F. Adams Co., 98 Neb. 4, 151 N.W. 949 (1915); Fredericks v. Chicago & N. W. Ry. Co., 96 Neb. 27, 146 N.W. 1011 (1914); Garfield v. Hodges & Baldwin, 90 Neb. 122, 132 N.W. 923 (1911).

New trial should be allowed where material uncontradicted evidence is clearly disregarded by jury. Hileman v. Maxwell, 97 Neb. 14, 149 N.W. 44 (1914).

Verdict should not be set aside if it can be sustained in any rational view of the evidence. Lammers v. Boehmer, 62 Neb. 159, 86 N.W. 1067 (1901).

Verdict contrary to law should be set aside if unwarranted by pleadings or in evident disregard of instructions. Westinghouse Co. v. Tilden, 56 Neb. 129, 76 N.W. 416 (1898); Wilson v. City Nat. Bank of Kearney, 51 Neb. 87, 70 N.W. 501 (1897).

Verdict clearly and unmistakably against the evidence should be set aside. Lubker v. Grand Detour Plow Co., 53 Neb. 111, 73 N.W. 457 (1897); Norfolk Beet-Sugar Co. v. Koch, 52 Neb. 197, 71 N.W. 1015 (1897).

7. Newly discovered evidence

The lower court did not abuse its discretion in overruling a motion for new trial when any material evidence presented as ''newly discovered'' could have been discovered and produced at the summary judgment hearing or prior to the entry of summary judgment. Woodhouse Ford v. Laflan, 268 Neb. 722, 687 N.W.2d 672 (2004).

New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict. State v. Koch, 224 Neb. 926, 402 N.W.2d 275 (1987).

A witness' testimony is not newly discovered evidence within the meaning of this section, where plaintiff's counsel knew what the witness' testimony would be but failed to serve a subpoena on the witness and the witness failed to appear at trial. Schroll v. Fulton, 213 Neb. 310, 328 N.W.2d 780 (1983).

Where the record revealed that evidence was in existence prior to trial and that neither the litigant nor his counsel, at the time of trial, could show that he exercised due diligence to discover it, the grounds for a new trial based on newly discovered evidence were not satisfied. Smith v. Erftmier, 210 Neb. 486, 315 N.W.2d 445 (1982).

Under section 25-1144, an application for new trial on the grounds of newly discovered evidence was required to be supported by affidavit. State v. Belding, 190 Neb. 646, 211 N.W.2d 715 (1973).

New trial on the ground of newly discovered evidence may be granted after an appeal to Supreme Court has been taken and disposed of. Finnern v. Bruner, 170 Neb. 170, 101 N.W.2d 905 (1960).

Except in extraordinary cases, evidence of facts occurring after the trial will not support a motion for new trial as newly discovered evidence. Wagner v. Loup River Public Power Dist., 150 Neb. 7, 33 N.W.2d 300 (1948).

Newly discovered evidence is not a ground for a new trial where the exercise of due diligence before trial would have produced it. Jensen v. John Hancock Mutual Life Ins. Co., 145 Neb. 409, 16 N.W.2d 847 (1944).

In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial. Gate City Co. v. Douglas County, 135 Neb. 531, 282 N.W. 532 (1938).

New evidence must be not merely cumulative but such as to warrant the belief that it might cause a jury to arrive at a different verdict. Miller v. Olander, 133 Neb. 762, 277 N.W. 72 (1938).

Motion for new trial was properly overruled where it was based on ground of newly discovered evidence which consisted of facts known to defendant which she failed to give to her attorney. Breen v. Nugent, 133 Neb. 131, 274 N.W. 379 (1937).

To warrant new trial for newly discovered evidence, it must appear that evidence could not have been discovered by due diligence, that it renders clear what was before uncertain, and that it will probably bring about a different result. Erwin v. Watson Bros. Transfer Co., 129 Neb. 64, 260 N.W. 565 (1935).

Requirement of showing for new trial on ground of newly discovered evidence set forth. Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N.W. 298 (1932).

New trial should not be granted for newly discovered evidence where alleged new witness was accessible, no good reason being shown why not produced at trial. Buzzello v. Sramek, 110 Neb. 262, 193 N.W. 743 (1923).

Motion on ground of newly discovered evidence was properly sustained on strong showing that evidence materially affecting amount of recovery, on point not suggested by pleadings, was untrue, and defeated party might not reasonably have anticipated it. Coon v. Drainage Dist. No. 1, Richardson County, 99 Neb. 138, 155 N.W. 799 (1915).

It is indispensable that moving party show diligence. Van Horn v. Cooper & Cole Bros., 88 Neb. 687, 130 N.W. 567 (1911).

New trial should not be allowed for newly discovered evidence merely cumulative in its nature. Parkins v. Missouri P. Ry. Co., 79 Neb. 788, 113 N.W. 265 (1907).

Application for new trial on ground of newly discovered evidence must show facts constituting alleged due diligence; statement in language of statute is insufficient. Todd v. City of Crete, 79 Neb. 677, 115 N.W. 307 (1908); Heady v. Fishburn, 3 Neb. 263 (1874).

The newly discovered evidence must be of such controlling nature as probably to change the result. Dickinson v. Aldrich, 79 Neb. 198, 112 N.W. 293 (1907); Williams v. Miles, 73 Neb. 193, 102 N.W. 482 (1905).

Application for new trial on ground of newly discovered evidence should, when practicable, be verified by both party and his attorney. Nebraska Tel. Co. v. Jones, 60 Neb. 396, 83 N.W. 197 (1900); Draper v. Taylor, 58 Neb. 787, 79 N.W. 709 (1899).

Application on ground of newly discovered evidence should be accompanied by affidavit of new witness, or absence accounted for. Nebraska Tel. Co. v. Jones, 60 Neb. 396, 83 N.W. 197 (1900).

8. Error of law

Assignment in motion for new trial that errors of law occurred at the trial does not present correctness of giving or refusing instructions. Drucker v. Goscar, Inc., 184 Neb. 475, 168 N.W.2d 534 (1969).

An error of law occurring at the trial must be raised by appropriate motion or request in the trial court. Zavoral v. Pacific Intermountain Express, 178 Neb. 161, 132 N.W.2d 329 (1965).

Error without prejudice is not sufficient to cause granting of a new trial. Klein v. Wilson, 167 Neb. 779, 94 N.W.2d 672 (1959).

Where refusal to give a requested instruction is not alleged as error in motion for new trial, it may not be asserted as error on appeal. Robinson v. Meyer, 165 Neb. 706, 87 N.W.2d 231 (1957).

An order overruling motion to strike petition or to strike from petition will be reviewed on appeal although not assigned as error in motion for new trial. Weideman v. Peterson's Estate, 129 Neb. 74, 261 N.W. 150 (1935).

Error in giving or refusing instructions must be specifically assigned. Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N.W. 855 (1897).

A motion for new trial should be granted only where there is an error prejudicial to the rights of the unsuccessful party. Cotton v. Gering Pub. Sch., 1 Neb. App. 1036, 511 N.W.2d 549 (1993).

Inadvertent mention of plaintiff's lack of health insurance is not prejudicial error requiring mistrial where it is not shown that jury inferred that plaintiff was incapable of paying expenses. Bailey v. AMISUB, 1 Neb. App. 56, 489 N.W.2d 323 (1992).

9. Miscellaneous

A motion which purportedly seeks a ''new trial'' after an entry of a summary judgment is not a proper motion for new trial. A new trial is a reexamination of an issue of fact by the same court, and a trial court does not resolve factual issues when ruling on a motion for summary judgment. Woodhouse Ford v. Laflan, 268 Neb. 722, 687 N.W.2d 672 (2004).

A party seeking to prove that the opposing party was driving a particular vehicle could have, with reasonable diligence, discovered the vehicle's odometer reading prior to a summary judgment hearing on the matter. Woodhouse Ford v. Laflan, 268 Neb. 722, 687 N.W.2d 672 (2004).

In reviewing the district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion. Bowley v. W.S.A., Inc., 264 Neb. 6, 645 N.W.2d 512 (2002).

The only pleading which tolls the time for the filing of an appeal is a motion for new trial as set out in this section, and the motion must state the statutory grounds found in this section. Breeden v. Nebraska Methodist Hosp., 257 Neb. 371, 598 N.W.2d 441 (1999).

A motion to vacate an order of dismissal is equivalent to a motion for new trial. Abboud v. Cutler, 238 Neb. 177, 469 N.W.2d 763 (1991).

Motion to correct verdict forms, because it sought not a reexamination of an issue of fact but, rather, an investigation into a possible clerical error of the jury, was not a motion for new trial and thus not subject to the 10-day filing limit imposed by section 25-1143. Harmon Cable Communications v. Scope Cable Television, 237 Neb. 871, 468 N.W.2d 350 (1991).

The Nebraska Workers' Compensation Act does not provide for a motion for new trial in the Nebraska Workers' Compensation Court. Carter v. Weyerhaeuser, 234 Neb. 558, 452 N.W.2d 32 (1990).

A motion for new trial is authorized after a judgment notwithstanding the verdict and, during pendency of such motion, suspends or tolls the time limit to comply with requirements for an appeal to the Nebraska Supreme Court. Dunn v. Hemberger, 230 Neb. 171, 430 N.W.2d 516 (1988).

Since a new trial is a reexamination in the same court of issues previously decided by it, the constitutional issues not raised by the pleadings may not be raised in the motion for a new trial. State ex rel. Douglas v. Schroeder, 212 Neb. 562, 324 N.W.2d 391 (1982).

None of the grounds for a new trial, except for newly discovered evidence, include remedying a proof defect. Battiato v. Falstaff Brewing Corp., 212 Neb. 474, 323 N.W.2d 105 (1982).

The trial court has the power and the authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motions for a new trial have been filed, notwithstanding the fact that no preliminary motion for a directed verdict has been made. Lockhart v. Continental Cheese, Inc., 203 Neb. 331, 278 N.W.2d 604 (1979).

Diligent discovery before trial requires litigant to attempt examination where on notice that evidence may be relevant. Maddox v. First Westroads Bank, 199 Neb. 81, 256 N.W.2d 647 (1977).

Trial court had authority to vacate judgment it had entered for plaintiff after trial to the court, and to then enter judgment for defendants on motion couched in terms of section 25-1315.02. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co., 196 Neb. 158, 241 N.W.2d 674 (1976).

On appeal from a county or municipal court, notice of appeal and bond must be filed within ten days after rendition of judgment and this period cannot be prolonged by filing a motion for new trial. Edward Frank Rozman Co. v. Keillor, 195 Neb. 587, 239 N.W.2d 779 (1976).

The constitutionality of the guest statute could not be first raised in the motion for new trial. Zoimen v. Landsman, 192 Neb. 561, 223 N.W.2d 49 (1974).

An issue of constitutionality not raised in the pleadings cannot be raised in a motion for new trial. Hale v. Taylor, 192 Neb. 298, 220 N.W.2d 378 (1974).

If a new trial will involve the reexamination of an issue of fact, the granting thereof is appealable. Morford v. Lipsey Meat Co., Inc., 179 Neb. 420, 138 N.W.2d 653 (1965).

A new trial is a reexamination in the same court of an issue of fact. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co., 178 Neb. 226, 132 N.W.2d 758 (1965).

Motion for new trial in divorce action specified four of the eight grounds set forth in this section. Isom v. Isom, 176 Neb. 344, 126 N.W.2d 198 (1964).

A new trial does not involve an original examination of issues, but only re-examination. Otteman v. Interstate Fire & Cas. Co. Inc., 171 Neb. 148, 105 N.W.2d 583 (1960).

A motion for a new trial within the purview of this section must be for a complete new trial. Harman v. Swanson, 169 Neb. 452, 100 N.W.2d 33 (1959).

Failure of litigant to ascertain facts shown by an existing public record is not reasonable diligence. Wemmer v. Young, 167 Neb. 495, 93 N.W.2d 837 (1958).

Motion for new trial is proper even though ruling thereon does not require a re-examination of an issue of fact. Brasier v. Cribbett, 166 Neb. 145, 88 N.W.2d 235 (1958).

Assignments of error on appeal may not be sufficient although substantially in the language relating to motions for new trial. Backer v. City of Sidney, 165 Neb. 816, 87 N.W.2d 610 (1958).

Motion for new trial by plaintiff was sufficient as to joint defendants. Wisnieski v. Moeller, 165 Neb. 476, 86 N.W.2d 52 (1957).

Assignments of error couched in exact words of motion for new trial generally are insufficient. Wieck v. Blessin, 165 Neb. 282, 85 N.W.2d 628 (1957).

Motion for new trial may be granted although no preliminary motion for directed verdict has been made. Kohl v. Unkel, 163 Neb. 257, 79 N.W.2d 405 (1956).

The grounds for a new trial are statutory. State v. Kubik, 159 Neb. 509, 67 N.W.2d 755 (1954).

Supreme Court may consider on appeal an additional reason for granting of new trial. Danielsen v. Eickhoff, 159 Neb. 374, 66 N.W.2d 913 (1954).

If legal reason exists, court should sustain motion. Pongruber v. Patrick, 157 Neb. 799, 61 N.W.2d 578 (1953).

Assignment of error in language of statute was sufficient. Lund v. Holbrook, 153 Neb. 706, 46 N.W.2d 130 (1951).

Motion filed setting up grounds under this section did not authorize vacation of judgment after term. Nemetz v. Nemetz, 152 Neb. 178, 40 N.W.2d 685 (1950).

A new trial is a reexamination in the same court of an issue of fact. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N.W.2d 533 (1949).

To be ground for new trial, error must affect materially the substantial rights of a party. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N.W.2d 772 (1949).

The remedy provided for errors committed during a trial is a new trial. Schnell v. United Hail Ins. Co., 145 Neb. 768, 18 N.W.2d 112 (1945).

When a general verdict is vacated or set aside by the trial court for errors specified in this section, it should award a new trial. In re George's Estate, 144 Neb. 915, 18 N.W.2d 68 (1945).

It is sufficient to set out grounds for new trial in language of the statute. McCullough v. Omaha Coliseum Corporation, 144 Neb. 92, 12 N.W.2d 639 (1944).

A copy of the provisions of this section is insufficient as an assignment of errors upon appeal. Labs v. Farmers State Bank of Millard, 135 Neb. 130, 280 N.W. 452 (1938).

Power of setting aside a verdict on ground that it is excessive should be used sparingly. Watson v. Miller, 131 Neb. 74, 267 N.W. 230 (1936).

Where defendant's motion for new trial is sustained, former judgment set aside, and judgment of dismissal of cause of action is entered, plaintiff becomes the ''aggrieved party'' with right to present motion for a new trial. Elfers v. Schuff & Sons Hotel Co., 127 Neb. 236, 254 N.W. 885 (1934).

Statute does not abridge the inherent power of the court to vacate or modify its own judgments during the term. Lyman v. Dunn, 125 Neb. 770, 252 N.W. 197 (1934).

Procedure under tax foreclosure statute necessarily invokes equity jurisdiction, hence motion for new trial hereunder was not required. Douglas County v. Barker Co., 125 Neb. 253, 249 N.W. 607 (1933).

In absence of motion for new trial, the only question presented by record is determination of whether defendant's answer supports judgment entered. Hamaker v. Patrick, 122 Neb. 688, 241 N.W. 537 (1932).

When, in equity case, Supreme Court on appeal directs trial court to enter different judgment, defeated party may file motion for new trial within three days after entry thereof. Ward v. Geary, 115 Neb. 58, 211 N.W. 208 (1926).

Affidavits of jurors are incompetent to show how amount of verdict computed. Palmer v. Parmele, 104 Neb. 30, 175 N.W. 649 (1919).

Section relates only to applications for new trial at same term judgment was rendered. Wunrath v. Peoples Fur. & Carpet Co., 98 Neb. 342, 152 N.W. 736 (1915).

New trial should be granted by equity court where party is deprived of bill of exceptions, because of inability of court reporter to furnish transcript of evidence. Ferber v. Leise, 97 Neb. 795, 151 N.W. 307 (1915).

Where special findings are returned, motion for new trial may be filed within three days from entry of judgment vacating general verdict and entering judgment on special findings. Platte County Bank v. Clark, 81 Neb. 255, 115 N.W. 787 (1908).

Application must be made during same term, and, except on newly discovered evidence, within three days. Carmack v. Erdenberger, 77 Neb. 592, 110 N.W. 315 (1906).

Right to new trial is waived by stay of judgment or decree. Rice v. Parrott, 76 Neb. 501, 107 N.W. 840 (1906), affirmed on rehearing 76 Neb. 505, 111 N.W. 583 (1907); Banks v. Hitchcock, 20 Neb. 315, 30 N.W. 56 (1886).

Where error complained of involves no reexamination of issues of fact, motion for new trial is not a prerequisite to review. Bannard v. Duncan, 65 Neb. 179, 90 N.W. 947 (1902).

Requirement of filing of motion applies only to issues of fact. Horton v. State ex rel. Hayden, 60 Neb. 701, 84 N.W. 87 (1900).

This section does not abridge power of court to vacate its own judgments during term. Bradley v. Slater, 58 Neb. 554, 78 N.W. 1069 (1899).

Motion may not be heard in vacation. Hodgin v. Whitcomb, 51 Neb. 617, 71 N.W. 314 (1897).

Primary purpose of section is to afford trial court the opportunity to correct its own errors. Weber v. Kirkendall, 44 Neb. 766, 63 N.W. 35 (1895).

New trial cannot be granted on grounds other than those prescribed by law. Risse v. Gasch, 43 Neb. 287, 61 N.W. 616 (1895).

Motion does not per se stay execution of judgment or decree. Von Dorn v. Mengedoht, 41 Neb. 525, 59 N.W. 800 (1894).

Additional grounds are not assignable by amendment at subsequent term. Aultman, Miller & Co. v. Leahey, 24 Neb. 286, 38 N.W. 740 (1888).

Motion may be heard at subsequent term. Chadron Loan & Building Assn. v. Scott, 4 Neb. Unof. 694, 96 N.W. 220 (1903).

Summary judgment is not a trial within the meaning of this section. Vesely v. National Travelers Life Co., 12 Neb. App. 622, 682 N.W.2d 713 (2004).

25-1143 Repealed. Laws 2000, LB 921, § 38.

25-1144 New trial; motion; form.

The application must be by motion upon written grounds, filed at the time of making the motion. It shall be sufficient, however, in assigning the grounds of the motion to assign the same in the language of the statute and without further or other particularity. The causes enumerated in section 25-1142, subdivisions (2), (3) and (7), of this code must be sustained by affidavits showing their truth, and may be controverted by affidavits.

Source: R.S.1867, Code § 317, p. 477; R.S.1913, § 7885; C.S.1922, § 8827; C.S.1929, § 20-1144.

1. Necessity
2. Form
3. Miscellaneous

1. Necessity

Provisions of this statute as to application for new trial are mandatory. Weideman v. Peterson's Estate, 129 Neb. 74, 261 N.W. 150 (1935); Douglas County v. Barker Co., 125 Neb. 253, 249 N.W. 607 (1933); Weber v. Allen, 121 Neb. 833, 238 N.W. 740 (1931).

Provisions are mandatory. Carmack v. Erdenberger, 77 Neb. 592, 110 N.W. 315 (1906).

Motion is not necessary to raise question of sufficiency of pleading to support judgment. Farris v. State ex rel. Murphy, 46 Neb. 857, 65 N.W. 890 (1896).

Court may set aside verdict on its own motion. Weber v. Kirkendall, 44 Neb. 766, 63 N.W. 35 (1895).

Motion is not necessary to obtain review of equity cases. Swansen v. Swansen, 12 Neb. 210, 10 N.W. 713 (1881).

2. Form

A written motion for new trial specifying ground thereof is mandatory for review of errors of law occurring at the trial of a law action or the sufficiency of the evidence. Parker v. Christensen, 192 Neb. 117, 219 N.W.2d 235 (1974).

It is sufficient to state ground for new trial in language of statute. Johnston Grain Co. v. Tridle, 175 Neb. 859, 124 N.W.2d 463 (1963); State v. Kubik, 159 Neb. 509, 67 N.W.2d 755 (1954); Harsche v. Czyz, 157 Neb. 699, 61 N.W.2d 265 (1953); Lund v. Holbrook, 153 Neb. 706, 46 N.W.2d 130 (1951); McCullough v. Omaha Coliseum Corporation, 144 Neb. 92, 12 N.W.2d 639 (1944); Chicago, B. & Q. R. R. Co. v. Cass County, 51 Neb. 369, 70 N.W. 955 (1897).

Claim of newly discovered evidence must be sustained by affidavit. Powell v. Van Donselaar, 160 Neb. 21, 68 N.W.2d 894 (1955).

Assignment of error in motion for new trial that court erred in giving or refusal to give a group of instructions will be considered only to the extent of ascertaining if any one of instructions should have been given or refused. Anderson v. Nebraska Defense Corporation, 146 Neb. 466, 20 N.W.2d 322 (1946).

When codefendants join in a motion for a new trial, errors assigned which are not good as to all defendants are not good as to any. Thomas v. Fundum, 135 Neb. 728, 283 N.W. 839 (1939).

Assignment in motion of errors of law occurring at trial and duly excepted to is sufficient to review ruling on demurrer. Riverside Coal Co. v. Holmes, 36 Neb. 858, 55 N.W. 255 (1893).

Assignment of errors of law occurring at trial is sufficient to entitle party to review rulings on admission or rejection of testimony. Labaree v. Klosterman, 33 Neb. 150, 49 N.W. 1102 (1891).

3. Miscellaneous

A motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment. Bechtold v. Gomez, 254 Neb. 282, 576 N.W.2d 185 (1998).

Erroneous failure to submit pleaded issues supported by evidence may be availed of by assignment of error in language of the statute. Fries v. Goldsby, 163 Neb. 424, 80 N.W.2d 171 (1956).

Setting out grounds for new trial in language of statute is sufficient for purposes of motion, but is insufficient as assignments of error upon appeal. Labs v. Farmers State Bank of Millard, 135 Neb. 130, 280 N.W. 452 (1938).

Record of trial itself must show how question was presented to and ruled upon by court; cannot be shown by affidavit filed with motion for new trial. Palmer v. Parmele, 104 Neb. 30, 175 N.W. 649 (1919).

Appeal to Supreme Court does not prevent district court from granting new trial. Smith v. Goodman, 100 Neb. 284, 159 N.W. 418 (1916).

Alleged errors of trial court in an action at law, not referred to in motion for new trial, will not be considered. Pennington County Bank v. Bauman, 81 Neb. 782, 116 N.W. 669 (1908).

Affidavits must be filed and preserved in bill of exceptions. Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473, 61 N.W. 740 (1895).

25-1144.01 New trial; motion; when filed; filing before entry of judgment; treatment.

A motion for a new trial shall be filed no later than ten days after the entry of the judgment. A motion for a new trial filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof.

Source: Laws 2000, LB 921, § 6; Laws 2004, LB 1207, § 3.

A motion for new trial must be filed within 10 days after an entry of judgment, which occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. Macke v. Pierce, 263 Neb. 868, 643 N.W.2d 673 (2002).

25-1145 Repealed. Laws 2000, LB 921, § 38.

(h) GENERAL PROVISIONS

25-1146 Damages.

Whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.

Source: R.S.1867, Code § 319, p. 448; R.S.1913, § 7887; C.S.1922, § 8829; C.S.1929, § 20-1146.

25-1147 Actions; when triable.

Actions shall be triable at the first term of the court after the issues therein, by the times fixed for pleading, are or should have been made up; and when by the times fixed for pleading, the issues are or should have been made up during a term, such action shall be triable at that term. When the issues are or should have been made up, either before or during a term of court, but after the period for preparing the trial docket of such term, the clerk shall place such actions on the trial docket of that term.

Source: G.S.1873, c. 57, § 9, p. 713; R.S.1913, § 7888; C.S.1922, § 8830; C.S.1929, § 20-1147.

Failure to put case on docket does not entitle party to vacate judgment where he is not prejudiced. Shelby v. St. James Orphan Asylum, 66 Neb. 40, 92 N.W. 155 (1902).

Court may pass case or set for trial on future day of term. Connell v. Chambers, 22 Neb. 302, 34 N.W. 636 (1887).

25-1148 Continuance or adjournment of causes pending; motion; affidavits; oral testimony; order; effect.

Whenever application for continuance or adjournment is made by a party or parties to any cause or proceeding pending in the district court of any county, such application shall be by written motion entitled in the cause or proceeding and setting forth the grounds upon which the application is made, which motion shall be supported by the affidavit or affidavits of person or persons competent to testify as witnesses under the laws of this state, in proof of and setting forth the facts upon which such continuance or adjournment is asked. After the filing of such application and the affidavits in support thereof, the adverse party shall have the right to file counter affidavits in the matter. Either party may, upon obtaining leave of the court, introduce oral testimony upon the hearing of such application. The court may, upon the hearing, in its discretion, grant or refuse such application, and no reversal of such cause or proceeding shall be had on account of the action of the court in granting or refusing such application except when there has been an abuse of a sound legal discretion by the court.

Source: Laws 1911, c. 39, § 1, p. 205; R.S.1913, § 7889; C.S.1922, § 8831; C.S.1929, § 20-1148; R.S.1943, § 25-1148; Laws 1991, LB 732, § 48.

1. Showing required
2. Discretion of court
3. Miscellaneous

1. Showing required

An application for continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of proceedings. Williams v. Gould, Inc., 232 Neb. 862, 443 N.W.2d 577 (1989).

Denial of motion for continuance was proper where no written application and affidavit were filed. Stastny v. Tachovsky, 178 Neb. 109, 132 N.W.2d 317 (1964).

Affidavits for continuance must allege facts and circumstances from which legal conclusions can be drawn. State v. Russell, 173 Neb. 882, 115 N.W.2d 578 (1962).

In reviewing order denying a continuance, it is proper to look to the entire record in the case. Kennedy v. State, 171 Neb. 160, 105 N.W.2d 710 (1960).

Where motion for continuance was not supported, denial was not error. Vasa v. Vasa, 165 Neb. 69, 84 N.W.2d 185 (1957).

In order to be considered by appellate court, affidavits must be preserved by bill of exceptions. Freeman v. City of Neligh, 155 Neb. 651, 53 N.W.2d 67 (1952).

Voluntary or negligent absence of a party to the suit is not a ground for continuance. Kulhanek v. Kulhanek, 134 Neb. 349, 278 N.W. 563 (1938).

Where pleading of party applying for continuance fails to disclose a meritorious cause of action or defense, continuance may be denied. Cornell v. Tuck, 104 Neb. 759, 178 N.W. 612 (1920).

Nonattendance of witnesses subpoenaed by plaintiff when the trial commenced is not of itself sufficient ground for a continuance at the request of defendant who relied upon plaintiff's efforts to procure the attendance of such witnesses. Jackson v. Omaha & C. B. St. Ry. Co., 101 Neb. 456, 163 N.W. 838 (1917).

Counter showing against motion for continuance is properly allowed. Dilley v. State, 97 Neb. 853, 151 N.W. 946 (1915).

Absence of witness is not ground for continuance where testimony would have been inadmissible. Aegerter v. Ronspies, 97 Neb. 656, 150 N.W. 1019 (1915).

Ordinarily failure to have witness subpoenaed and reliance on his promise to appear and testify shows lack of such diligence as requires a continuance in case the witness fails to keep his promise. Life Ins. Clearing Co. v. Altschuler, 55 Neb. 341, 75 N.W. 862 (1898).

An application for a continuance must be in writing and supported by an affidavit which contains factual allegations demonstrating good cause or sufficient reason necessitating postponement of the proceedings. In re Interest of Azia B., 10 Neb. App. 124, 626 N.W.2d 602 (2001).

The burden of showing an abuse of discretion in refusing a continuance is upon person who asserts it. Rhodes v. Houston, 258 F.Supp. 546 (D. Neb. 1966).

2. Discretion of court

In determining whether a trial court has abused its discretion in refusing to grant a continuance, it is proper for the reviewing court to look at the entire record in the case. State v. Valdez, 239 Neb. 453, 476 N.W.2d 814 (1991).

The failure to file a written motion for continuance supported by affidavit is a factor to be considered in determining whether a trial court abused its discretion in denying a continuance. State v. Santos, 238 Neb. 25, 468 N.W.2d 613 (1991).

Generally, the denial of a motion for a continuance is a matter for the discretion of the trial court whose ruling will be upheld absent an abuse of discretion. State v. Perez, 235 Neb. 796, 457 N.W.2d 448 (1990).

There is no abuse of discretion by the court in denying a request for a continuance unless it appears that the defendant suffered prejudice as a result of that denial. State v. Perez, 235 Neb. 796, 457 N.W.2d 448 (1990).

Where a criminal defendant's motion for continuance is based upon the occurrence or nonoccurrence of events within the defendant's own control, denial of such motion generally is not abuse of discretion. State v. Perez, 235 Neb. 796, 457 N.W.2d 448 (1990).

Failure to comply with the requirement that application for continuance shall be by written motion and supported by affidavits is relevant in determining whether the trial court abused its discretion in refusing to grant a continuance. State v. Carter, 226 Neb. 636, 413 N.W.2d 901 (1987).

A situation in which a party moves to continue the testimony of a physician to the next day in order to permit a physical examination of the injured party, and in which the trial proceeds with testimony from other witnesses, does not amount to a continuance which would require a written motion supported by affidavit. Hoegerl v. Burt, 215 Neb. 752, 340 N.W.2d 428 (1983).

A trial court may, in a proper case, order a continuance on its own motion and in the absence of a showing of abuse of discretion, its ruling on a motion for a continuance will not be disturbed on appeal. State v. Lee, 195 Neb. 348, 237 N.W.2d 880 (1976).

A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for continuance will not be disturbed on appeal. Korte v. Betzer, 193 Neb. 15, 225 N.W.2d 30 (1975).

A denial of a party's motion for continuance of a hearing on a motion for new trial is not an abuse of sound legal discretion. Engel v. Mead, 191 Neb. 541, 216 N.W.2d 718 (1974).

In the absence of a showing in conformance with this section, it is not error for the trial court to refuse to grant a continuance. Metschke v. Department of Motor Vehicles, 186 Neb. 197, 181 N.W.2d 843 (1970).

Trial court may in a proper case order a continuance on its own motion. Waite v. State, 169 Neb. 113, 98 N.W.2d 688 (1959).

Application for a continuance is addressed to the sound discretion of the trial court. O'Rourke v. State, 166 Neb. 866, 90 N.W.2d 820 (1958).

The granting of a continuance rests in discretion of trial court. Cox v. State, 159 Neb. 811, 68 N.W.2d 497 (1955).

In absence of showing of abuse of discretion, denial of continuance is not error. Hyslop v. State, 159 Neb. 802, 68 N.W.2d 698 (1955).

Where parties agree to continue case beyond day set for trial, and default judgment is entered at request of party violating the agreement for continuance, it is abuse of discretion to overrule motion for new trial. National Cooperative Hail Assn. v. Doran Bros., 121 Neb. 746, 238 N.W. 527 (1931).

There was no abuse of discretion in refusing continuance. Middaugh v. Chicago & N. W. Ry. Co., 114 Neb. 438, 208 N.W. 139 (1926).

Refusal to grant continuance was abuse of discretion under circumstances of case. Richelieu v. Union P. R. R. Co., 97 Neb. 360, 149 N.W. 772 (1914).

Courts may grant a continuance when the factual basis for granting the motion is wholly or largely dependent upon the oral statements of the prosecutor where the defense does not object to the procedure. State v. Roundtree, 11 Neb. App. 628, 658 N.W.2d 308 (2003).

Failure to comply with this section is relevant as to whether the trial court abused its discretion. In re Interest of Azia B., 10 Neb. App. 124, 626 N.W.2d 602 (2001).

3. Miscellaneous

This section and section 29-1206 do not define whether a defendant's right to a speedy trial has been violated. State v. Turner, 252 Neb. 620, 564 N.W.2d 231 (1997).

25-1149 Issues; order in which tried; time of hearing.

The trial of an issue of fact, and the assessment of damages in any case shall be in the order in which they are placed on the trial docket, unless by consent

of parties, or the order of the court, they are continued, or placed at the heel of the docket, or temporarily postponed. The time of hearing all other cases shall be in the order in which they are placed on the docket, unless the court shall otherwise direct. The court may in its discretion hear at any time a motion, may by rule prescribe the time for hearing motions, and provide for dismissing actions without prejudice for want of prosecution.

Source: R.S.1867, Code § 324, p. 448; Laws 1887, c. 94, § 2, p. 648; Laws 1899, c. 83, § 2, p. 339; R.S.1913, § 7890; C.S.1922, § 8832; C.S.1929, § 20-1149.

A district court has discretionary power to dismiss a case without prejudice for want of prosecution. Such a dismissal is also within the inherent power of the court. Talkington v. Womens Servs., P.C., 256 Neb. 2, 588 N.W.2d 790 (1999).

Even where statute of limitations would bar filing of a new action, district court may dismiss a case for want of prosecution where facts indicate unreasonable delay with no justifiable excuse. Schaeffer v. Hunter, 200 Neb. 221, 263 N.W.2d 102 (1978).

A court may under court rule dismiss cases for lack of progress after a specified time interval. Fanning v. Richards, 193 Neb. 431, 227 N.W.2d 595 (1975).

Court has power to dismiss for want of prosecution. Brown v. Lincoln, 157 Neb. 840, 61 N.W.2d 836 (1954).

Causes are to be tried in the district court in the order in which they are entered upon the trial docket, unless court otherwise directs. Osgood v. Grant, 44 Neb. 350, 62 N.W. 894 (1895).

25-1150 Transferred to section 25-21,184.

25-1151 Transferred to section 25-21,185.

25-1152 Transferred to section 25-21,186.

25-1153 Transferred to section 25-21,187.

(i) SUMMARY JURY TRIAL

25-1154 Legislative purpose and findings.

The purpose of sections 25-1154 to 25-1157 is to provide an alternate dispute resolution technique, to be known as the summary jury trial, for use by the parties to civil court actions. The Legislature finds that the procedures set forth in such sections will save valuable court and juror resources, promote prompt resolution of disputes, and increase settlement of disputed actions prior to a jury trial. The Legislature declares that courts should liberally construe such sections and employ summary jury trials in appropriate civil actions to effectuate the purposes and findings set forth in this section.

Source: Laws 1987, LB 225, § 1.

25-1155 Motion; when granted; contents.

In any civil action, the district court may grant a summary jury trial upon the written motion of all parties or their oral motion in court entered upon the record. The motion for summary jury trial may contain a stipulation of the parties concerning the use or effect of the summary jury verdict.

Source: Laws 1987, LB 225, § 2.

25-1156 Trial; how conducted.

Summary jury trials shall be conducted in the same manner as any other trial by jury under Chapter 25, article 11, with the following exceptions:

(1) A six-person jury shall be selected from persons whose names appear on the jury list and who qualify as jurors. Examination of the prospective jurors

shall be conducted by the judge who shall select the jury subject to each party's right to challenge two jurors;

(2) Each party shall have an equal amount of time to present his or her case as shall be agreed upon by the parties and the judge;

(3) The judge need not preside during the presentation of the case but may give the jury written or oral instructions on the applicable law following the presentation;

(4) The parties shall not present evidence but may present representations or summaries of evidence which would be adduced and admissible at trial. At least ten days prior to trial the parties shall exchange the representations or summaries of evidence which will be presented to the jury. All objections to the evidence shall be made prior to the summary jury trial and shall not be allowed during the trial;

(5) The parties shall attend the summary jury trial. The president, chief executive officer, or any other representative with authority to enter into a binding agreement or make a binding settlement offer from each corporation or association which is a party shall attend; and

(6) The jury may return either a consensus verdict or a special verdict consisting of an anonymous statement of each juror's findings which includes (a) the parties' respective liability, (b) the value of damages, and (c) a general verdict.

Source: Laws 1987, LB 225, § 3.

25-1157 Trial; use of verdict; records; not required.

Summary jury trials shall not result in a final determination on the merits and shall not be appealable. Neither the fact of the holding of a summary jury trial nor the jurors' verdict nor the presentations by the parties shall be admissible as evidence in any subsequent trial of the action except any documents otherwise admissible under the rules of evidence. No record shall be required of the jury selection, the presentation of the parties, or the instructions by the court of the summary jury trial.

Source: Laws 1987, LB 225, § 4.

ARTICLE 12

EVIDENCE

Cross References

Deeds as evidence, see section 76-235.
Livestock brands, recorded, evidence of ownership, see section 54-303.
Presumptive evidence:
Marriage certificate and record, see section 42-116.
Notary public, certificate of, see section 64-107.
Partition, judgment in, see section 25-21,107.
Tax deeds, evidence of, see sections 77-1842 to 77-1846.
Tax title, certificate of purchase, see section 77-1822.
Prima facie evidence:
Brand on animals, when, see section 54-303.
State official, failure to remit funds, see section 84-711.
Witness fees, see section 33-139.

(a) COMPETENCY AND PRIVILEGES OF WITNESSES

Section
25-1201. Repealed. Laws 1975, LB 279, § 75.
25-1202. Repealed. Laws 1975, LB 279, § 75.

Section

25-1249. Repealed. Laws 1951, c. 68, § 43.
25-1250. Repealed. Laws 1951, c. 68, § 43.
25-1251. Repealed. Laws 1951, c. 68, § 43.
25-1252. Repealed. Laws 1951, c. 68, § 43.
25-1253. Repealed. Laws 1951, c. 68, § 43.
25-1254. Repealed. Laws 1951, c. 68, § 43.
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25-1257. Repealed. Laws 1951, c. 68, § 43.
25-1258. Repealed. Laws 1951, c. 68, § 43.
25-1259. Repealed. Laws 1951, c. 68, § 43.
25-1260. Repealed. Laws 1951, c. 68, § 43.
25-1261. Repealed. Laws 1951, c. 68, § 43.
25-1262. Repealed. Laws 1951, c. 68, § 43.
25-1263. Repealed. Laws 1951, c. 68, § 43.
25-1264. Repealed. Laws 1951, c. 68, § 43.
25-1265. Repealed. Laws 1951, c. 68, § 43.
25-1266. Repealed. Laws 1951, c. 68, § 43.
25-1267. Repealed. Laws 1951, c. 68, § 43.
25-1267.01. Repealed. Laws 1982, LB 716, § 4.
25-1267.02. Repealed. Laws 1982, LB 716, § 4.
25-1267.03. Repealed. Laws 1982, LB 716, § 4.
25-1267.04. Repealed. Laws 1982, LB 716, § 4.
25-1267.05. Repealed. Laws 1982, LB 716, § 4.
25-1267.06. Repealed. Laws 1982, LB 716, § 4.
25-1267.07. Repealed. Laws 1982, LB 716, § 4.
25-1267.08. Repealed. Laws 1982, LB 716, § 4.
25-1267.09. Repealed. Laws 1982, LB 716, § 4.
25-1267.10. Repealed. Laws 1982, LB 716, § 4.
25-1267.11. Repealed. Laws 1982, LB 716, § 4.
25-1267.12. Repealed. Laws 1982, LB 716, § 4.
25-1267.13. Repealed. Laws 1982, LB 716, § 4.
25-1267.14. Repealed. Laws 1982, LB 716, § 4.
25-1267.15. Repealed. Laws 1982, LB 716, § 4.
25-1267.16. Repealed. Laws 1982, LB 716, § 4.
25-1267.17. Repealed. Laws 1982, LB 716, § 4.
25-1267.18. Repealed. Laws 1982, LB 716, § 4.
25-1267.19. Repealed. Laws 1982, LB 716, § 4.
25-1267.20. Repealed. Laws 1982, LB 716, § 4.
25-1267.21. Repealed. Laws 1982, LB 716, § 4.
25-1267.22. Repealed. Laws 1982, LB 716, § 4.
25-1267.23. Repealed. Laws 1982, LB 716, § 4.
25-1267.24. Repealed. Laws 1982, LB 716, § 4.
25-1267.25. Repealed. Laws 1982, LB 716, § 4.
25-1267.26. Repealed. Laws 1982, LB 716, § 4.
25-1267.27. Repealed. Laws 1982, LB 716, § 4.
25-1267.28. Repealed. Laws 1982, LB 716, § 4.
25-1267.29. Repealed. Laws 1982, LB 716, § 4.
25-1267.30. Repealed. Laws 1982, LB 716, § 4.
25-1267.31. Repealed. Laws 1982, LB 716, § 4.
25-1267.32. Repealed. Laws 1982, LB 716, § 4.
25-1267.33. Repealed. Laws 1982, LB 716, § 4.
25-1267.34. Repealed. Laws 1982, LB 716, § 4.
25-1267.35. Repealed. Laws 1982, LB 716, § 4.
25-1267.36. Repealed. Laws 1982, LB 716, § 4.
25-1267.37. Repealed. Laws 1982, LB 716, § 4.
25-1267.38. Repealed. Laws 1982, LB 716, § 4.
25-1267.39. Repealed. Laws 1982, LB 716, § 4.
25-1267.40. Repealed. Laws 1982, LB 716, § 4.
25-1267.41. Repealed. Laws 1982, LB 716, § 4.
25-1267.42. Repealed. Laws 1982, LB 716, § 4.

Section

(i) UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT

25-12,112. Admissibility of reproduced records in evidence; destruction of records; approval.
25-12,113. Sections, how construed.
25-12,114. Act, how cited.

(j) UNIFORM COMPOSITE REPORTS AS EVIDENCE ACT

25-12,115. Report or finding admissible.
25-12,116. Cross-examination by adverse party.
25-12,117. Notice; copy of report or finding.
25-12,118. Sections, how construed.
25-12,119. Act, how cited.

(k) HOSPITAL RECORDS

25-12,120. Hospital records, examination, and inspection; hospital medical staff committee; hospitalization utilization committee.
25-12,121. Hospital medical staff committee; hospital utilization committee; extended care facility utilization committee; recommendations or orders; liability for damages.
25-12,122. Repealed. Laws 1975, LB 279, § 75.

(l) HEALTH PRACTITIONER PEER REVIEW COMMITTEE

25-12,123. Peer review committee; proceedings and records; testimony; use in civil actions; limitation.

(m) STATEMENTS FROM INJURED PERSONS

25-12,124. Statement, defined.
25-12,125. Rebuttable presumption; when.
25-12,126. Sections, how construed.

(a) COMPETENCY AND PRIVILEGES OF WITNESSES

25-1201 Repealed. Laws 1975, LB 279, § 75.

25-1202 Repealed. Laws 1975, LB 279, § 75.

25-1203 Repealed. Laws 1975, LB 279, § 75.

25-1204 Repealed. Laws 1975, LB 279, § 75.

25-1205 Repealed. Laws 1975, LB 279, § 75.

25-1206 Repealed. Laws 1975, LB 279, § 75.

25-1207 Repealed. Laws 1975, LB 279, § 75.

25-1208 Repealed. Laws 1975, LB 279, § 75.

25-1209 Witnesses; answer subjecting to civil liability; not privileged.

A witness is not excused from answering a question upon the mere ground that he would be thereby subject to a civil liability.

Source: R.S.1867, Code § 336, p. 450; R.S.1913, § 7901; C.S.1922, § 8843; C.S.1929, § 20-1209.

25-1210 Witnesses; answer subjecting to criminal liability; disgracing answer; privilege.

When the matter sought to be elicited would tend to render the witness criminally liable or to expose him or her to public ignominy, the witness is not compelled to answer, except as provided in section 27-609.

Source: R.S.1867, Code § 337, p. 450; R.S.1913, § 7902; C.S.1922, § 8844; C.S.1929, § 20-1210; R.S.1943, § 25-1210; Laws 2003, LB 19, § 2.

Cross References

For privilege of immunity in proceeding for discovery of property, see section 25-1567.

In dissolution action, trial court's ruling allowing wife to invoke the privilege against self-incrimination was supported by this section. Ritchey v. Ritchey, 208 Neb. 100, 302 N.W.2d 372 (1981).

In determining whether the testimony of a witness who had pleaded guilty to a similar charge but had not been sentenced, who invoked the privilege of self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the creditability of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. State v. Bittner, 188 Neb. 298, 196 N.W.2d 186 (1972).

Privilege of refusing to answer may be asserted at time witness is confronted with question or interrogatory. State ex rel. Beck v. Lush, 168 Neb. 367, 95 N.W.2d 695 (1959).

Privilege of witness to refuse to answer on ground answer may tend to incriminate him or expose him to public ignominy must be timely made or it will be deemed to have been waived. State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937).

Questions tending to incriminate or expose witness to public ignominy were improper. Pricer v. Lincoln Gas & Elec. Co., 111 Neb. 209, 196 N.W. 150 (1923).

If witness testified to part, he waives privilege as to whole transaction. Lombard v. Mayberry, 24 Neb. 674, 40 N.W. 271 (1888).

(b) ADMISSIBILITY AND CONSTRUCTION OF EVIDENCE

25-1211 Witnesses; credibility; impeachment.

Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility.

Source: R.S.1867, Code § 330, p. 450; R.S.1913, § 7903; C.S.1922, § 8845; C.S.1929, § 20-1211.

State was permitted on cross-examination to interrogate accused as to his prior criminal record. O'Connor v. State, 123 Neb. 471, 243 N.W. 650 (1932).

Evidence of writings made during trial as a basis of comparison for determination of disputed documents was properly admitted. In re Estate of Husa, 121 Neb. 67, 236 N.W. 177 (1931).

Record of conviction may be received to lessen credibility of witness, but such record is not conclusive. Reed v. State, 66 Neb. 184, 92 N.W. 321 (1902).

Previous inconsistent statements of witness may be shown, where proper foundation therefor has been laid. Omaha Loan & Trust Co. v. Douglas County, 62 Neb. 1, 86 N.W. 936 (1901); Tatum v. State, 61 Neb. 229, 85 N.W. 40 (1901).

Evidence of reputation of witness should be confined to reputation at place of residence. Faulkner v. Gilbert, 61 Neb. 602, 85 N.W. 843 (1901).

The record of conviction of an offense below the grade of a felony is not admissible to affect the credibility of a witness. YMCA of Lincoln v. Rawlings, 60 Neb. 377, 83 N.W. 175 (1900).

25-1212 Repealed. Laws 1951, c. 62, § 5.

25-1213 Notarial protest as evidence of dishonor; bill of exchange or promissory note.

The usual protest by a notary public, without proof of his signature or notarial seal, is evidence of the dishonor and notice of a bill of exchange or promissory note.

Source: R.S.1867, Code § 349, p. 452; R.S.1913, § 7905; C.S.1922, § 8847; C.S.1929, § 20-1213.

Certificate of notary is evidence of notice as well as protest. Williams v. Parks, 63 Neb. 747, 89 N.W. 395 (1902).

25-1214 Repealed. Laws 1975, LB 279, § 75.

25-1215 Repealed. Laws 1975, LB 279, § 75.

25-1216 Evidence; instrument; written and printed matter; writing controls.

When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent.

Source: R.S.1867, Code § 340, p. 451; R.S.1913, § 7908; C.S.1922, § 8850; C.S.1929, § 20-1216.

Cross References

Commercial paper, see section 3-114, Uniform Commercial Code.

In a typed contract, writing subsequent to the typing controls where there is a conflict between the typed and written provisions thereof. Spencer-O'Neill House, Inc. v. Denbeck, 196 Neb. 456, 243 N.W.2d 767 (1976).

Typewriting controls printed form where two are inconsistent. Jacobsen v. Farnham, 155 Neb. 776, 53 N.W.2d 917 (1952).

Typewriting is writing within the contemplation of the statute. Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N.W.2d 295 (1941); New Masonic Temple Assn. v. Globe Indemnity Co., 134 Neb. 731, 279 N.W. 475 (1938).

Sewer contractor could recover for sheeting lumber left in trench by city engineer's order, where payment was provided for in specifications, though contract provided no extras would be allowed for sheeting left in trench. Petersen v. City of Omaha, 120 Neb. 219, 231 N.W. 763 (1930).

Where first paragraph of conditions of builder's bond is in typewriting complete within itself, and inconsistent provisions are in fine print as part of blank form evidently not intended to be used, typewritten part controls. American Surety Co. v. School Dist. No. 64 of Douglas Co., 117 Neb. 6, 219 N.W. 583 (1928).

Where printed part of land contract says "good title of record," but typewritten part says "title satisfactory to attorney" of purchaser, latter prevails. Flower v. Coe, 111 Neb. 296, 196 N.W. 139 (1923).

25-1217 Agreements; construction of terms.

When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

Source: R.S.1867, Code § 341, p. 451; R.S.1913, § 7909; C.S.1922, § 8851; C.S.1929, § 20-1217.

1. Construction
2. Reformation

1. Construction

The intention of the parties to an accord and satisfaction is a question of law where the written contract is couched in clear and unambiguous terms and where the evidence creates no conflict as to intention. Meyers v. Frohm Holdings, Inc., 211 Neb. 329, 318 N.W.2d 716 (1982).

In determining the meaning of a written contract, where it is in doubt and dispute, the court will consider all facts and circumstances leading up to and attending its execution, and consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. Younker Brothers, Inc. v. Westroads, Inc., 196 Neb. 168, 241 N.W.2d 679 (1976).

The meaning of an ambiguity in a contract is a matter of fact to be determined as other questions of fact and summary judgment is precluded. Grantham v. General Tel. Co., 191 Neb. 21, 213 N.W.2d 439 (1973).

Contract for treatment of house for termites was not subject to construction under this section. Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N.W.2d 458 (1956).

Where one party uses language to which it attaches a certain meaning, and that meaning is made known to the other party and no objection is made thereto, the language will be construed according to the meaning of the party using it. Platte Valley Bank v. Lemke, 141 Neb. 218, 3 N.W.2d 396 (1942).

An agreement that is vague and ambiguous in its terms may be explained by other evidence. Jensen v. Romigh, 133 Neb. 71, 274 N.W. 199 (1937).

When terms of an agreement have been intended in a different sense by the parties to it, that sense will prevail against either party in which he had reason to suppose the other understood it. Elvidge v. Brant, 131 Neb. 1, 267 N.W. 169 (1936); Eagle Indemnity Co. v. Village of Creston, 129 Neb. 850, 263 N.W. 220 (1935).

Evidence of oral agreement is inadmissible where written contract is certain. Smith v. Bailey, 105 Neb. 754, 181 N.W. 926 (1921).

Technical terms should be given nontechnical meaning where one party has reason to suppose other party so understood them. Richey v. Omaha & Lincoln Ry. & Light Co., 100 Neb. 847, 161 N.W. 575 (1917).

Construction of terms of insurance as to word "dwelling," was adopted in accordance with sense that insurer had reason to believe insured understood it. Hamilton v. North American Accident Ins. Co., 99 Neb. 579, 157 N.W. 111 (1916).

Contract prepared by one party should be given construction that party preparing it supposed other would give it. Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N.W. 295 (1915).

Section was applied to a land contract where parties intended a different meaning. Edmiston v. Hupp, 98 Neb. 84, 152 N.W. 296 (1915).

When agreement between the parties is indefinite and uncertain and intended in a different sense by the parties, it should be construed in the sense plaintiff had reason to suppose defendant understood it to have. Campbell v. Hobbs, 97 Neb. 833, 151 N.W. 929 (1915).

Applied in action for purchase price of land where contract was based on letters. Pottratz v. Piper, 95 Neb. 145, 145 N.W. 265 (1914).

Section applied to stipulation for settlement of controversy. Southern Realty Co. v. Hannon, 89 Neb. 802, 132 N.W. 533 (1911).

Principal is bound by statements of agent as to meaning of terms inducing contract. Fairbanks, Morse & Co. v. Burgert, 88 Neb. 376, 129 N.W. 557 (1911).

Agreement is legal if other party did not understand there was agreement not to prosecute. Griffin v. Chriswisser, 84 Neb. 196, 120 N.W. 909 (1909).

Assignment fell within provisions of this section. Barnes v. Sim, 80 Neb. 213, 117 N.W. 881 (1908).

Where bank president gave customer personal note in lieu of obligation of bank on certificate of deposit, bank was bound by understanding of customer that document was liability of bank. Patterson v. First National Bank of Humboldt, 78 Neb. 228, 110 N.W. 721 (1907).

Guaranty construed to cover any amount that person guaranteed failed to pay to the extent of specified amount. Standard Oil Co. v. Hoese, 57 Neb. 665, 78 N.W. 292 (1899).

Oral evidence to vary or control written agreement is inadmissible, in absence of fraud, ambiguity, or mistake. State Bank of Ceresco v. Belk, 56 Neb. 710, 77 N.W. 58 (1898); Sylvester v. Carpenter Paper Co., 55 Neb. 621, 75 N.W. 1092 (1898).

Terms of health certificate, in application for insurance, construed against insurer. American Order of Prot. v. Stanley, 5 Neb. Unof. 132, 97 N.W. 467 (1903).

Must be construed as party or agent understood it when he signed. People's B., L. & S. Assn. v. Klauber, 1 Neb. Unof. 676, 95 N.W. 1072 (1901).

2. Reformation

Section was applied in case where automobile liability insurance policy was reformed to conform to original contract that it should be issued to cover plaintiff's son as driver. Davis v. Highway Motor Underwriters, 120 Neb. 734, 235 N.W. 325 (1931).

In action for deficiency judgment, grantee, under deed in which he "assumes" mortgage, may show by parol that understanding was he was not to be personally liable. Durland Trust Co. v. Payne, 106 Neb. 135, 182 N.W. 1016 (1921).

Reformation may be had in equity to express agreement as understood. Blair v. Kingman Imp. Co., 82 Neb. 344, 117 N.W. 773 (1908).

25-1218 Works of history, science, or art; presumptive evidence.

Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest.

Source: R.S.1867, Code § 342, p. 451; R.S.1913, § 7910; C.S.1922, § 8852; C.S.1929, § 20-1218.

Text books on surgery are not competent evidence except as to matters of general notoriety or interest. Van Skike v. Potter, 53 Neb. 28, 73 N.W. 295 (1897).

Books of science or art are competent evidence when shown to be reputable or standard works. Sioux City & Pacific R. R. Co. v. Finlayson, 16 Neb. 578, 20 N.W. 860 (1884).

25-1219 Repealed. Laws 1975, LB 279, § 75.

25-1220 Handwriting; proof by comparison; experts; jury.

Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writing of the same person which is proved to be genuine.

Source: R.S.1867, Code § 344, p. 451; R.S.1913, § 7912; C.S.1922, § 8854; C.S.1929, § 20-1220.

1. Comparison
2. Miscellaneous

1. Comparison

This section permits comparisons between known genuine writing and the disputed writing to be made by a jury either with or without the aid of experts. Aetna Cas. & Surety Co. v. Nielsen, 222 Neb. 92, 382 N.W.2d 328 (1986).

In case tried to judge, handwriting may be compared by him with genuine writing of the same person. First Nat. Bank & Trust Co. v. Cutright, 189 Neb. 805, 205 N.W.2d 542 (1973).

Court may admit writings made during progress of trial as a basis for comparison. In re Estate of Husa, 121 Neb. 67, 236 N.W. 177 (1931).

Expert testimony of handwriting based wholly on comparison of hands is in nature of circumstantial evidence. Wakeley v. State, 118 Neb. 346, 225 N.W. 42 (1929).

Instrument and signature introduced in evidence was sufficient basis for comparison with signature in question. Harrington v. Vogle, 103 Neb. 677, 173 N.W. 699 (1919).

Where execution of contract was denied, introduction of genuine signatures of deceased in evidence for comparison raised question of fact for jury. Wells v. Cochran, 78 Neb. 612, 111 N.W. 381 (1907).

Proved genuine writings should be admitted in evidence for the purpose of permitting the jury as well as experts to make the necessary comparison. First Nat. Bank of Madison v. Carson, 48 Neb. 763, 67 N.W. 779 (1896).

Comparison may be made by experts or by jury. Grand Island Banking Co. v. Shoemaker, 31 Neb. 124, 47 N.W. 696 (1891).

Only genuine signature admitted or proven can be submitted to jury for comparison with disputed writings. Link v. Reeves, 3 Neb. Unof. 383, 91 N.W. 506 (1902).

2. Miscellaneous

Opinion of handwriting experts on issue of forgery in civil action may be used to contradict testimony of witnesses who saw note executed, and may be sufficient to overturn same. Bank of Commerce of Louisville v. McCarty, 119 Neb. 795, 231 N.W. 34 (1930).

Refusal to permit cross-examination of expert on handwriting was not prejudicial. Schreiner v. Shanahan, 105 Neb. 525, 181 N.W. 536 (1921).

One familiar with handwriting of party denying alleged signature is competent to give opinion. First Nat. Bank of Omaha v. Lierman, 5 Neb. 247 (1876).

25-1221 Repealed. Laws 1975, LB 279, § 75.

25-1222 Private writing; when admissible without proof.

Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without further proof.

Source: R.S.1867, Code § 347, p. 452; R.S.1913, § 7914; C.S.1922, § 8856; C.S.1929, § 20-1222.

Letter in answer, if self explanatory, is admissible by itself. New Hampshire Trust Co. v. Korsmeyer Plumbing & Heating Co., 57 Neb. 784, 78 N.W. 303 (1899).

Memorandum made contemporaneously with the facts therein noted, when supplemented by oath of party who made it, is admissible as independent evidence. Imhoff v. Richards, 48 Neb. 590, 67 N.W. 483 (1896).

Proof of preexistence and search for written evidence is essential to admission of secondary evidence. Samuelson v. Gale Mfg. Co., 1 Neb. Unof. 815, 95 N.W. 809 (1901).

25-1222.01 Advance payment by person or corporation to injured person; not admission against interest; credit for payment; not admissible as evidence at trial.

No advance payments or partial payment of damages made by an insurance company or other person, firm, trust, or corporation as an accommodation to an injured person or on his behalf to others or to the heirs at law or dependents of a deceased person made under any liability insurance policy, or other voluntary payments made because of an injury, death claim, property loss, or potential claim against any insured or other person, firm, trust, or corporation thereunder shall be construed as an admission of liability by the insured or other person, firm, trust, or corporation, or the payer's recognition of such liability, with respect to such injured or deceased person or with respect to any other claim arising from the same accident or event. Any such payments shall constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such injured or deceased person. In the event of a trial involving such a claim, the fact that such payments have been made shall not be admissible in evidence or brought to the attention of the jury, and the matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties.

Source: Laws 1967, c. 145, § 1, p. 442; Laws 1975, LB 560, § 1.

Under this section, a party is entitled to a credit on any judgment rendered against him or her for payments or partial payment of damages made on behalf of such party to an injured person. Maxwell v. Montey, 265 Neb. 335, 656 N.W.2d 617 (2003).

The language and the intent of this section, which provides that an insurance company is entitled to credit on any judgment rendered against an insured for any payments or partial payment of claimed damages made on behalf of such party to an injured person or on his or her behalf to others, include an assignee or subrogee of the injured person. Brockhaus v. Lambert, 259 Neb. 160, 608 N.W.2d 588 (2000).

An insurance company is entitled to credit on a judgment against its insured for payments of claimed damages made on behalf of the injured party to the assignee or subrogee of the injured party. Beeder v. Fleer, 211 Neb. 294, 318 N.W.2d 708 (1982).

Unless the context otherwise requires, an advance payment by an insurer pursuant to a medical payments coverage provision in its insured's automobile liability policy should be applied as a credit to damages awarded against the insured. Murrish v. Burkey, 1 Neb. App. 650, 510 N.W.2d 366 (1993).

25-1222.02 Repealed. Laws 1982, LB 716, § 4.

(c) MEANS OF PRODUCING WITNESSES

25-1223 Subpoena; issuance; by whom served; return; costs.

The clerks of the several courts and judges of the county courts shall on application of any person having a cause or any matter pending in court, issue

a subpoena for witnesses under the seal of the court, inserting all the names required by the applicant in one subpoena, which may be served by any person not interested in the action, or by the sheriff, coroner or constable; but when served by any person other than a public officer, proof of service shall be shown by affidavit, but no costs of serving the same shall be allowed, except when served by an officer.

Source: R.S.1867, Code § 350, p. 452; R.S.1913, § 7915; C.S.1922, § 8857; C.S.1929, § 20-1223.

25-1224 Subpoena; to whom directed; duces tecum.

The subpoena shall be directed to the person therein named, requiring him to attend at a particular time and place, to testify as a witness; and it may contain a clause directing a witness to bring with him any book, writing or other thing under his control, which he is bound by law to produce as evidence.

Source: R.S.1867, Code § 351, p. 452; R.S.1913, § 7916; C.S.1922, § 8858; C.S.1929, § 20-1224.

A subpoena duces tecum for trial imposes a duty upon the witness to bring with him sought-after matter under his control that the law requires him to produce as evidence. City of Omaha v. American Theater Corp., 189 Neb. 441, 203 N.W.2d 155 (1973).

25-1225 Subpoena on taking deposition; by whom issued.

When the attendance of a witness before any officer authorized to take depositions is required the subpoena shall be issued by such officer.

Source: R.S.1867, Code § 352, p. 452; R.S.1913, § 7917; C.S.1922, § 8859; C.S.1929, § 20-1225.

25-1226 Subpoena; manner of service; time; return.

The subpoena shall be served either (1) personally or (2) by mailing a copy thereof by either registered or certified mail not less than six days before the trial day of the cause upon which said witness is required to attend. The person making such service shall make a return thereof showing the manner of service.

Source: R.S.1867, Code § 353, p. 452; R.S.1913, § 7918; Laws 1915, c. 148, § 2, p. 318; C.S.1922, § 8860; C.S.1929, § 20-1226; R.S. 1943, § 25-1226; Laws 1953, c. 69, § 1, p. 220; Laws 1957, c. 242, § 16, p. 830.

This section was cited as illustrative of service of process by registered mail. Blauvelt v. Beck, 162 Neb. 576, 76 N.W.2d 738 (1956).

25-1227 Witnesses in civil cases; compulsory attendance; distance required to travel; fees and expenses allowed.

(1) Witnesses in civil cases cannot be compelled to attend a trial out of the state where they are served or at a distance of more than one hundred miles from the place of their residence or from the place where they are served with a subpoena, unless within the same county. Witnesses in civil cases shall not be obliged to attend a deposition outside the county of their residence or outside the county where the subpoena is served.

(2) A district court or county court judge, for good cause shown, may, upon deposit with the clerk of the court of sufficient money to pay the legal fees and

mileage and reasonable expenses for hotel and meals of such a witness who attends at points so far removed from his or her residence as to make it reasonably necessary that such expenses be incurred, order a subpoena to issue requiring the trial attendance, but excluding a deposition appearance, of such witness from a greater distance within the state than that provided in subsection (1) of this section. Mileage shall be computed at the rate provided in section 81-1176. The subpoena shall show that it is issued under the provisions hereof. After the appearance of such witness in response to any such subpoena, the judge shall enter an order directing the payment to the witness from such deposit of such legal fees, mileage, and the actual expenses for hotel and meals incurred by such witness. If such deposit is not adequate for such purpose, the judge shall direct the party procuring the issuance of such subpoena to pay to such witness the deficiency.

(3) No other subpoena except from the district court or county court can compel a witness to attend for examination on the trial of a civil action, except in the county of his or her residence, nor to attend to give his or her deposition out of the county where he or she resides, or where he or she may be when the subpoena is served upon him or her.

Source: R.S.1867, Code § 354, p. 452; R.S.1913, § 7919; C.S.1922, § 8861; C.S.1929, § 20-1227; R.S.1943, § 25-1227; Laws 1963, c. 142, § 1, p. 521; Laws 1981, LB 204, § 38; Laws 1998, LB 234, § 5.

Section is valid and constitutional. Brannan v. Chicago & N. W. Ry. Co., 118 Neb. 503, 223 N.W. 21, 225 N.W. 474 (1929).

Mileage is not allowed except for distance actually and necessarily traveled. Smith v. Bartlett, 78 Neb. 359, 110 N.W. 991 (1907).

This section and Neb. Ct. R. of Discovery 32(a)(3)(B) make distance and whether the witness can be reached by the court's subpoena power the conclusive test of availability, unless the proponent of the testimony arranges the unavailability. Burke v. Harman, 6 Neb. App. 309, 574 N.W.2d 156 (1998).

25-1228 Subpoena; duty of witness; privilege as to fees and expenses; return.

(1) Except as provided in subsection (2) of this section, a witness may demand his traveling fees, and fee for one day's attendance, when the subpoena is served upon him, and if the same be not paid the witness shall not be obliged to obey the subpoena. The fact of such demand and nonpayment shall be stated in the return.

(2) When a subpoena is issued at the request of any agency of state government, the witness shall not be entitled to demand his traveling fees and fee for one day's attendance but shall be required to obey the subpoena if, at the time of service upon him, he is furnished a statement prepared by the agency advising him of the rate of travel fees allowable, the fee for each day's attendance pursuant to the subpoena, and that he will be paid at such rates following his attendance.

Source: R.S.1867, Code § 355, p. 453; R.S.1913, § 7920; C.S.1922, § 8862; C.S.1929, § 20-1228; R.S.1943, § 25-1228; Laws 1976, LB 750, § 1.

Cross References

Witness fees, see section 33-139.

Section is not applicable to criminal cases. Huckins v. State, 61 Neb. 871, 86 N.W. 485 (1901).

25-1229 Subpoena; disobedience; refusal to testify or sign deposition; contempt.

Disobedience of a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required.

Source: R.S.1867, Code § 356, p. 453; R.S.1913, § 7921; C.S.1922, § 8863; C.S.1929, § 20-1229.

Justice of peace before whom deposition is taken may punish as contempt refusal to be sworn or to answer questions. In re Hammond, 83 Neb. 636, 120 N.W. 203 (1909).

Notary public may commit for contempt witness refusing to answer. Dogge v. State, 21 Neb. 272, 31 N.W. 929 (1887).

25-1230 Subpoena; disobedience; attachment; undertaking; rule to show cause.

When a witness fails to attend in obedience to a subpoena, except in case of a demand and failure to pay his or her fee, the court or officer before whom his or her attendance is required may issue an attachment to the sheriff or coroner of the county commanding him or her to arrest and bring the person therein named before the court or officer, at a time and place to be fixed in the attachment, to give his or her testimony and answer for the contempt. If the attachment is not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking with surety for his or her appearance. Such sum shall be endorsed on the back of the attachment, and if no sum is so fixed and endorsed, it shall be one hundred dollars. If the witness is not personally served, the court may, by a rule, order him or her to show cause why attachment should not issue against him or her.

Source: R.S.1867, Code § 357, p. 453; R.S.1913, § 7922; C.S.1922, § 8864; C.S.1929, § 20-1230; R.S.1943, § 25-1230; Laws 1988, LB 1030, § 18.

Court upon own motion, or on oral request of prosecutor, may issue attachment. Hanika v. State, 87 Neb. 845, 128 N.W. 526 (1910).

Power to punish for contempt is inherent in every court having common law jurisdiction. Kregel v. Bartling, 23 Neb. 848, 37 N.W. 668 (1888).

25-1231 Subpoena; disobedience; refusal to testify or sign deposition; punishment of witness for contempt.

The punishment for the contempt mentioned in section 25-1229 shall be as follows: When the witness fails to attend in obedience to the subpoena, except in case of a demand and failure to pay his fees, the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases, the court or officer may fine the witness in a sum not exceeding fifty dollars nor less than five dollars, or may imprison him in the county jail, there to remain until he shall submit to be sworn, to testify or give his deposition. The fine imposed by the court shall be paid into the county treasurer, and that imposed by the officer shall be for the use of the party for whom the witness was subpoenaed. The witness shall also be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, to testify or give his deposition.

Source: R.S.1867, Code § 358, p. 453; R.S.1913, § 7923; C.S.1922, § 8865; C.S.1929, § 20-1231.

Notary, on refusal of witness to obey subpoena, may impose fine; but may not commit for contempt. In re Butler, 76 Neb. 267, 107 N.W. 572 (1906).

25-1232 Subpoena; disobedience; attachment; commitment; form; to whom directed.

Every attachment for the arrest or order of commitment to prison of a witness by a court or officer pursuant to sections 25-1230 and 25-1231 shall be under the seal of the court or officer, if he or she has an official seal, and shall specify particularly the cause of the arrest or commitment, and if the commitment is for refusing to answer a question, such question shall be stated in the order. Such order of commitment may be directed to the sheriff or coroner of the county where such witness resides or may be at the time and shall be executed by committing him or her to the jail of such county and delivering a copy of the order to the jailer.

Source: R.S.1867, Code § 360, p. 454; R.S.1913, § 7924; C.S.1922, § 8866; C.S.1929, § 20-1232; R.S.1943, § 25-1232; Laws 1988, LB 1030, § 19.

Record of conviction of contempt by refusal to testify must state questions asked that witness refused to answer. Tastee Inn, Inc. v. Beatrice Foods Co., Inc., 167 Neb. 264, 92 N.W.2d 664 (1958).

When a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment. Wilcox v. State, 46 Neb. 402, 64 N.W. 1072 (1895).

25-1233 Prisoner; examination; deposition; production order.

(1) A person confined in any prison in this state shall, by order of any court of record, be produced for oral examination in the county where he or she is imprisoned. In all other cases his or her examination must be by deposition.

(2) In civil matters, the court shall notify the Department of Correctional Services of any production order, in which a confined person is the subject, at least fifteen days before the required production. The court shall allow the department to present evidence relating to public safety and security concerns associated with the production of the confined person prior to the required production date. The party who moved for the production order shall be allowed to respond. Based on evidence presented, the court may rescind its production order. If the confined person is produced pursuant to court order, the party who moved for the production order shall pay to the department the actual cost of security and transportation arrangements incurred by the department related to such production.

Source: R.S.1867, Code § 361, p. 454; R.S.1913, § 7925; C.S.1922, § 8867; C.S.1929, § 20-1233; R.S.1943, § 25-1233; Laws 1997, LB 94, § 1.

The accused in a criminal prosecution has a right to compulsory process to compel the attendance of witnesses in his behalf; however, a criminal defendant does not possess an absolute constitutional right to demand the personal attendance of a prisoner witness incarcerated outside the county of the venue of trial. As a result, this section does not violate the compulsory process clauses of the U.S. and Nebraska Constitutions. State v. Stott, 243 Neb. 967, 503 N.W.2d 822 (1993).

Deposition of a person confined in a penal institution may be taken by the defendant in a criminal action. Rains v. State, 173 Neb. 586, 114 N.W.2d 399 (1962).

Question of whether inmate of penitentiary should be produced for oral examination raised but not decided. Garcia v. State, 159 Neb. 571, 68 N.W.2d 151 (1955).

25-1234 Prisoner; deposition; manner of taking.

While a prisoner's deposition is being taken he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition.

Source: R.S.1867, Code § 362, p. 454; R.S.1913, § 7926; C.S.1922, § 8868; C.S.1929, § 20-1234.

25-1235 Subpoena; nonresident witness; immunity from service of summons.

A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county, while going, returning or attending in obedience to a subpoena.

Source: R.S.1867, Code § 363, p. 454; R.S.1913, § 7927; C.S.1922, § 8869; C.S.1929, § 20-1235.

Nonresident is privileged from service while coming to, going from, and attending trial; and has reasonable time to prepare for his return. Linton v. Cooper, 54 Neb. 438, 74 N.W. 842 (1898), judgment affirmed in 54 Neb. 443, 74 N.W. 961 (1898).

Exemption is a personal privilege which may be waived. Mayer v. Nelson, 54 Neb. 434, 74 N.W. 841 (1898).

25-1236 Witnesses; duty to testify; privilege as to fees.

At the commencement of each day, after the first day, a witness may demand his fees for that day's attendance in obedience to a subpoena, and if the same be not paid he shall not be required to remain.

Source: R.S.1867, Code § 364, p. 454; R.S.1913, § 7928; C.S.1922, § 8870; C.S.1929, § 20-1236.

Cross References

Witness fees, see section 33-139.

Continuance should be denied where no showing is made of unavoidable absence, or that testimony can be secured. Home Fire Ins. Co. v. Johnson, 43 Neb. 71, 61 N.W. 84 (1894).

Either party may subpoena the other. Dogge v. State, 21 Neb. 272, 31 N.W. 929 (1887).

25-1237 Repealed. Laws 1975, LB 279, § 75.

25-1238 Subpoena; witness avoiding service; powers of officer.

If a witness conceals himself, or in any other manner attempts to avoid being personally served with a subpoena any sheriff or constable, having the subpoena, may use all necessary and proper means to serve the same, and for that purpose may break into any building or other place where the witness is to be found, having first made known his business and demanded admittance.

Source: R.S.1867, Code § 397, p. 460; R.S.1913, § 7930; C.S.1922, § 8872; C.S.1929, § 20-1238.

25-1239 Subpoena to party; failure to attend and testify; continuance; costs.

In addition to the above remedies, if a party to a suit in his own right on being duly subpoenaed, failed to appear and give testimony, the other party may, at his option, have a continuance of the cause as in cases of other witnesses, and at the cost of the delinquent.

Source: R.S.1867, Code § 398, p. 460; R.S.1913, § 7931; C.S.1922, § 8873; C.S.1929, § 20-1239.

(d) EVIDENCE; HOW TAKEN AND PROCURED

25-1240 Testimony; how taken.

The testimony of witnesses may be taken in four modes: (1) By affidavit; (2) by deposition; (3) by oral examination; and (4) by videotape of an examination conducted prior to the time of trial for use at trial in accordance with procedures provided by law.

Source: R.S.1867, Code § 366, p. 454; R.S.1913, § 7932; C.S.1922, § 8874; C.S.1929, § 20-1240; R.S.1943, § 25-1240; Laws 1973, LB 504, § 2.

A document subscribed and sworn to before a person not authorized by law to administer oaths is not an affidavit and is void as such. State v. Haase, 247 Neb. 817, 530 N.W.2d 617 (1995).

''Testimony'' means oral evidence. Woolworth v. Parker, 57 Neb. 417, 77 N.W. 1090 (1899); Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, 77 N.W. 346 (1898).

The unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts. Schroeder v. Barnes, 5 Neb. App. 811, 565 N.W.2d 749 (1997).

25-1241 Affidavit, defined.

An affidavit is a written declaration under oath, made without notice to the adverse party.

Source: R.S.1867, Code § 367, p. 455; R.S.1913, § 7933; C.S.1922, § 8875; C.S.1929, § 20-1241.

An unsigned affidavit which was not offered until the day of the hearing on the summary judgment motion was properly excluded by the trial court. Medley v. Davis, 247 Neb. 611, 529 N.W.2d 58 (1995).

Requirement met where affiant acknowledged to authorized official that he was affiant and then signed affidavit in official presence. State v. Howard, 184 Neb. 274, 167 N.W.2d 80 (1969).

An affidavit must bear upon its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same. Kennedy & Parsons Co. v. Schmidt, 152 Neb. 637, 42 N.W.2d 191 (1950).

Document sworn to before an officer not authorized to administer an oath was not an affidavit. Lanning v. Haases, 89 Neb. 19, 130 N.W. 1008 (1911).

Affidavit drawn by counsel, in language which is ambiguous, will be construed strongly against party in whose behalf it is offered. Nebraska Moline Plow Co. v. Fuehring, 52 Neb. 541, 72 N.W. 1003 (1897).

An affidavit is a declaration in writing sworn to by a party before some person who has authority to administer oaths. Bantley v. Finney, 43 Neb. 794, 62 N.W. 213 (1895).

Sworn statements in question-and-answer format, which were created by questioning an affiant under oath in a nonadversarial context and having a court reporter record the exchange, are written declarations within the purview of this section. Thorne v. Omaha Pub. Power Dist., 2 Neb. App. 437, 510 N.W.2d 575 (1994).

25-1242 Deposition, defined.

A deposition is a written declaration under oath or a videotape taken under oath in accordance with procedures provided by law, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine, or made upon written interrogatories.

Source: R.S.1867, Code § 368, p. 455; R.S.1913, § 7934; C.S.1922, § 8876; C.S.1929, § 20-1242; R.S.1943, § 25-1242; Laws 1973, LB 504, § 3.

25-1243 Oral examination, defined.

An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

Source: R.S.1867, Code § 369, p. 455; R.S.1913, § 7935; C.S.1922, § 8877; C.S.1929, § 20-1243.

The unsupported assertions of attorneys during court proceedings do not establish the facts asserted unless the other appropriate parties stipulate to such facts. Schroeder v. Barnes, 5 Neb. App. 811, 565 N.W.2d 749 (1997).

25-1244 Affidavit; when used.

An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law.

Source: R.S.1867, Code § 370, p. 455; R.S.1913, § 7936; C.S.1922, § 8878; C.S.1929, § 20-1244.

1. Scope
2. Admission in evidence

3. Miscellaneous

1. Scope

A special appearance, which is preliminary and collateral to determining the merits of an action, is a pleading within this section, and thus, in a hearing on a special appearance, an affidavit may be used to prove or disprove the factual basis for a court's assertion or exercise of personal jurisdiction over a defendant. Williams v. Gould, Inc., 232 Neb. 862, 443 N.W.2d 577 (1989).

In judicial sale confirmation hearing, the trial court has broad discretion in determining if affidavits should be considered. Nebraska State Bank & Trust Co. v. Wright, 213 Neb. 822, 331 N.W.2d 535 (1983).

An affidavit may be used to support a special appearance. Erdman v. National Indemnity Co., 180 Neb. 133, 141 N.W.2d 753 (1966).

Section applied in application for liquor license. Benson v. Olson, 97 Neb. 29, 149 N.W. 51 (1914).

Affidavit may be used to impeach officer's return. Johnson v. Carpenter, 77 Neb. 49, 108 N.W. 161 (1906).

Notary public who is an attorney is not permitted to take affidavit of his client for purpose of procuring an attachment. Horkey v. Kendall, 53 Neb. 522, 73 N.W. 953 (1898).

Jurat is no part of affidavit; fact that it was sworn to may be shown by parol. Bantley v. Finney, 43 Neb. 794, 62 N.W. 213 (1895).

Only affidavits verifying pleadings are part of record proper. Frederick v. Ballard, 16 Neb. 559, 20 N.W. 870 (1884).

Affidavit may be used to prove service of process; is no part of bill of exceptions unless presented to trial court. State v. Fawcett, 2 Neb. Unof. 243, 96 N.W. 219 (1901).

2. Admission in evidence

Although an affidavit may be used to prove service of process, such affidavit will not be considered on an appeal of a cause to the Supreme Court unless it was offered in evidence in the trial court and was preserved in and made a part of the bill of exceptions. T. S. McShane Co., Inc., v. Dominion Constr. Co., 203 Neb. 318, 278 N.W.2d 596 (1979).

Proof of service by mail must include a receipt signed by the addressee, or other satisfactory evidence of personal delivery, and an affidavit to be considered on appeal must be offered in evidence and preserved in the bill of exceptions. Anderson v. Autocrat Corp., 194 Neb. 278, 231 N.W.2d 560 (1975).

Affidavits that nonresident firm of attorneys did not have a usual place of doing business and did not maintain an office in this state were admissible in evidence in support of special appearance. State ex rel. Johnson v. Tautges, Rerat & Welch, 146 Neb. 439, 20 N.W.2d 232 (1945).

Affidavit is not admissible to establish facts material to trial of an issue. Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N.W.2d 185 (1943).

On hearing of an application for a moratory stay after decree of foreclosure of a mortgage, affidavits may be admitted in evidence as to value of mortgaged land. First Trust Co. of Lincoln v. Hickey, 130 Neb. 351, 264 N.W. 888 (1936).

Affidavit which fails to disclose county of officer taking is inadmissible. Albers v. Kozeluh, 68 Neb. 522, 94 N.W. 521 (1903), affirmed on rehearing 68 Neb. 529, 97 N.W. 646 (1903).

Affidavits may be used at hearing on motion. Hamer v. McKinley-Lanning Loan & Trust Co., 52 Neb. 705, 72 N.W. 1041 (1897).

3. Miscellaneous

Affidavit of publication may be impeached by competent proof. Rosewater v. Pinzenscham, 38 Neb. 835, 57 N.W. 563 (1894).

25-1245 Affidavit; before whom made; attorney at law not disqualified.

An affidavit may be made in and out of this state before any person authorized to take depositions, and must be authenticated in the same way. An attorney at law who is attorney for a party in any proceedings in any court of this state shall not be disqualified as the person before whom the affidavit is made by reason of such representation.

Source: R.S.1867, Code § 371, p. 455; R.S.1913, § 7937; C.S.1922, § 8879; C.S.1929, § 20-1245; R.S.1943, § 25-1245; Laws 1965, c. 121, § 1, p. 457.

Affidavits are not improper or excludable because notarized by one who is attorney of record. Frazier, Inc. v. 20th Century Builders, Inc., 188 Neb. 618, 198 N.W.2d 478 (1972).

Affidavits verified before attorneys for state held competent after being reverified before authorized officer. Baker v. State, 112 Neb. 654, 200 N.W. 876 (1924).

Attorney in case is not competent to act as notary in taking affidavit to be used on hearing. Maroosis v. Catalano, 98 Neb. 284, 152 N.W. 559 (1915); Horkey v. Kendall, 53 Neb. 522, 73 N.W. 953 (1898).

Objections to use of affidavit as evidence are not required to be made in the manner provided for interposing objections to depositions. Malcom Savings Bank v. Cronin, 80 Neb. 231, 116 N.W. 150 (1908).

Affidavit must have attached certificate of officer before whom taken that oath was administered. Sebesta v. Supreme Court of Honor, 77 Neb. 249, 109 N.W. 166 (1906).

Affidavit taken before notary of a sister state or foreign government was properly received. Browne v. Palmer, 66 Neb. 287, 92 N.W. 315 (1902).

There must be authentication by both seal and signature. Holmes v. Crooks, 56 Neb. 466, 76 N.W. 1073 (1898).

25-1246 Repealed. Laws 1951, c. 68, § 43.

25-1247 Repealed. Laws 1951, c. 68, § 43.

25-1248 Repealed. Laws 1951, c. 68, § 43.

25-1249 Repealed. Laws 1951, c. 68, § 43.

25-1250 Repealed. Laws 1951, c. 68, § 43.

25-1251 Repealed. Laws 1951, c. 68, § 43.

25-1252 Repealed. Laws 1951, c. 68, § 43.

25-1253 Repealed. Laws 1951, c. 68, § 43.

25-1254 Repealed. Laws 1951, c. 68, § 43.

25-1255 Repealed. Laws 1951, c. 68, § 43.

25-1256 Repealed. Laws 1951, c. 68, § 43.

25-1257 Repealed. Laws 1951, c. 68, § 43.

25-1258 Repealed. Laws 1951, c. 68, § 43.

25-1259 Repealed. Laws 1951, c. 68, § 43.

25-1260 Repealed. Laws 1951, c. 68, § 43.

25-1261 Repealed. Laws 1951, c. 68, § 43.

25-1262 Repealed. Laws 1951, c. 68, § 43.

25-1263 Repealed. Laws 1951, c. 68, § 43.

25-1264 Repealed. Laws 1951, c. 68, § 43.

25-1265 Repealed. Laws 1951, c. 68, § 43.

25-1266 Repealed. Laws 1951, c. 68, § 43.

25-1267 Repealed. Laws 1951, c. 68, § 43.

25-1267.01 Repealed. Laws 1982, LB 716, § 4.

25-1267.02 Repealed. Laws 1982, LB 716, § 4.

25-1267.03 Repealed. Laws 1982, LB 716, § 4.

25-1267.04 Repealed. Laws 1982, LB 716, § 4.

25-1267.05 Repealed. Laws 1982, LB 716, § 4.

25-1267.06 Repealed. Laws 1982, LB 716, § 4.

25-1267.07 Repealed. Laws 1982, LB 716, § 4.

25-1267.08 Repealed. Laws 1982, LB 716, § 4.

25-1267.09 Repealed. Laws 1982, LB 716, § 4.

25-1267.10 Repealed. Laws 1982, LB 716, § 4.

25-1267.11 Repealed. Laws 1982, LB 716, § 4.

25-1267.12 Repealed. Laws 1982, LB 716, § 4.

25-1267.13 Repealed. Laws 1982, LB 716, § 4.

25-1267.14 Repealed. Laws 1982, LB 716, § 4.

25-1267.15 Repealed. Laws 1982, LB 716, § 4.

25-1267.16 Repealed. Laws 1982, LB 716, § 4.

25-1267.17 Repealed. Laws 1982, LB 716, § 4.

25-1267.18 Repealed. Laws 1982, LB 716, § 4.

25-1267.19 Repealed. Laws 1982, LB 716, § 4.

25-1267.20 Repealed. Laws 1982, LB 716, § 4.

25-1267.21 Repealed. Laws 1982, LB 716, § 4.

25-1267.22 Repealed. Laws 1982, LB 716, § 4.

25-1267.23 Repealed. Laws 1982, LB 716, § 4.

25-1267.24 Repealed. Laws 1982, LB 716, § 4.

25-1267.25 Repealed. Laws 1982, LB 716, § 4.

25-1267.26 Repealed. Laws 1982, LB 716, § 4.

25-1267.27 Repealed. Laws 1982, LB 716, § 4.

25-1267.28 Repealed. Laws 1982, LB 716, § 4.

25-1267.29 Repealed. Laws 1982, LB 716, § 4.

25-1267.30 Repealed. Laws 1982, LB 716, § 4.

25-1267.31 Repealed. Laws 1982, LB 716, § 4.

25-1267.32 Repealed. Laws 1982, LB 716, § 4.

25-1267.33 Repealed. Laws 1982, LB 716, § 4.

25-1267.34 Repealed. Laws 1982, LB 716, § 4.

25-1267.35 Repealed. Laws 1982, LB 716, § 4.

25-1267.36 Repealed. Laws 1982, LB 716, § 4.

25-1267.37 Repealed. Laws 1982, LB 716, § 4.

25-1267.38 Repealed. Laws 1982, LB 716, § 4.

25-1267.39 Repealed. Laws 1982, LB 716, § 4.

25-1267.40 Repealed. Laws 1982, LB 716, § 4.

25-1267.41 Repealed. Laws 1982, LB 716, § 4.

25-1267.42 Repealed. Laws 1982, LB 716, § 4.

25-1267.43 Repealed. Laws 1982, LB 716, § 4.

25-1267.44 Repealed. Laws 1982, LB 716, § 4.

25-1267.45 Repealed. Laws 1982, LB 716, § 4.

25-1268 Discovery; delivery of copies of documents; refusal to deliver; penalty.

Either party or his attorney, if required, shall deliver to the other party or his attorney, a copy of any deed, instrument or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence, at the trial, the original, of which a copy has been refused. This section shall not apply to any paper a copy of which is filed with a pleading.

Source: R.S.1867, Code § 395, p. 459; R.S.1913, § 7961; C.S.1922, § 8902; C.S.1929, § 20-1268.

25-1269 Repealed. Laws 1975, LB 279, § 75.

25-1270 Repealed. Laws 1951, c. 68, § 43.

25-1271 Repealed. Laws 1951, c. 68, § 43.

25-1272 Repealed. Laws 1951, c. 68, § 43.

25-1273 Nonparty; discovery; subpoena; procedure.

When the discovery rules promulgated by the Supreme Court authorize discovery from a nonparty without a deposition, a subpoena shall be issued by the clerk of the court before whom the action is pending upon request of a party. An attorney as an officer of the court may also issue and sign such a subpoena on behalf of a court in which the attorney is authorized to practice. The subpoena shall be served in the time and manner required by the discovery rules. Such discovery rules shall not be construed to permit discovery by subpoena if the information is protected by statute or if that procedure conflicts with any other statute.

Source: Laws 2001, LB 489, § 2.

25-1273.01 Rules of procedure.

The Supreme Court shall promulgate rules of procedure for discovery in civil cases, which rules shall not be in conflict with laws governing such matters. Rules which provide for the admissibility of depositions shall not be considered as conflicting with the Nebraska Evidence Rules.

Source: Laws 1982, LB 716, § 1; Laws 2000, LB 921, § 8.

Cross References

Nebraska Evidence Rules, see section 27-1103.

(e) DOCUMENTARY EVIDENCE

25-1274 Legal notices; proof of publication.

Publications required by law to be made in a newspaper, may be proved by affidavit of any person having knowledge of the fact, specifying the time when and the paper in which the publication was made, and that said newspaper is a legal newspaper under the statutes of the State of Nebraska, but such affidavit

must, for the purposes now contemplated, be made within six months after the last day of publication, in the office where the original affidavit of publication is required to be filed.

Source: R.S.1867, Code § 403, p. 461; R.S.1913, § 7967; Laws 1922, Spec. Sess., c. 11, § 1, p. 80; C.S.1922, § 8908; C.S.1929, § 20-1274.

Affidavit need not state particulars as to circulation of newspaper or number of weeks published prior to sale; it is sufficient if in language of this section. Seymour v. Lawson, 111 Neb. 770, 197 N.W. 623 (1924).

Proof of publication must be made within six months after the last day of publication. Lonergan v. City of South Omaha, 72 Neb. 317, 100 N.W. 407 (1904).

Publication affidavit is not sufficiently authenticated if it lacks signature of an officer to the jurat. Holmes v. Crooks, 56 Neb. 466, 76 N.W. 1073 (1898).

Proof of publication of notice or order of sale may be made by affidavit of one who has knowledge of fact. Johnson v. Colby, 52 Neb. 327, 72 N.W. 313 (1897).

25-1275 Legal notices; proof of posting or service.

The posting or service of any notice or other paper required by law may be proved by the affidavit of any competent witness, attached to a copy of said notice or paper, and made within six months of the time of such posting.

Source: R.S.1867, Code § 404, p. 461; R.S.1913, § 7968; C.S.1922, § 8909; C.S.1929, § 20-1275.

Proof by affidavit of posting of public notice is not exclusive. Larimer v. Wallace, 36 Neb. 444, 54 N.W. 835 (1893).

25-1276 Other facts required to be shown by affidavit; how proved.

Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course indicated in sections 25-1274 and 25-1275, as nearly as the circumstances of the case will admit.

Source: R.S.1867, Code § 405, p. 461; R.S.1913, § 7969; C.S.1922, § 8910; C.S.1929, § 20-1276.

25-1277 Legal notices and other facts provable by affidavit; perpetuation of proof.

Proof made as provided in sections 25-1274 to 25-1276, may be perpetuated and preserved for future use by filing the papers above mentioned in the office of the county judge, and the original affidavit appended to the notice or paper, if there be one, and if not the affidavit, by itself, is presumptive evidence of the facts stated therein, but does not preclude other modes of proof permitted by law.

Source: R.S.1867, Code § 406, p. 461; R.S.1913, § 7970; C.S.1922, § 8911; C.S.1929, § 20-1277.

25-1278 Field notes or plat of county surveyor; when admissible.

A copy of the field notes of any county surveyor, or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact whose ascertainment requires only the exercise of scientific skill or calculation.

Source: R.S.1867, Code § 407, p. 461; R.S.1913, § 7971; C.S.1922, § 8912; C.S.1929, § 20-1278.

Cross References

For other provisions for county surveyor's certificate, see section 23-1904.

Field notes of county surveyor are admissible. Worm v. Crowell, 165 Neb. 713, 87 N.W.2d 384 (1958).

Field notes and plats of original surveys are presumptively correct and government field notes are admissible. Peterson v. Skjelver, 43 Neb. 663, 62 N.W. 43 (1895); Woods v. West, 40 Neb. 307, 58 N.W. 938 (1894).

25-1279 Repealed. Laws 1975, LB 279, § 75.

25-1280 Official records; certified copies; duty of custodian to furnish; fees.

Every state, county or political subdivision officer having the custody of a public record or writing is bound to give any person on demand a certified copy thereof on payment of the legal fees therefor. Where fees are not otherwise expressly provided by statute, the fee shall be thirty cents per hundred words if the copy is a typewritten copy, and the cost of the mechanically reproduced copy when the copy is made by photographic or offset process. In addition thereto a fee of one dollar shall be charged for the certificate of the officer.

Source: R.S.1867, Code § 409, p. 461; R.S.1913, § 7973; C.S.1922, § 8914; C.S.1929, § 20-1280; R.S.1943, § 25-1280; Laws 1957, c. 86, § 1, p. 335; Laws 1961, c. 454, § 1, p. 1383; Laws 1977, LB 126, § 1.

Prison physician was not obligated to furnish inmate of penitentiary with copy of hospital record. Rhodes v. Meyer, 225 F.Supp. 80 (D. Neb. 1963).

25-1281 Official records; photographic copies; admissibility; destruction of original records.

In all cases in which any instrument or document is required by law to be copied or recorded in any public record in any public office within the State of Nebraska, the officials having charge of the making of such records may employ the use of photographic processes for the reproduction of such instrument or document. This shall be done for the public records and shall be a true copy of the original instrument or document to be so recorded, and may likewise use any such photographic process for the making of certified copies of such public records; *Provided*, no such photographic processes shall be used for the making of permanent records until it shall have been demonstrated to the satisfaction of the officials having charge of such records and the State Records Administrator, that the processes to be used will produce an accurate and permanent record of the instrument or document to be recorded. Any such existing records when reproduced by such photographic processes may be destroyed by the official having charge of the same when approval is given by the State Records Administrator.

Source: Laws 1911, c. 103, § 1, p. 369; R.S.1913, § 7974; C.S.1922, § 8915; C.S.1929, § 20-1281; R.S.1943, § 25-1281; Laws 1957, c. 87, § 1, p. 336; Laws 1969, c. 105, § 5, p. 481.

Photostatic copies of county surveyor's records are admissible. Worm v. Crowell, 165 Neb. 713, 87 N.W.2d 384 (1958).

This section does not prevent courts from admitting photographs as secondary evidence; identification of photograph by one who took it not essential; correctness may be shown by knowledge and observation of witness. Nebraska State Bank of Republican City v. Walker, 111 Neb. 203, 196 N.W. 128 (1923).

25-1282 Official records; proof of lack of record.

The certificate of a public officer that he has made diligent and ineffectual search for a paper in his office is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts.

Source: R.S.1867, Code § 410, p. 462; R.S.1913, § 7975; C.S.1922, § 8916; C.S.1929, § 20-1282.

Where public officer certifies he has been unable to find original record, secondary evidence is admissible. Clough v. North Central Gas Co., 150 Neb. 418, 34 N.W.2d 862 (1948).

Nonexistence of record may be proved by anyone who has made search therefor. Smith v. First Nat. Bank of Chadron, 45 Neb. 444, 63 N.W. 796 (1895); Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775, 59 N.W. 513 (1894).

25-1283 Land office receipts; effect as evidence.

The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual is proof of title equivalent to a patent against all but the holder of an actual patent.

Source: R.S.1867, Code § 411, p. 462; R.S.1913, § 7976; C.S.1922, § 8917; C.S.1929, § 20-1283.

Holder of receiver's certificate cannot, when entry is canceled, maintain ejectment. Oldfather v. Ericson, 79 Neb. 1, 112 N.W. 356 (1907); Headley v. Coffman, 38 Neb. 68, 56 N.W. 701 (1893).

Land office receipt is sufficient to protect one in possession against naked claim of superior right. Moore v. Parker, 59 Neb. 29, 80 N.W. 43 (1899); Kinney v. Degman, 12 Neb. 237, 11 N.W. 318 (1882).

Receiver's receipt gives color of title to entire tract described. Draper v. Taylor, 58 Neb. 787, 79 N.W. 709 (1899).

United States land officer's certificate is such color of title as to start statute of limitation running. Carroll v. Patrick, 23 Neb. 834, 37 N.W. 671 (1888).

25-1284 Official records; signature of custodian; genuineness presumed, when.

In the cases contemplated in sections 25-1280, 25-1282 and 25-1283, the signature of the officer shall be presumed to be genuine until the contrary is shown.

Source: R.S.1867, Code § 412, p. 462; R.S.1913, § 7977; C.S.1922, § 8918; C.S.1929, § 20-1284.

Field notes and tract book were sufficiently authenticated. Worm v. Crowell, 165 Neb. 713, 87 N.W.2d 384 (1958).

It is not necessary to prove signature of county clerk accompanying jurat to oath lawfully filed in his office. Merriam v. Coffee, 16 Neb. 450, 20 N.W. 389 (1884).

25-1285 Judicial records of Nebraska and federal courts; how proved.

A judicial record of this state, or of any other federal court of the United States, may be proved by producing the original or a copy thereof, certified by the clerk or the clerk's designee or the person having the legal custody thereof, authenticated by his or her seal of office, if there is one.

Source: R.S.1867, Code § 413, p. 462; R.S.1913, § 7978; C.S.1922, § 8919; C.S.1929, § 20-1285; Laws 2007, LB449, § 1.

A certified copy of judgment of prior conviction in any federal court or in a court of this state is sufficient proof thereof. State v. Micek, 193 Neb. 379, 227 N.W.2d 409 (1975).

Judgment of justice, including copy of complaint embodied therein, was established by competent proof. Osborne v. State, 115 Neb. 65, 211 N.W. 179 (1926).

Judicial record, if properly certified, is admissible to prove its own existence. Sheibley v. Fales, 81 Neb. 795, 116 N.W. 1035 (1908).

Orders or judgments of court of general jurisdiction may be pleaded without alleging jurisdictional facts. Lear v. Brown County, 77 Neb. 230, 109 N.W. 174 (1906).

Records of sister state may be examined to determine court's jurisdiction. Fall v. Fall, 75 Neb. 104, 106 N.W. 412 (1905), judgment vacated 75 Neb. 120, 113 N.W. 175 (1907).

Transcript of proceedings, duly certified, of United States court, is competent evidence, though presiding judge failed to sign journal. Stacks v. Crawford, 63 Neb. 662, 88 N.W. 852 (1902).

Recitals in judgment record kept by clerk of district court of transcript from county court are not competent to prove judgment. Burge v. Gandy, 41 Neb. 149, 59 N.W. 359 (1894).

25-1286 Deleted.

Note: The Nebraska Supreme Court in State v. Munn, 212 Neb. 265, 322 N.W.2d 429 (1982), held that ''the adoption of the Nebraska Rules of Evidence repealed section 25-1286''. The Revisor of Statutes has pursuant to section 49-705 deleted section 25-1286 to harmonize the legislative actions with the Supreme Court decision.

25-1287 Records of justice of the peace; how proved.

The official certificate of a justice of the peace of any of the United States, to any judgment, and the preliminary proceeding before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature of his certificate is genuine, is sufficient evidence of such proceedings and judgment.

Source: R.S.1867, Code § 415, p. 462; R.S.1913, § 7980; C.S.1922, § 8921; C.S.1929, § 20-1287.

Transcript of justice of peace of another state is receivable in evidence if it complies with this section. Gordon Bros. v. Wageman, 77 Neb. 185, 108 N.W. 1067 (1906).

25-1288 Repealed. Laws 1975, LB 279, § 75.

25-1289 Repealed. Laws 1975, LB 279, § 75.

25-1290 Legislative proceedings; how proved.

The proceedings of the Legislature of this state, or any state of the Union, or of the United States, or of any foreign government, are proved by the journals of those bodies, respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which the proceedings were had, or by a copy purporting to have been printed by their order.

Source: R.S.1867, Code § 418, p. 463; R.S.1913, § 7983; C.S.1922, § 8924; C.S.1929, § 20-1290.

Where entries in journal expressly and unequivocally contradict enrolled bill, former will prevail. State v. Burlington & Missouri River R. R. Co., 60 Neb. 741, 84 N.W. 254 (1901).

If it appears from journals of Legislature that bill had not actually passed, certificate of presiding officer is overthrown and bill is invalid. Webster v. City of Hastings, 56 Neb. 669, 77 N.W. 127 (1898).

25-1291 Repealed. Laws 1975, LB 279, § 75.

25-1292 Abstracts of title and title insurance policy; when used as evidence; certification.

(1) Any party to a civil action who may desire to use in evidence at the trial any abstract of title to real estate shall, not less than seven days prior to the date of trial, notify the adverse party by written notice addressed to such party's counsel of record and deposit such abstract in the office of the clerk of the district court of the county in which such action is pending for examination by such adverse party. Such abstract of title, if certified to and issued by a registered abstracter, shall be received in evidence as prima facie evidence of the existence of the record of deeds, mortgages, and other instruments, conveyances, or liens affecting the real estate mentioned in such abstract and that such record is as described in such abstract. If such abstract is successively

certified to by abstracters who were bonded under section 76-506 prior to November 18, 1965, registered under sections 76-509 to 76-528 on or after November 18, 1965, but prior to March 26, 1985, or registered under the Abstracters Act, the same shall be received in evidence without further foundation.

(2) A title insurance policy issued by a title insurer licensed to issue such policy by the State of Nebraska shall also be received in court as prima facie evidence of the ownership, liens, mortgages, easements, and all other corporeal as well as incorporeal hereditaments to such real estate, the existence of which are indicated in such title insurance policy.

Source: Laws 1887, c. 64, § 3, p. 566; R.S.1913, § 7985; C.S.1922, § 8926; C.S.1929, § 20-1292; R.S.1943, § 25-1292; Laws 1965, c. 453, § 21, p. 1446; Laws 1985, LB 47, § 1; Laws 1991, LB 235, § 1.

Cross References

Abstracters Act, see section 76-535.

Abstracts of title, when proper foundation has been laid, are admissible in evidence. Worm v. Crowell, 165 Neb. 713, 87 N.W.2d 384 (1958).

25-1293 Public seal affixed to copy of written law or public writing; effect; unwritten law; how proved.

The public seal of the state or county affixed to a copy of a written law or other public writing, is also admissible as evidence of such law or writing respectively; the unwritten law of any other state or government may be proved as fact by parol evidence, and also by the books of reports of cases adjudged in their courts.

Source: R.S.1867, Code § 420, p. 463; R.S.1913, § 7986; C.S.1922, § 8927; C.S.1929, § 20-1293.

Where no evidence was given as to marriage laws of sister state where common law marriage was alleged to have occurred, law of this state at time marriage was alleged to have taken place was applicable. Forshay v. Johnston, 144 Neb. 525, 13 N.W.2d 873 (1944).

This section provides a method for proof of unwritten law of foreign states by parol evidence or reports of adjudicated cases. Banks v. Metropolitan Life Ins. Co., 142 Neb. 823, 8 N.W.2d 185 (1943).

Common law of sister state may be proved by books of reports of decisions of her courts. Steinke v. Dobson, 90 Neb. 616, 134 N.W. 169 (1912).

Public seal of another state, affixed to copy of written law, is admissible as evidence of such law. Rieck v. Griffin, 74 Neb. 102, 103 N.W. 1061 (1905).

Except as to statute, law of another state is proper subject of expert testimony. Barber v. Hildebrand, 42 Neb. 400, 60 N.W. 594 (1894).

(f) PERPETUATION OF TESTIMONY

25-1294 Repealed. Laws 1951, c. 68, § 43.

25-1295 Repealed. Laws 1951, c. 68, § 43.

25-1296 Repealed. Laws 1951, c. 68, § 43.

25-1297 Repealed. Laws 1951, c. 68, § 43.

25-1298 Repealed. Laws 1951, c. 68, § 43.

25-1299 Repealed. Laws 1951, c. 68, § 43.

25-12,100 Repealed. Laws 1951, c. 68, § 43.

(g) UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT

25-12,101 Judicial notice.

Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

Source: Laws 1947, c. 93, § 1, p. 272.

Where statutes of sister state have not been interpreted, the courts of this state will give a practical interpretation thereto. Exstrum v. Union Cas. & Life Ins. Co., 165 Neb. 554, 86 N.W.2d 568 (1957).

Act is applicable to any action seeking to enforce rights based upon the common law or statute law of another state. Abramson v. Abramson, 161 Neb. 782, 74 N.W.2d 919 (1956).

Provisions of this act must be properly invoked. Smith v. Brooks, 154 Neb. 93, 47 N.W.2d 389 (1951).

Uniform Judicial Notice of Foreign Law Act does not remove the necessity of pleading and presenting the common law or statutes of sister state. Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951).

District court was authorized to take judicial notice of the laws of Colorado. Snyder v. Lincoln, 153 Neb. 611, 45 N.W.2d 749 (1951).

The federal court sitting in Nebraska without violating doctrine of Erie R. Co. v. Tompkins, takes judicial notice of law of another state although it was not pleaded and proved and although under Nebraska law, if law of foreign state is not pleaded and proved, it is presumed to be the same as the law of the forum. Fullington v. Iowa Sheet Metal Contractors, Inc., 319 F.Supp. 243 (D. Neb. 1970).

25-12,102 Information of the court.

The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

Source: Laws 1947, c. 93, § 2, p. 273.

Court may require party invoking law of sister state to plead and present it. Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951).

25-12,103 Ruling reviewable.

The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.

Source: Laws 1947, c. 93, § 3, p. 273.

Issue of validity of marriage in another state was properly pleaded and presented. Abramson v. Abramson, 161 Neb. 782, 74 N.W.2d 919 (1956).

25-12,104 Evidence as to laws of other jurisdictions.

Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

Source: Laws 1947, c. 93, § 4, p. 273.

In order for litigant to invoke Uniform Judicial Notice of Foreign Law Act, he must give reasonable notice in pleadings or otherwise of intention so to do. Smith v. Brooks, 154 Neb. 93, 47 N.W.2d 389 (1951).

To require trial court to take judicial notice of law of another state, it must be pleaded. Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951).

25-12,105 Foreign country.

The law of a jurisdiction other than those referred to in section 25-12,101 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

Source: Laws 1947, c. 93, § 5, p. 273.

Laws of a jurisdiction other than state or territory of the United States must be both pleaded and proved. Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951).

25-12,106 Interpretation.

Sections 25-12,101 to 25-12,107 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them.

Source: Laws 1947, c. 93, § 6, p. 273.

Operation of act is not dependent upon reciprocal law in another state. Abramson v. Abramson, 161 Neb. 782, 74 N.W.2d 919 (1956).

25-12,107 Short title.

Sections 25-12,101 to 25-12,107 may be cited as the Uniform Judicial Notice of Foreign Law Act.

Source: Laws 1947, c. 93, § 7, p. 273.

(h) UNIFORM BUSINESS RECORDS AS EVIDENCE ACT

25-12,108 Repealed. Laws 1975, LB 279, § 75.

25-12,109 Repealed. Laws 1975, LB 279, § 75.

25-12,110 Repealed. Laws 1975, LB 279, § 75.

25-12,111 Repealed. Laws 1975, LB 279, § 75.

(i) UNIFORM PHOTOGRAPHIC COPIES OF BUSINESS AND PUBLIC RECORDS AS EVIDENCE ACT

25-12,112 Admissibility of reproduced records in evidence; destruction of records; approval.

If any business, institution, member of a profession or calling, or department or agency of government in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation, or combination thereof of any act, transaction, occurrence, or event and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, optical imagery, microfilm, microcard, miniature photographic, optical disk, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law and, with respect to agencies or departments of government, if the State Records Administrator approves such destruction. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original.

Source: Laws 1951, c. 56, § 1, p. 188; Laws 1969, c. 105, § 6, p. 481; Laws 1991, LB 25, § 1; Laws 1994, LB 980, § 1.

Cross References

Credit union records, see section 21-1737.

Copy of memorandum from Postmaster General regarding early retirement opportunities was admissible hereunder. Corn v. Corn, 190 Neb. 383, 208 N.W.2d 678 (1973).

25-12,113 Sections, how construed.

Sections 25-12,112 to 25-12,114 shall be so interpreted and construed as to effectuate their general purpose of making uniform the law of those states which enact them.

Source: Laws 1951, c. 56, § 2, p. 189.

25-12,114 Act, how cited.

Sections 25-12,112 to 25-12,114 may be cited as the Uniform Photographic Copies of Business and Public Records as Evidence Act.

Source: Laws 1951, c. 56, § 3, p. 189.

(j) UNIFORM COMPOSITE REPORTS AS EVIDENCE ACT

25-12,115 Report or finding admissible.

A written report or finding of facts prepared by an expert not being a party to the cause, nor an employee of a party, except for the purpose of making such report or finding, nor financially interested in the result of the controversy, and containing the conclusions resulting wholly or partly from written information furnished by the cooperation of several persons acting for a common purpose, shall, insofar as the same may be relevant, be admissible when testified to by the person, or one of the persons, making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based, if, in the opinion of the court, no substantial injustice will be done the opposite party.

Source: Laws 1951, c. 57, § 1, p. 190.

An offer of a composite record under this act is prima facie sufficient if a proper foundation is laid. Gateway Bank v. Department of Banking, 192 Neb. 109, 219 N.W.2d 211 (1974).

Report of results of blood test was admissible in evidence when supported by testimony of doctor who supervised the test. Houghton v. Houghton, 179 Neb. 275, 137 N.W.2d 861 (1965).

Application of statute doubted, but sufficient compliance shown. Chicago & N. W. Ry. Co. v. City of Norfolk, 157 Neb. 594, 60 N.W.2d 662 (1953).

25-12,116 Cross-examination by adverse party.

Any person who has furnished information on which such report or finding is based may be cross-examined by the adverse party, but the fact that his testimony is not obtainable shall not render the report or finding inadmissible, unless the trial court finds that substantial injustice would be done to the adverse party by its admission.

Source: Laws 1951, c. 57, § 2, p. 190.

25-12,117 Notice; copy of report or finding.

Such report or finding shall not be admissible unless the party offering it shall have given notice to the adverse party a reasonable time before trial of his intention to offer it, together with a copy of the report or finding, or so much thereof as may relate to the controversy, and shall also have afforded him a

reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control, on which the report or finding was based, and also the names of all persons furnishing facts upon which the report or finding was based, except that it may be admitted if the trial court finds that no substantial injustice would result from the failure to give such notice.

Source: Laws 1951, c. 57, § 3, p. 190.

Trial court is given discretion to admit report in evidence although no copy was served. Trute v. Skeede, 162 Neb. 266, 75 N.W.2d 672 (1956).

25-12,118 Sections, how construed.

Sections 25-12,115 to 25-12,119 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them.

Source: Laws 1951, c. 57, § 4, p. 190.

25-12,119 Act, how cited.

Sections 25-12,115 to 25-12,119 may be cited as the Uniform Composite Reports as Evidence Act.

Source: Laws 1951, c. 57, § 5, p. 191.

(k) HOSPITAL RECORDS

25-12,120 Hospital records, examination, and inspection; hospital medical staff committee; hospitalization utilization committee.

From and after October 23, 1967, in the interest of public health and the improvement of patient medical and hospital care and in the interest of effective utilization of hospital facilities it shall be conclusively presumed that all persons hospitalized in any hospital in the State of Nebraska or confined in any extended care facility in the State of Nebraska have consented to the examination and inspection of all medical records of such hospital or extended care facility relating to such patient's care, treatment and the need for hospitalization or extended care by any hospital medical staff committee or by any utilization review committee for the purpose of studying and evaluating the necessity and the quality of the hospital and medical care and treatment or extended care provided to such patient and the necessity for continuation of such hospitalization or extended care of such patient. Hospital medical staff committee or hospital utilization committee as used in sections 25-12,120 and 25-12,121 shall mean a committee required by federal law or regulation for the purpose of administering in whole or in part a federal program for health care.

Source: Laws 1967, c. 142, § 1, p. 437.

25-12,121 Hospital medical staff committee; hospital utilization committee; extended care facility utilization committee; recommendations or orders; liability for damages.

No hospital medical staff committee or hospital utilization committee or extended care facility utilization committee or any member or agent of any such committee shall be held legally liable for damages or other relief to any patient or to any person or organization in behalf of any patient because of any recommendation or order made by such committee with reference to the

hospitalization or continued hospitalization or confinement in an extended care facility of any individual or patient.

Source: Laws 1967, c. 142, § 2, p. 438.

25-12,122 Repealed. Laws 1975, LB 279, § 75.

(l) HEALTH PRACTITIONER PEER REVIEW COMMITTEE

25-12,123 Peer review committee; proceedings and records; testimony; use in civil actions; limitation.

The proceedings and records of a peer review committee of a state or local association or society composed of health practitioners licensed pursuant to the Uniform Credentialing Act shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a person licensed pursuant to the act arising out of the matters which are the subject of evaluation and review by such committee. No person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof, except that information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee. Any documents or records which have been presented to the review committee by any witness shall be returned to the witness, if requested by him or her or if ordered to be produced by a court in any action, with copies thereof to be retained by the committee at its discretion. Any person who testifies before such committee or who is a member of such committee shall not be prevented from testifying as to matters within his or her knowledge, but such witness cannot be asked about his or her testimony before such a committee or opinions formed as a result of such committee hearings. Nothing in this section shall prohibit a court of record, after a hearing and for good cause arising from extraordinary circumstances being shown, from ordering the disclosure of such proceedings, minutes, records, reports, or communications.

Source: Laws 1982, LB 267, § 1; Laws 2007, LB463, § 1114.

Cross References

Uniform Credentialing Act, see section 38-101.

(m) STATEMENTS FROM INJURED PERSONS

25-12,124 Statement, defined.

As used in sections 25-12,124 to 25-12,126, unless the context otherwise requires, statement shall mean a recorded or written account of the facts out of which an injury arose given by the injured person to a person having an adverse interest. Statement shall not include (1) insurance claims forms, (2) medical authorizations, or (3) personal injury or accident report forms which are completed when an adverse person is not present.

Source: Laws 1988, LB 191, § 1.

25-12,125 Rebuttable presumption; when.

(1) There shall be a rebuttable presumption that any statement secured from an injured person by an adverse person at any time within thirty days after such injuries were sustained shall have been taken under duress for purposes of a trial of any action for damages for injuries sustained by such person or for the death of such person as the result of such injuries.

(2) The presumption described in subsection (1) of this section may be rebutted by evidence. The presumption shall be deemed rebutted as a matter of law if the adverse person taking the statement discloses to the injured person prior to taking the statement:

(a) Whom he or she represents;

(b) That the injured person may make the statement in the presence of counsel or any other representative; and

(c) That a copy of the statement is available at no cost to the injured person.

Source: Laws 1988, LB 191, § 2.

25-12,126 Sections, how construed.

Nothing in sections 25-12,124 to 25-12,126 shall be construed to supersede, abrogate, or limit any common-law remedies available to any injured person who has given a statement.

Source: Laws 1988, LB 191, § 3.

ARTICLE 13

JUDGMENTS

Cross References

Judgment for motor vehicle injury or death, see section 60-516.

(a) JUDGMENTS IN GENERAL

Section
25-1301. Judgment, rendition of judgment, entry of judgment, decree, or final order, defined; records.
25-1301.01. Civil judgment; mailing of copy; duty of clerk; exception.
25-1302. Repealed. Laws 2000, LB 921, § 38.

(b) LIENS

25-1303. Transcript of judgment to other county; effect.
25-1304. Decree for conveyance; effect.
25-1305. Federal court judgment; transcript to other county; effect.
25-1306. Dissolution of lien; deposit; bond; appellate proceedings.
25-1307. Dissolution of lien; disposition of deposit.

(c) JUDGMENT UPON FAILURE TO ANSWER

25-1308. Judgment upon failure to answer; procedure.

(d) JUDGMENT BY CONFESSION

25-1309. Right to confess judgment; creditor's assent necessary.
25-1310. Judgment by confession; contents.
25-1311. Enforcement of judgment.
25-1312. Confession of judgment by attorney; warrant; requirements.

(e) MANNER OF ENTERING JUDGMENT

25-1313. Jury trial; rendition of judgment by court; entry by clerk.
25-1314. Entry of judgment by court; when required.
25-1315. Multiple claims or parties; effect.

(a) JUDGMENTS IN GENERAL

25-1301 Judgment, rendition of judgment, entry of judgment, decree, or final order, defined; records.

(1) A judgment is the final determination of the rights of the parties in an action.

(2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.

(3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

(4) The clerk shall prepare and maintain the records of judgments, decrees, and final orders that are required by statute and rule of the Supreme Court.

Source: R.S.1867, Code § 428, p. 465; R.S.1913, § 7994; C.S.1922, § 8935; C.S.1929, § 20-1301; R.S.1943, § 25-1301; Laws 1961, c. 111, § 1, p. 350; Laws 1999, LB 43, § 3.

Cross References

For rate of interest on judgment, see section 45-103.

1. Judgment

2. Miscellaneous

1. Judgment

The void conditional judgment rule does not extend to actions in equity or to equitable relief granted within an action at law. Rather, where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature. Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006).

Orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable. State ex rel. Stenberg v. Moore, 258 Neb. 199, 602 N.W.2d 465 (1999).

Under this section, there are two occurrences, either of which constitutes a final order, which may begin the 30-day period in which a notice of appeal must be filed: (1) The rendition of a judgment, which occurs when an oral pronouncement of the judgment is made in open court and a notation of the judgment is made on the trial docket, or (2) the entry of a judgment, which is the act of the clerk of the court spreading on the court's journal both the proceedings had and the relief granted or denied. Dvorak v. Bunge Corp., 256 Neb. 341, 590 N.W.2d 682 (1999).

A rendition of judgment occurs when the court makes an oral pronouncement with a notation on the trial docket or, in the alternative, when some written notation of the judgment is filed in the records of the court. Reutzel v. Reutzel, 252 Neb. 354, 562 N.W.2d 351 (1997).

Rendition of a judgment includes the announcement by the court of the judgment. When written record of judgment and the verbatim record of the proceedings in open court are in conflict, the latter prevails. State v. Temple, 230 Neb. 624, 432 N.W.2d 818 (1988).

Although the clerk of the district court is authorized to spread upon the court journal the proceedings had and relief granted by the court, and to that extent is responsible for entry of the judgment, such clerk has no authority to perform the judicial function of rendering a judgment. Building Systems, Inc. v. Medical Center, Ltd., 228 Neb. 168, 421 N.W.2d 773 (1988).

District court order which was conditional in nature was not final and therefore not appealable. Federal Land Bank of Omaha v. Johnson, 226 Neb. 877, 415 N.W.2d 478 (1987).

A trial court's order which provided that if a case had not been ''tried or otherwise disposed of'' by a certain date and which required a showing of good cause if such deadline was not met, was a conditional order, and as such, not a judgment as defined in this provision. Lemburg v. Adams County, 225 Neb. 289, 404 N.W.2d 429 (1987).

The rendition of a judgment and the entry of a judgment are actions taken with respect to the judgment itself. State v. Carney, 220 Neb. 906, 374 N.W.2d 59 (1985).

An ''order'' entered on the trial docket does not constitute a rendition of judgment. State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113, 200 Neb. 525, 264 N.W.2d 422 (1978).

Order of dismissal of party not final where motion for new trial filed and not ruled on. First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 553, 203 N.W.2d 770 (1973).

Amendments made to Installment Loan Act reducing penalty did not apply to actions in which a final judgment had been obtained. Kometscher v. Wade, 177 Neb. 299, 128 N.W.2d 781 (1964).

A judgment is the final determination of the rights of the parties in an action. Rumbel v. Ress, 166 Neb. 839, 91 N.W.2d 36 (1958).

Decree to wife of divorce and monthly sum during minority of children is final judgment and lien upon husband's real estate. Wharton v. Jackson, 107 Neb. 288, 185 N.W. 428 (1921).

Order of justice on garnishee is a judgment. Johnson v. Samuelson, 82 Neb. 201, 117 N.W. 470 (1908).

Entry, that defendant is required to pay plaintiff determined amount, is a judgment. McNamara & Duncan v. Cabon, 21 Neb. 589, 33 N.W. 259 (1887).

Duly certified copy is transcript of judgment. Hastings School Dist. v. Caldwell, Hamilton & Co., 16 Neb. 68, 19 N.W. 634 (1884).

Judgment against city is binding on taxpayers. Shanahan v. City of So. Omaha, 2 Neb. Unof. 466, 89 N.W. 285 (1902).

The two ministerial requirements for a final judgment are (1) a rendition of the judgment, defined as the act of the court or a judge thereof in making and signing a written notation of the relief granted or denied in an action, and (2) an ''entry'' of a final order, occurring when the clerk of the court places the file stamp and date upon the judgment. State v. Brown, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

Pursuant to this section, a judgment is entered by the clerk of the court by placing the file stamp and date upon a rendered judgment. State v. Wahrman, 11 Neb. App. 101, 644 N.W.2d 572 (2002).

A trial docket note entered by the court was not a judgment. Lee Sapp Leasing v. Ciao Caffe & Espresso, Inc., 10 Neb. App. 948, 640 N.W.2d 677 (2002).

Any action purporting to be a judgment, decree, or final order must be rendered and entered to be valid, as provided by this section. Murray Constr. Servs. v. Meco-Henne Contracting, 10 Neb. App. 316, 633 N.W.2d 915 (2001).

Pursuant to this section and section 25-2729, a judgment is entered when the clerk of the court places a file stamp and date upon it. State v. Wilcox, 9 Neb. App. 933, 623 N.W.2d 329 (2001).

Pursuant to subsection (2) of this section, a final, appealable judgment was never rendered when there was a final sentencing order, but the only indication the defendant had been found guilty was a letter, signed by the court stenographer for the judge, stating, ''Defendant is found guilty on Counts 1, 2 and 3'', and the letter, although included in the transcript, did not contain a county court file stamp. State v. Engleman, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

Entry in trial docket indicating ''motion for postconviction relief overruled'' was rendering of judgment, and subsequent file-stamped memorandum order was merely confirmation of docket entry. State v. McPherson, 1 Neb. App. 1022, 510 N.W.2d 487 (1993).

2. Miscellaneous

A journal entry that contemplates the preparation of a decree for opposing counsel's review and for signature by the court is not a final determination of the rights of the parties under this section. Hosack v. Hosack, 267 Neb. 934, 678 N.W.2d 746 (2004).

A motion for a new trial filed prior to the rendition of a judgment is premature and constitutes a nullity. Spanheimer Roofing & Supply Co. v. Thompson, 198 Neb. 710, 255 N.W.2d 265 (1977).

Application for new trial may be made within ten days after judgment is pronounced and noted on trial docket. Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N.W.2d 541 (1976).

No judgment is rendered until pronouncement thereof is noted on the trial docket. Fritch v. Fritch, 191 Neb. 29, 213 N.W.2d 445 (1973).

Unless the context is shown to intend otherwise, action includes any proceeding in a court and only final orders therein are bases for appeals. Grantham v. General Telephone Co., 187 Neb. 647, 193 N.W.2d 449 (1972).

This section does not apply to eminent domain proceedings until they reach the district court. Weiner v. State, 179 Neb. 297, 137 N.W.2d 852 (1965).

Notice of rendition of judgment was not required as to judgments rendered before amendment of statute. Bebee v. Kriewald, 173 Neb. 179, 112 N.W.2d 764 (1962).

A judgment for alimony in gross survived the death of the judgment debtor. Spencer v. Spencer, 165 Neb. 675, 87 N.W.2d 212 (1957).

Finding of fact in replevin is not a judgment. Brounty v. Daniels, 23 Neb. 162, 36 N.W. 463 (1888).

Determination of rights of parties not before court is not judgment. State ex rel. Chandler v. Dodge County, 10 Neb. 20, 4 N.W. 370 (1880).

25-1301.01 Civil judgment; mailing of copy; duty of clerk; exception.

Within three working days after the entry of any civil judgment, except judgments by default when service has been obtained by publication or an appearance of the defaulting party has been made, the clerk of the court shall send a postcard or notice by United States mail to each party whose address appears in the records of the action, or to the party's attorney or attorneys of record, advising that a judgment has been entered and the date of entry.

Source: Laws 1961, c. 111, § 2, p. 350; Laws 1969, c. 186, § 1, p. 778; Laws 1977, LB 124, § 1; Laws 1999, LB 43, § 4.

Where notice of judgment was mailed late, to an attorney no longer representing defendant and to an address where defendant could not be reached, the notification of judgment statute was not complied with, and is additional evidence to permit vacation of a default judgment. Tietsort v. Ranne, 200 Neb. 651, 264 N.W.2d 860 (1978).

Where judgment of dismissal was entered and no notice was given by the clerk to the parties, the proper proceeding to correct omissions of the clerk is by motion and notice. Pofahl v. Pofahl, 196 Neb. 347, 243 N.W.2d 55 (1976).

This section has no application to the filing of the report of appraisers with the county judge in eminent domain proceedings. Weiner v. State, 179 Neb. 297, 137 N.W.2d 852 (1965).

Sending of notice by post card is required as to ruling on motion for new trial where such ruling is a prerequisite to an appeal. Simmons v. Lincoln, 176 Neb. 71, 125 N.W.2d 63 (1963).

25-1302 Repealed. Laws 2000, LB 921, § 38.

(b) LIENS

25-1303 Transcript of judgment to other county; effect.

The transcript of a judgment of any district court in this state may be filed in the office of the clerk of the district court in any county. Such transcript, when so filed and entered on the judgment record, shall be a lien on the property of the debtor in any county in which such transcript is so filed, in the same manner and under the same conditions only as in the county where such judgment was rendered, and execution may be issued on such transcript in the same manner as on the original judgment; *Provided*, such transcript shall at no time have any greater validity or effect than the original judgment.

Source: Laws 1869, § 1, p. 158; R.S.1913, § 7796; C.S.1922, § 8937; Laws 1929, c. 83, § 1, p. 332; C.S.1929, § 20-1303.

Cross References

County court judgment, transcript to district court for lien, see section 25-2721.

Federal court judgments are liens on real estate only in county where rendered unless transcript is filed in other counties. Rathbone Co. v. Kimball, 117 Neb. 229, 220 N.W. 244 (1928).

Transcript filed in other county can only be vacated in suit to set aside original judgment; applies in suits to remove cloud on title. State ex rel. Long v. Westover, 107 Neb. 593, 186 N.W. 998 (1922).

Motion to revive judgment of district court must be made in court where rendered. Case Threshing Mach. Co. v. Edmisten, 85 Neb. 272, 122 N.W. 891 (1909).

Judgment in county court, regardless of amount, may be transcripted to any county in state. Cabon v. Gruenig, 18 Neb. 562, 26 N.W. 253 (1886).

Transcript of justice judgment must be filed in district court of county where judgment was rendered. Pemberton v. Pollard, 18 Neb. 435, 25 N.W. 582 (1885).

25-1304 Decree for conveyance; effect.

When any judgment or decree shall be rendered for a conveyance, release or acquittance, in any court of this state, and the party or parties against whom

the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available as if the conveyance, release or acquittance had been executed conformable to such judgment or decree.

Source: Laws 1869, § 1, p. 70; R.S.1913, § 7997; C.S.1922, § 8938; C.S.1929, § 20-1304.

25-1305 Federal court judgment; transcript to other county; effect.

A transcript of any judgment or decree rendered in a circuit or district court of the United States within the State of Nebraska, may be filed in the office of the clerk of the district court in any county in this state. Such transcript, when so filed and entered on the judgment record, shall be a lien on the property of the debtor in any county in which such transcript is so filed, in the same manner and under the same conditions only as if such judgment or decree had been rendered by the district court of such county; *Provided*, such transcript shall at no time have a greater validity or effect than the original judgment. The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the day on which such judgment is rendered without the filing of a transcript; *Provided, however*, that orders reviving dormant judgments shall become liens upon the lands and tenements of the judgment debtor only when such order is entered on the judgment record in the same manner as an original judgment.

Source: Laws 1889, c. 30, § 1, p. 377; R.S.1913, § 7998; C.S.1922, § 8939; Laws 1929, c. 83, § 1, p. 332; C.S.1929, § 20-1305.

On appeal under this section, parties retain the same status in district court as they had in tribunal below. School Dist. of Wilber v. Pracheil, 180 Neb. 121, 141 N.W.2d 768 (1966).

Federal court judgment is lien on real estate only in county where rendered, unless transcript is filed in other counties. Rathbone Co. v. Kimball, 117 Neb. 229, 220 N.W. 244 (1928).

25-1306 Dissolution of lien; deposit; bond; appellate proceedings.

In all cases wherein the judgment of any court, for payment of money only, which may be a general lien on property of the judgment debtor, and the debtor proposes to take proceedings in error or by appeal for review of such judgment, he may deposit in the court in which such judgment is rendered the full sum of such judgment, interest and costs, there to abide until termination of such appellate proceedings, and may file bond in such sum as the court or judge thereof may determine, with sureties to the approval of the clerk of such court, conditioned to pay interest on the judgment debt and costs to accrue in event the judgment be affirmed. On such payment being made, and such bond filed and approved, the general lien of the judgment shall be dissolved.

Source: Laws 1893, c. 42, § 1, p. 383; R.S.1913, § 7999; C.S.1922, § 8940; C.S.1929, § 20-1306.

This section provides for filing of petition and answer in an appeal under this section. School Dist. of Wilber v. Pracheil, 180 Neb. 121, 141 N.W.2d 768 (1966).

Under Nebraska law, which applies to a foreign judgment after the judgment is filed in Nebraska, once a party appeals a monetary judgment for money only and files a supersedeas bond which is approved by the court in which judgment was rendered, the general lien resulting from the judgment is dissolved. Anderson v. Werner Enters., Inc., 7 Neb. App. 294, 581 N.W.2d 104 (1998).

25-1307 Dissolution of lien; disposition of deposit.

If such judgment be affirmed, the money so deposited shall be paid to the judgment creditor, but if such judgment be reversed, the debtor may withdraw such deposit.

Source: Laws 1893, c. 42, § 2, p. 384; R.S.1913, § 8000; C.S.1922, § 8941; C.S.1929, § 20-1307.

(c) JUDGMENT UPON FAILURE TO ANSWER

25-1308 Judgment upon failure to answer; procedure.

If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may, with the assent of the party not in default, take the account, hear the proof, or assess the damages; or may, with the like assent, refer the same to a referee, master, or commissioner, or may direct the same to be ascertained or assessed by a jury. If a jury be ordered, it shall be on or after the day on which the action is set for trial. This section shall not be construed to impair the right of a party to a jury if he appear at the trial by himself or attorney, and demand the same.

Source: R.S.1867, Code § 432, p. 466; R.S.1913, § 8001; C.S.1922, § 8942; C.S.1929, § 20-1308.

This section applies where it is necessary to make proof of allegations of value and amount of damage, and did not apply to creditor's bill. Danbom v. Danbom, 132 Neb. 858, 273 N.W. 502 (1937).

Where only issue presented by answer was one of law, court properly proceeded under this section. Bankers' Reserve Life Assn. v. Finn, 64 Neb. 105, 89 N.W. 672 (1902).

(d) JUDGMENT BY CONFESSION

25-1309 Right to confess judgment; creditor's assent necessary.

Any person indebted, or against whom a cause of action exists, may personally appear, in a court of competent jurisdiction, and, with the assent of the creditor or person having such cause of action, confess judgment therefor, whereupon judgment shall be entered accordingly.

Source: R.S.1867, Code § 433, p. 466; R.S.1913, § 8002; C.S.1922, § 8943; C.S.1929, § 20-1309.

General appearance is sufficient; actual physical presence of defendant is unnecessary. Thornhill v. Hargreaves, 76 Neb. 582, 107 N.W. 847 (1906).

Where corporation is already in default of answer, judgment may be entered upon stipulation without warrant to attorney. Alter v. State ex rel. Kountze Bros., 62 Neb. 239, 86 N.W. 1080 (1901).

Confession of judgment by corporation must be made by warrant of attorney. Fogg v. Ellis, 61 Neb. 829, 86 N.W. 494 (1901).

Corporation for pecuniary profit may confess judgment. Solomon Co. v. Schneider & Co., 56 Neb. 680, 77 N.W. 65 (1898).

Manager of corporation has no power to confess judgment. Howell v. Gilt Edge Mfg. Co., 32 Neb. 627, 49 N.W. 704 (1891).

Creditor's assent is necessary; but is presumed where defendant confesses sum demanded in petition. Flanigan v. Continental Ins. Co., 22 Neb. 235, 34 N.W. 367 (1887).

25-1310 Judgment by confession; contents.

The debt or cause of action shall be briefly stated in the judgment, or in a writing to be filed as pleadings in other actions.

Source: R.S.1867, Code § 434, p. 466; R.S.1913, § 8003; C.S.1922, § 8944; C.S.1929, § 20-1310.

The provisions of this section are applicable to only civil proceedings. Dunham v. O'Grady, 137 Neb. 649, 290 N.W. 723 (1940).

25-1311 Enforcement of judgment.

Such judgment shall authorize the same proceedings for its enforcement as judgments rendered in actions regularly brought and prosecuted; and the confession shall operate as a release of errors.

Source: R.S.1867, Code § 435, p. 466; R.S.1913, § 8004; C.S.1922, § 8945; C.S.1929, § 20-1311.

25-1312 Confession of judgment by attorney; warrant; requirements.

Every attorney who shall confess judgment in any case, shall, at the time of making such confession, produce the warrant of attorney for making the same to the court before which he makes the confession; and the original or a copy of the warrant shall be filed with the clerk of the court in which the judgment shall be entered.

Source: R.S.1867, Code § 436, p. 466; R.S.1913, § 8005; C.S.1922, § 8946; C.S.1929, § 20-1312.

Judgment on appeal, entered by consent, is not ''judgment by confession.'' Wabaska Electric Co. v. City of Blue Springs, 84 Neb. 577, 122 N.W. 21 (1909).

County attorney must show warrant, or judgment against county is void. Custer County v. Chicago, B. & Q. R. R. Co., 62 Neb. 657, 87 N.W. 341 (1901).

Judgment by confession against corporation, unless warrant of attorney is produced, is void. Fogg v. Ellis, 61 Neb. 829, 86 N.W. 494 (1901).

Authority of attorney to confess judgment under warrant in promissory note, without issuance of summons, raised but not decided. Wiley v. Neal, 24 Neb. 141, 37 N.W. 926 (1888).

(e) MANNER OF ENTERING JUDGMENT

25-1313 Jury trial; rendition of judgment by court; entry by clerk.

When a trial by jury has been had, judgment must be rendered by the court and entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration.

Source: R.S.1867, Code § 438, p. 467; R.S.1913, § 8006; C.S.1922, § 8947; C.S.1929, § 20-1313; R.S.1943, § 25-1313; Laws 1961, c. 111, § 3, p. 350.

There was no compliance with this section or its alternatives. Northwestern Public Service Co. v. Juhl, 177 Neb. 625, 129 N.W.2d 570 (1964).

It is the duty of the clerk to render judgment on verdict. Webber v. City of Scottsbluff, 155 Neb. 48, 50 N.W.2d 533 (1951).

Judgment was properly entered the same day verdict was received. Hamaker v. Patrick, 123 Neb. 809, 244 N.W. 420 (1932); Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N.W. 298 (1932).

When verdict is general, it is clerk's duty to render judgment in conformity therewith, unless otherwise ordered. Crete Mills v. Stevens, 120 Neb. 794, 235 N.W. 453 (1931).

Where jury verdict finds for plaintiff but awards incorrect amount, court cannot recompute and enter judgment for proper amount; only remedy is motion for new trial. Kenesaw Mill & Elevator Co. v. Aufdenkamp, 106 Neb. 246, 183 N.W. 294 (1921).

It is error to enter judgment for amount of verdict if in excess of amount claimed; party may remit. Davis v. Hall, 70 Neb. 678, 97 N.W. 1023 (1904).

Court may reserve case on specific law points which must be stated in record; not on sufficiency of evidence. Barge v. Haslam, 65 Neb. 656, 91 N.W. 528 (1902).

Failure to enter judgment at term; court may enter later. Toogood v. Russell, 3 Neb. Unof. 189, 91 N.W. 249 (1902).

25-1314 Entry of judgment by court; when required.

Where the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be entered.

Source: R.S.1867, Code § 439, p. 467; R.S.1913, § 8007; C.S.1922, § 8948; C.S.1929, § 20-1314.

Special circumstances of case required trial court to order what judgment should be entered. Bell v. Crook, 168 Neb. 685, 97 N.W.2d 352 (1959).

25-1315 Multiple claims or parties; effect.

(1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express

direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(2) When a court has ordered a final judgment under the conditions stated in subsection (1) of this section, the court may stay enforcement of that judgment until the entry of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Source: Laws 2000, LB 921, § 10.

Subsection (1) of this section requires, in cases with multiple claims or parties, an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of all claims or parties, an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties. Malolepszy v. State, 270 Neb. 100, 699 N.W.2d 387 (2005).

In a case involving two appellees, a lower court order sustaining one appellee's motion for summary judgment and entering judgment against the appellant was a final order, because it determined the action as related to those two parties, and no further action was necessary as between those two parties. Blue Cross and Blue Shield v. Dailey, 268 Neb. 733, 687 N.W.2d 689 (2004).

An order granting an evidentiary hearing on some issues and denying a hearing on others is a final order because a postconviction proceeding is a special proceeding. The enactment of this section does not change that conclusion. State v. Harris, 267 Neb. 771, 677 N.W.2d 147 (2004).

With the enactment of subsection (1) of this section, one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of section 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. Bailey v. Lund-Ross Constructors Co., 265 Neb. 539, 657 N.W.2d 916 (2003).

Pursuant to subsection (1) of this section, only when more than one claim for relief or multiple parties are involved may the court direct entry of a final judgment as to fewer than all the claims or parties. Tri-Par Investments v. Sousa, 263 Neb. 209, 640 N.W.2d 371 (2002).

Subsection (1) of this section is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action. Keef v. State, Dept. of Motor Vehicles, 262 Neb. 622, 634 N.W.2d 751 (2001).

Where multiple causes of action or multiple parties are involved, the trial court must both enter a final order pursuant to section 25-1902 and make an express determination that there is no just reason for delay and expressly direct the entry of judgment to make appealable an order adjudicating fewer than all claims or the rights and liabilities of fewer than all parties. Pioneer Chem. Co. v. City of North Platte, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

Subsection (1) of this section is implicated only where multiple causes of action are presented or multiple parties are involved and a final judgment is entered as to one of the parties or causes of action. Parker v. Parker, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

25-1315.01 Motion for directed verdict; joinder; effect; requisites.

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

Source: Laws 1947, c. 88, § 1, p. 267.

Although a motion for directed verdict should state the specific grounds therefor, where proof relating to a specific issue is so clear and convincing that reasonable minds cannot reach different conclusions, it is the duty of the trial court to enter judgment in accordance with the evidence. Hill v. City of Lincoln, 249 Neb. 88, 541 N.W.2d 655 (1996).

In the absence of a showing of prejudice, error may not be predicated on failure to state reasons in motion for directed verdict. Swink v. Smith, 173 Neb. 423, 113 N.W.2d 515 (1962).

Motion for directed verdict should set forth specific grounds. Allied Building Credits, Inc. v. Damicus, 167 Neb. 390, 93 N.W.2d 210 (1958); Segebart v. Gregory, 156 Neb. 261, 55 N.W.2d 678 (1952).

Motion sufficiently stated the specific grounds therefor. Sullivan v. Omaha & C. B. St. Ry. Co., 160 Neb. 342, 70 N.W.2d 98 (1955).

Although joined in by all parties, motion for directed verdict raises only questions of law and does not constitute waiver of a jury trial. In re Estate of Coons, 154 Neb. 690, 48 N.W.2d 778 (1951).

Act applies only in a case in which a motion for a directed verdict is made at the close of the evidence. In re Estate of Kinsey, 152 Neb. 95, 40 N.W.2d 526 (1949).

25-1315.02 Motion for directed verdict at close of evidence; effect; filing before entry of judgment; treatment; motion to set aside verdict or judgment; power of court.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. No later than ten days after the entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the moving party's motion for a directed verdict. If the motion is filed after the announcement of a verdict but before the entry of judgment, it shall be treated as filed after the entry of judgment and on the day thereof. If a verdict is not returned, within ten days after the jury is discharged a party who has moved for a directed verdict may move for judgment in accordance with the moving party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If judgment was entered, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Source: Laws 1947, c. 85, § 1(1), p. 262; Laws 2000, LB 921, § 9; Laws 2004, LB 1207, § 4.

1. Duty of court
2. Allowance of motion
3. Denial of motion
4. Miscellaneous

1. Duty of court

Trial court had authority to vacate judgment it had entered for plaintiff after trial to the court, and to then enter judgment for defendants on motion couched in terms of this section. Woodmen of the World Life Ins. Soc. v. Peter Kiewit Sons' Co., 196 Neb. 158, 241 N.W.2d 674 (1976).

In passing on motion, court is required to re-examine the entire material evidence. Wagoun v. Chicago, B. & Q. R. R., 155 Neb. 132, 50 N.W.2d 810 (1952); In re Estate of Bingaman, 155 Neb. 24, 50 N.W.2d 523 (1951).

Whether a judgment will be directed or new trial granted is matter of judicial discretion. In re Estate of Coons, 154 Neb. 690, 48 N.W.2d 778 (1951).

Where motion to dismiss was made on ground that evidence did not sustain a cause of action, this section applied. Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N.W.2d 769 (1951).

This section deals with the powers of the trial court. Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N.W.2d 609 (1950).

2. Allowance of motion

This section authorizes entry of a judgment notwithstanding the verdict if the appropriate motion is made within ten days after reception of the verdict to be set aside; a trial court should direct a verdict only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. Getzschman v. Miller Chemical Co., 232 Neb. 885, 443 N.W.2d 260 (1989).

Where evidence showed that plaintiff was damaged but not the extent or amount thereof, grant of alternative motion for new trial rather than entry of judgment notwithstanding the verdict was proper. Wylie v. Czapla, 168 Neb. 646, 97 N.W.2d 255 (1959).

Judgment notwithstanding the verdict should be granted where motion for directed verdict at close of all of the evidence should have been sustained. Weston v. Gold & Co., 167 Neb. 692, 94 N.W.2d 380 (1959).

A proper motion for a directed verdict is a necessary condition precedent to a motion for judgment notwithstanding the verdict. Allied Building Credits, Inc. v. Damicus, 167 Neb. 390, 93 N.W.2d 210 (1958).

When a party has filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, the granting of the motion for judgment notwithstanding the verdict operates as a denial of the motion for new trial. Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N.W.2d 640 (1950).

If a motion for directed verdict made at the close of all of the evidence should have been sustained, it is the duty of the court on motion for judgment notwithstanding the verdict to set same aside and render judgment pursuant to the motion. Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N.W.2d 139 (1950).

When proper motion is made and overruled, court is empowered to set aside verdict and enter judgment in accordance with motion. Sohler v. Christensen, 151 Neb. 843, 39 N.W.2d 837 (1949); Patrick v. Union Central Life Ins. Co., 150 Neb. 201, 33

N.W.2d 537 (1948); In re Estate of Farr, 150 Neb. 67, 33 N.W.2d 454 (1948).

3. Denial of motion

The prerequisite motion for directed verdict made at the close of all the evidence was not made where plaintiff failed to renew her motion for directed verdict after defendant presented evidence on surrebuttal. Spulak v. Tower Ins. Co., 251 Neb. 784, 559 N.W.2d 197 (1997).

A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for a directed verdict made at the close of all the evidence, which motion should have been sustained because of a want of evidence. Palmtag v. Gartner Constr. Co., 245 Neb. 405, 513 N.W.2d 495 (1994).

Motions for directed verdict and for judgment notwithstanding inability of jury to agree on a verdict, were properly denied in view of the evidence on the record. Danielsen v. Richards Mfg. Co., Inc., 206 Neb. 676, 294 N.W.2d 858 (1980).

In the absence of a motion for directed verdict, a motion for judgment notwithstanding the verdict may not properly be sustained. Harris v. Pullen, 169 Neb. 298, 99 N.W.2d 238 (1959).

Where trial court denies motion for new trial and makes no ruling on motion for judgment notwithstanding the verdict, the denial operates for both. Lund v. Holbrook, 153 Neb. 706, 46 N.W.2d 130 (1951).

4. Miscellaneous

Pursuant to this section, when a jury is unable to return a verdict and is discharged, a party properly preserves for appeal only those issues stated in its motion for judgment notwithstanding the verdict that it also asserted in its motion for directed verdict. Parks v. Merrill, Lynch, 268 Neb. 499, 684 N.W.2d 543 (2004).

This section authorizes an appeal from the denial of a judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict. Snyder v. Contemporary Obstetrics & Gyn., 258 Neb. 643, 605 N.W.2d 782 (2000).

This section authorizes an appeal from the denial of a judgment notwithstanding the verdict after the jury has been discharged as the result of an inability to reach a verdict. Critchfield v. McNamara, 248 Neb. 39, 532 N.W.2d 287 (1995).

A motion for judgment notwithstanding the verdict is not available in criminal proceedings in Nebraska state courts. State v. Miller, 240 Neb. 297, 481 N.W.2d 580 (1992).

This section authorizes the renewal of a party's previous directed verdict motion in cases where a jury is unable to reach a verdict and is discharged for that reason. Ditloff v. Otto, 239 Neb. 377, 476 N.W.2d 675 (1991).

A motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict. Lockhart v. Continental Cheese, Inc., 203 Neb. 331, 278 N.W.2d 604 (1979); Pearson v. Schuler, 172 Neb. 353, 109 N.W.2d 537 (1961); Springer v. Henthorn, 169 Neb. 578, 100 N.W.2d 521 (1960); Kohl v. Unkel, 163 Neb. 257, 79 N.W.2d 405 (1956); In re Estate of Kinsey, 152 Neb. 95, 40 N.W.2d 526 (1949).

The procedure hereunder is limited to civil proceedings. State v. Torrence, 192 Neb. 720, 224 N.W.2d 177 (1974).

Section 25-1315.03, provides that certain orders are appealable, but it is not exclusive. Edquist v. Commercial Sav. & Loan Assn., 191 Neb. 618, 217 N.W.2d 82 (1974).

Motions for directed verdict following all evidence and, after mistrial, for judgment for defendant or dismissal of petition were proper. Giangrasso v. Schimmel, 190 Neb. 228, 207 N.W.2d 517 (1973).

Party may seek a new trial without asking for judgment notwithstanding the verdict. Guynan v. Olson, 178 Neb. 335, 133 N.W.2d 571 (1965).

This section constitutes a special statutory procedure. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co., 178 Neb. 226, 132 N.W.2d 758 (1965).

Under specified conditions, order granting a new trial is an appealable order. Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N.W.2d 583 (1960).

Motion for new trial is not always essential to review on appeal. Hungerford v. Knudsen, 171 Neb. 125, 105 N.W.2d 568 (1960).

Where requisite motions have been made, order denying a new trial is an appealable order. Bell v. Crook, 168 Neb. 685, 97 N.W.2d 352 (1959).

Act applies where proper motions are made even though jury does not agree on verdict and is discharged. In re Estate of Fehrenkamp, 154 Neb. 488, 48 N.W.2d 421 (1951).

Party is required not only to timely make motion for directed verdict but thereafter to timely file motion for judgment notwithstanding the verdict. Pahl v. Sprague, 152 Neb. 681, 42 N.W.2d 367 (1950).

The purpose of the act, of which this section is a part, was to simplify and expedite the final disposition of litigation. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N.W.2d 533 (1949).

25-1315.03 Order for directed verdict or for new trial; appeal.

An order entering judgment as provided in section 25-1315.02 or granting or denying a new trial is an appealable order. The time for and manner of taking such appeal shall be as in an appeal from a judgment, decree, or final order of the district court in a civil action. On appeal from an order granting a new trial, upon a review of an order denying a new trial in the action in which such motion was made, or on appeal from the judgment, the appellate court may order and direct judgment to be entered in favor of the party who was entitled to such judgment.

Source: Laws 1947, c. 85, § 1(2), p. 263; Laws 1955, c. 89, § 1, p. 263; Laws 1991, LB 732, § 49; Laws 1992, LB 360, § 5.

1. Appealable order
2. Procedure
3. Action of Supreme Court
4. Miscellaneous

1. Appealable order

The filing of a motion for new trial and its subsequent overruling do not convert an otherwise unappealable order into an appealable order. Similarly, the failure to file a motion for new trial does not preclude a party from appealing a final order. Jarrett v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993).

The denial of a judgment authorized by section 25-1315.02 is an appealable order under this section. Ditloff v. Otto, 239 Neb. 377, 476 N.W.2d 675 (1991).

On appeal from the county court sitting as a juvenile court, an order of the district court remanding the case to the county court for a further dispositional hearing is a final order appealable to this court. In re Interest of Roman, 212 Neb. 919, 327 N.W.2d 36 (1982).

Order overruling motion for judgment in accordance with a motion for directed verdict may be reviewed on appeal although no verdict was returned by the jury. Bailey v. Williams, 189 Neb. 484, 203 N.W.2d 454 (1973).

An order granting a new trial in a civil action is appealable. Morford v. Lipsey Meat Co., Inc., 179 Neb. 420, 138 N.W.2d 653 (1965).

Where appropriate motions have been made, the granting or denying of a new trial is an appealable order. Hungerford v. Knudsen, 171 Neb. 125, 105 N.W.2d 568 (1960).

Appeal from order granting a new trial is authorized. Sleezer v. Lang, 170 Neb. 239, 102 N.W.2d 435 (1960); Dunlap v. Welch, 152 Neb. 459, 41 N.W.2d 384 (1950); Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N.W.2d 772 (1949).

Order granting or denying a new trial is an appealable order. Mueller v. Keeley, 163 Neb. 613, 80 N.W.2d 707 (1957).

Order denying a new trial is an appealable order. Lund v. Holbrook, 153 Neb. 706, 46 N.W.2d 130 (1951).

Order for entry of judgment notwithstanding the verdict is an appealable order. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N.W.2d 533 (1949).

2. Procedure

The filing of a notice of appeal and a deposit of a docket fee within 30 days after an order overruling a motion for new trial timely filed in a county court perfects an appeal to the district court from the final order of the county court. 132nd Street Ltd. v. Fellman, 245 Neb. 59, 511 N.W.2d 88 (1994).

On an appeal from the entry of a judgment notwithstanding the verdict, all parties must preserve all errors on which they rely, alternative or otherwise, by adequate assignments in their respective briefs. Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N.W.2d 640 (1950).

Where trial court has granted new trial, correctness of ruling may properly be raised by direct appeal. Wagner v. Loup River Public Power Dist., 150 Neb. 7, 33 N.W.2d 300 (1948).

3. Action of Supreme Court

Order of trial court overruling motions of defendant for a directed verdict and for judgment notwithstanding the verdict reversed and cause remanded with directions to enter judgment for defendant. Welsh v. Zuck, 192 Neb. 1, 218 N.W.2d 236 (1974).

Supreme Court can direct entry of judgment for defendant notwithstanding verdict. Laurinat v. Giery, 157 Neb. 681, 61 N.W.2d 251 (1953).

Supreme Court may review action on motion for directed verdict even though jury failed to agree. In re Estate of Fehrenkamp, 154 Neb. 488, 48 N.W.2d 421 (1951).

Judgment directed to be entered for defendant in automobile damage case under this section. Yanney v. Nemer, 154 Neb. 188, 47 N.W.2d 368 (1951).

Where trial court should have dismissed action, Supreme Court can direct such action to be taken. Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N.W.2d 769 (1951).

Supreme Court may, on appeal from order granting judgment notwithstanding the verdict, dispose of motion for new trial. Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N.W.2d 609 (1950).

On appeal from an order refusing to enter judgment notwithstanding verdict, Supreme Court may direct judgment to be entered in favor of party entitled thereto. Patrick v. Union Central Life Ins. Co., 150 Neb. 201, 33 N.W.2d 537 (1948).

On appeal, Supreme Court may order judgment to be entered in favor of party entitled thereto without ordering new trial in district court. In re Estate of Farr, 150 Neb. 67, 33 N.W.2d 454 (1948).

4. Miscellaneous

Unless the proceedings leading up to a motion for new trial constitute a trial, the order granting a new trial does not afford a right to appeal. Jarrett v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993).

While this section authorizes appeals in certain described situations, its definitions are not exclusive. Edquist v. Commercial Sav. & Loan Assn., 191 Neb. 618, 217 N.W.2d 82 (1974).

This section was not applicable to issues presented. Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co., 178 Neb. 226, 132 N.W.2d 758 (1965).

Under specified conditions, right of appeal from interlocutory order was granted. Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N.W.2d 583 (1960).

Purpose and intention of the 1947 act, of which this section is a part, was not only to facilitate procedure but also to create additional rights. In re Estate of Kinsey, 152 Neb. 95, 40 N.W.2d 526 (1949).

25-1316 Judgment upon counterclaim or setoff.

If a counterclaim or setoff established at the trial exceeds the plaintiff's claim so established, judgment for the defendant must be given for the excess; or, if it appears that the defendant is entitled to any affirmative relief, judgment should be given therefor.

Source: R.S.1867, Code § 441, p. 467; R.S.1913, § 8009; C.S.1922, § 8950; C.S.1929, § 20-1316.

It is approved practice for the judgment entry to show findings of the verdict for each party for computations of the judgment for excess. Crete Mills v. Stevens, 120 Neb. 794, 235 N.W. 453 (1931).

Plaintiff's claim and counterclaim should be disposed of in one trial. Miller v. McGannon, 79 Neb. 609, 113 N.W. 170 (1907).

25-1317 Judgment or order; infant's right reserved.

It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining twenty years of age; but in

any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty years, may show cause against such order or judgment.

Source: R.S.1867, Code § 442, p. 467; R.S.1913, § 8010; C.S.1922, § 8951; C.S.1929, § 20-1317; R.S.1943, § 25-1317; Laws 1972, LB 1049, § 5.

Where infant, by guardian ad litem, unsuccessfully appealed from judgment against him, he cannot, after attaining his majority, open up judgment on ground of error in former proceedings. Foerster v. Helming, 105 Neb. 531, 181 N.W. 521 (1921).

After period stated, minor is as conclusively bound as an adult. McCreary v. Creighton, 76 Neb. 179, 107 N.W. 240 (1906).

Decree of strict foreclosure will not bar infant from showing cause against same. Stull v. Masilonka, 74 Neb. 322, 108 N.W. 166 (1906).

Modifies chancery rules only as to form of decree; decree of sale of infant's lands is binding. Manfull v. Graham, 55 Neb. 645, 76 N.W. 19 (1898).

25-1318 Judgments and orders; journal entry.

All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action.

Source: R.S.1867, Code § 443, p. 467; R.S.1913, § 8011; C.S.1922, § 8952; C.S.1929, § 20-1318.

1. Necessity
2. Effect
3. Miscellaneous

1. Necessity

Orders which are not announced in open court are not formalized until they have been entered on the journal. The journal of the trial court is the official record of the judgments and orders of that court. In re Interest of J.A., 244 Neb. 919, 510 N.W.2d 68 (1994).

Order overruling motion for new trial must be entered on journal. Mueller v. Keeley, 163 Neb. 613, 80 N.W.2d 707 (1957).

Order overruling motion for new trial in criminal case must be entered on journal to start time running in which error proceedings may be taken. Fisher v. State, 153 Neb. 226, 43 N.W.2d 600 (1950).

Dismissal after final submission, to be effective, must be entered on journal. Tuttle v. Wyman, 149 Neb. 769, 32 N.W.2d 742 (1948).

Memorandum on trial docket is not judgment until extended upon journal, within meaning of section requiring appeals to Supreme Court to be filed within three months from rendition of judgment. Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N.W. 342 (1927).

Order of dismissal must be entered on journal. Knaak v. Brown, 115 Neb. 260, 212 N.W. 431 (1927).

Memorandum by judge in trial docket does not take place of entry in journal. Hornick v. Maguire, 47 Neb. 826, 66 N.W. 867 (1896).

Memorandum for a decree will not authorize a review in Supreme Court until extended upon the court journal. Ward v. Urmson, 40 Neb. 695, 59 N.W. 97 (1894).

May enter judgment nunc pro tunc. Morrill v. McNeill, 1 Neb. Unof. 651, 91 N.W. 601 (1901).

2. Effect

Entry in journal is controlling over notes in trial docket. Midwest Laundry Equipment Corp. v. Berg, 174 Neb. 747, 119 N.W.2d 509 (1963).

Failure of court, in decree of confirmation, to direct clerk to make an entry on the journal that the court is satisfied of the legality of such sale, was not prejudicial where clerk had, in fact, entered such decree on journal. Erwin v. Brunke, 133 Neb. 745, 277 N.W. 48 (1938).

District court has power to correct journal entry, at any time after decree pronounced and before complied with, on motion and satisfactory evidence. Occidental Building & Loan Assn. v. Adams, 96 Neb. 454, 148 N.W. 88 (1914).

Entry of judgment is not essential to validity. Horn v. Miller, 20 Neb. 98, 29 N.W. 260 (1886).

Entries in journal are not any part of complete record of case. McDonald v. Penniston, 1 Neb. 324 (1871).

3. Miscellaneous

Under facts in this case, there was no error in denying motion to correct decree nunc pro tunc. Karrer v. Karrer, 190 Neb. 610, 211 N.W.2d 116 (1973).

A judgment dismissing plaintiff's petition upon proper motion for judgment after mistrial and discharge of jury, but containing phrase notwithstanding verdict, is harmless error. Giangrasso v. Schimmel, 190 Neb. 228, 207 N.W.2d 517 (1973).

25-1319 Complete record; duty of clerk; waiver.

The clerk shall make a complete record of every cause, as soon as it is finally determined, unless such record, or some part thereof, is duly waived.

Source: R.S.1867, Code § 444, p. 467; R.S.1913, § 8012; C.S.1922, § 8953; C.S.1929, § 20-1319.

Duty devolves on each successive incumbent. Boettcher v. Lancaster County, 74 Neb. 148, 103 N.W. 1075 (1905).

Complete record of mortgage foreclosure must be made unless waived by all parties to suit. Johnson v. Rawls, 39 Neb. 351, 58 N.W. 132 (1894)).

Provisions as to time of making and signing are directory. Colony v. Billingsley, 2 Neb. Unof. 670, 89 N.W. 744 (1902).

25-1320 Complete record; when made; judge to sign.

The clerk shall make up such record in each cause, in the vacation next after the term at which the same was determined, and the presiding judge of such court shall, at its next term thereafter, subscribe the same.

Source: R.S.1867, Code § 445, p. 467; R.S.1913, § 8013; C.S.1922, § 8954; C.S.1929, § 20-1320.

Fixing of time within which record shall be made is directory. Boettcher v. Lancaster County, 74 Neb. 148, 103 N.W. 1075 (1905).

25-1321 Complete record; contents.

The complete record shall include the complaint, the process, the return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. All journal entries and all such filings as are required to be entered in full in the appearance dockets, shall, by reference, be made a part of the complete record for all purposes, including the taxing of fees and costs, and need not be reentered in the making up of such record; but if the items of an account or the copies of a paper attached to the pleadings are voluminous, the court may order the record to be made by abbreviating the same, by inserting a pertinent description thereof, or by omitting them entirely. Evidence introduced at any proceeding is not part of the complete record of the cause.

Source: R.S.1867, Code § 446, p. 467; R.S.1913, § 8014; C.S.1922, § 8955; C.S.1929, § 20-1321; Laws 1941, c. 33, § 1, p. 143; C.S.Supp.,1941, § 20-1321; R.S.1943, § 25-1321; Laws 2002, LB 876, § 25.

A bill of exceptions is no part of complete record in district court. Behrends v. Beyschlag, 50 Neb. 304, 69 N.W. 835 (1897).

Answer, demurrer thereto, and ruling are proper parts of record. Mills v. Miller, 2 Neb. 299 (1873).

Signature of judge is not essential to validity of decree or record. Gallentine v. Cummings, 4 Neb. Unof. 690, 96 N.W. 178 (1903).

25-1322 Complete record; extension of time for making and subscribing.

When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and recorded within such time as it may direct. When they are made up, and upon examination found to be correct, the presiding judge of such court shall subscribe the same.

Source: R.S.1867, Code § 447, p. 468; R.S.1913, § 8015; C.S.1922, § 8956; C.S.1929, § 20-1322.

Failure of judge to sign record does not invalidate judgment pronounced by court. Scott v. Rohman, 43 Neb. 618, 62 N.W. 46 (1895).

Record includes judgment and decrees. Horn v. Miller, 20 Neb. 98, 29 N.W. 260 (1886).

25-1323 Complete record; when unnecessary.

No complete record shall be made (1) in criminal prosecutions where the indictment has been quashed, or where the prosecuting attorney shall have entered a nolle prosequi on the indictment; (2) in cases where the action has

been dismissed without prejudice to a future action; (3) in actions in which, in open court, at the term at which the final order or judgment shall be made, both parties shall declare their agreement that no record shall be made.

Source: R.S.1867, Code § 448, p. 468; R.S.1913, § 8016; C.S.1922, § 8957; C.S.1929, § 20-1323.

Complete record in mortgage foreclosure cannot be waived by plaintiff alone even though all defendants default. Colonial & U. S. Mtg. Co. v. Foutch, 31 Neb. 282, 47 N.W. 929 (1891).

25-1324 Complete record; action dismissed without prejudice.

In cases where an action has been dismissed without prejudice to a future action, the clerk shall make a complete record of the proceedings, upon being paid for making the same by the party desiring the record to be made.

Source: R.S.1867, Code § 449, p. 468; R.S.1913, § 8017; C.S.1922, § 8958; C.S.1929, § 20-1324.

25-1325 Complete record; action dismissed; setoff and counterclaim.

Unless waived by the parties, a complete record shall be made in cases where a setoff or a counterclaim has been presented by the defendant and the plaintiff's cause dismissed by himself or by the court.

Source: R.S.1867, Code § 450, p. 468; R.S.1913, § 8018; C.S.1922, § 8959; C.S.1929, § 20-1325.

(f) CONVEYANCE BY COMMISSIONERS

25-1326 Judicial sale; conveyance of land by commissioners; when allowed.

Real property may be conveyed by master commissioners (1) when by an order or judgment in an action or a proceeding, a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment; (2) when specific real property is required to be sold under an order or judgment of the court.

Source: R.S.1867, Code § 451, p. 468; R.S.1913, § 8019; C.S.1922, § 8960; C.S.1929, § 20-1326.

Commissioner need not take oath; may administer oath to appraisers. George v. Keniston, 57 Neb. 313, 77 N.W. 772 (1899).

Person designated by court to execute decree of foreclosure is a master commissioner. Northwestern Mutual Life Ins. Co. v. Mulvihill, 53 Neb. 538, 74 N.W. 78 (1898).

Appointment of commissioner instead of sheriff to make sale of real estate rests in discretion of trial court. American Investment Co. v. Nye, 40 Neb. 720, 59 N.W. 355 (1894).

Court may appoint sheriff or other person to conduct sale under mortgage foreclosure. State ex rel. Elliott v. Holliday, 35 Neb. 327, 53 N.W. 142 (1892).

This section applies to all sales of real estate under process of court. McKeighan v. Hopkins, 14 Neb. 361, 15 N.W. 711 (1883).

25-1327 Judicial sale; sheriff as commissioner.

A sheriff may act as a master commissioner under the provisions of section 25-1326, subdivision (2). Sales made under the same shall conform in all respects to the laws regulating sales of land upon execution.

Source: R.S.1867, Code § 452, p. 468; R.S.1913, § 8020; C.S.1922, § 8961; C.S.1929, § 20-1327.

Officer cannot be compelled to advertise sale in any particular newspaper. State ex rel. Elliott v. Holliday, 35 Neb. 327, 53 N.W. 142 (1892).

25-1328 Judicial sale; deed of commissioner; form and execution.

The deed of a master commissioner shall contain the like recital and shall be executed, acknowledged and recorded in the same manner as the deed of a sheriff of real property sold under execution.

Source: R.S.1867, Code § 453, p. 468; R.S.1913, § 8021; C.S.1922, § 8962; C.S.1929, § 20-1328.

(g) MOTION TO ALTER OR AMEND

25-1329 Motion; when filed; filing before entry of judgment; treatment.

A motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment. A motion to alter or amend a judgment filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof.

Source: Laws 2000, LB 921, § 7; Laws 2004, LB 1207, § 5.

In determining what qualifies as a motion to alter or amend a judgment, the key is not the motion's title. If the motion seeks substantive alteration of the judgment-as opposed to the correction of clerical errors or relief wholly collateral to the judgment-a court may treat the motion as one to alter or amend the judgment. Strong v. Omaha Constr. Indus. Pension Plan, 270 Neb. 1, 701 N.W.2d 320 (2005).

A motion which seeks a new hearing based on newly discovered evidence may be treated as a motion to alter or amend a judgment. Woodhouse Ford v. Laflan, 268 Neb. 722, 687 N.W.2d 672 (2004).

A motion which seeks a substantive alteration of an order may be treated as a motion to alter or amend the judgment under this section. A timely motion under this section tolls the time for filing a notice of appeal. Central Neb. Pub. Power v. Jeffrey Lake Dev., 267 Neb. 997, 679 N.W.2d 235 (2004).

A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment and must seek substantive alteration of the judgment. A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment, and the time for filing a notice of appeal runs from the date of the judgment. State v. Bellamy, 264 Neb. 784, 652 N.W.2d 86 (2002).

(h) SUMMARY JUDGMENTS

25-1330 Claimant; right to move for summary judgment.

A party seeking to recover in district court upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the service of process on the opposing party or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his or her favor upon all or any part thereof.

Source: Laws 1951, c. 65, § 1, p. 199; Laws 1998, LB 234, § 6.

1. Proper
2. Not proper
3. Miscellaneous

1. Proper

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from these facts and that the moving party is entitled to judgment as a matter of law. Carpender v. Bendorf, 246 Neb. 77, 516 N.W.2d 619 (1994).

A summary judgment shall be granted where there is no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law. Glen Park Terr. #1 Homeowners Assn. v. M. Timm, Inc., 230 Neb. 48, 430 N.W.2d 40 (1988).

The right of a party to sue as representative of a class may be raised by a motion for summary judgment. Blankenship v. Omaha P. P. Dist., 195 Neb. 170, 237 N.W.2d 86 (1976).

Where only question of law was presented, summary judgment was proper. State v. Kidder, 173 Neb. 130, 112 N.W.2d 759 (1962).

Where controlling facts are not in dispute, and both parties have moved for summary judgment, entry of summary judgment is proper. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961).

Summary judgment was proper under record presented. Dougherty v. Commonwealth Co., 172 Neb. 330, 109 N.W.2d 409 (1961).

Where there is no real controversy as to the facts, and no genuine issue remains for trial, summary judgment is proper. First Nat. Bank of Wayne v. Gross Real Estate Co., 162 Neb. 343, 75 N.W.2d 704 (1956).

Summary judgment was authorized where coverage of policy of group insurance was not in force. Palmer v. Capitol Life Ins. Co. 157 Neb. 760, 61 N.W.2d 396 (1953).

Summary judgment is proper if pleadings and admissions show there is no genuine issue of fact. Mueller v. Shacklett, 156 Neb. 881, 58 N.W.2d 344 (1953).

Summary judgment was proper on issue of liability where publication was libel per se. Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N.W.2d 806 (1953).

Summary judgment for recovery of attorney's fees was properly granted. Mecham v. Colby, 156 Neb. 386, 56 N.W.2d 299 (1953).

Summary judgment is authorized only where moving party is entitled to judgment as a matter of law. Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952).

2. Not proper

Where there is a genuine issue as to material facts, it is error to render summary judgment. Hall v. Hadley, 173 Neb. 675, 114 N.W.2d 590 (1962).

Denial of summary judgment was not prejudicial error. Greer v. Chelewski, 162 Neb. 450, 76 N.W.2d 438 (1956).

Where question of fact is in dispute, summary judgment is not proper. City of Omaha v. Lewis & Smith Drug Co., Inc., 156 Neb. 650, 57 N.W.2d 269 (1953).

3. Miscellaneous

It would be prejudicial to permit plaintiff to proceed in summary judgment where the defendant has been denied the right to file amended answers and a setoff. Building Systems, Inc. v. Medical Center, Ltd., 213 Neb. 49, 327 N.W.2d 95 (1982).

On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law, and this burden may be discharged by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position. In re Estate of Nicholson, 211 Neb. 805, 320 N.W.2d 739 (1982).

Issue on motion for summary judgment is whether or not there is a genuine issue of fact, not how that issue should be determined. Valentine Production Credit Assn. v. Spencer Foods, Inc., 196 Neb. 119, 241 N.W.2d 541 (1976).

The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact. Youngs v. Wagner, 172 Neb. 735, 111 N.W.2d 629 (1961).

Summary judgment may be obtained in a declaratory judgment proceeding. Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961).

Rules for application of Summary Judgment Act stated. Ingersoll v. Montgomery Ward & Co., Inc., 171 Neb. 297, 106 N.W.2d 197 (1960).

Summary Judgment Act is constitutional. Eden v. Klaas, 165 Neb. 323, 85 N.W.2d 643 (1957).

Object of motion for summary judgment is to separate the formal from the substantial issues. Rehn v. Bingaman, 157 Neb. 467, 59 N.W.2d 614 (1953).

25-1331 Defending party; right to move for summary judgment.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

Source: Laws 1951, c. 65, § 2, p. 199.

A defendant is entitled to summary judgment if the defendant shows that an essential element of the plaintiff's cause of action is nonexistent. Tuttle & Assoc. v. Gendler, 237 Neb. 825, 467 N.W.2d 881 (1991).

The defense of res judicata need not be raised by answer, but can be raised and passed upon for the first time on a motion for summary judgment. DeCosta Sporting Goods, Inc. v. Kirkland, 210 Neb. 815, 316 N.W.2d 772 (1982)

Party in declaratory judgments proceeding may move for summary judgment. Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N.W.2d 1 (1962).

To receive consideration on appeal, affidavits used on motion for summary judgment must be made a part of the bill of exceptions. Peterson v. George, 168 Neb. 571, 96 N.W.2d 627 (1959).

When a cause of action is commenced against an estate that has already been closed, the proper method of attacking the petition on the grounds that the estate has previously been closed and the personal representative discharged is through a motion for summary judgment, not a demurrer, because evidence beyond what appears on the face of the petition is usually necessary to establish that the estate has been closed and the personal representative discharged. Mach v. Schmer, 4 Neb. App. 819, 550 N.W.2d 385 (1996).

25-1332 Motion for summary judgment; proceedings.

The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings and the evidence admitted at the hearing show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The evidence that may be received on a motion for summary judgment includes depositions, answers to interrogatories, admissions, stipulations, and affidavits. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Source: Laws 1951, c. 65, § 3, p. 199; Laws 2001, LB 489, § 3.

1. Scope
2. Motion granted
3. Motion denied
4. Procedure
5. Court review

1. Scope

The plain, direct, and unambiguous meaning of the language of this section is that parties adverse to a motion for summary judgment may serve opposing affidavits prior to the day of the summary judgment hearing. Woodhouse Ford v. Laflan, 268 Neb. 722, 687 N.W.2d 672 (2004).

The ''clear beyond all doubt'' standard for a summary judgment is inconsistent with the standard expressed in this section. Anderson v. Service Merchandise Co, 240 Neb. 873, 485 N.W.2d 170 (1992).

To entitle defendant to summary judgment on the issue of contributory negligence, defendant has the burden of proving, under the facts viewed most favorably to the plaintiff, that (1) plaintiff's contributory negligence was more than slight as a matter of law or (2) defendant's negligence was not gross in comparison to plaintiff's negligence as a matter of law. John v. OO (Infinity) S Development Co., 234 Neb. 190, 450 N.W.2d 199 (1990).

This section has been construed to mean that if the moving party submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact. Raskey v. Michelin Tire Corp., 223 Neb. 520, 391 N.W.2d 123 (1986).

A summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to a judgment as a matter of law. Yankton Prod. Credit Assn. v. Larsen, 219 Neb. 610, 365 N.W.2d 430 (1985).

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Yankton Prod. Credit Assn. v. Larsen, 219 Neb. 610, 365 N.W.2d 430 (1985).

The absence of a genuine issue as to a material fact and entitlement to judgment as a matter of law are prerequisites to a summary judgment. Stolte v. Blackstone, 213 Neb. 113, 328 N.W.2d 462 (1982).

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Bank of Valley v. Shunk, 208 Neb. 200, 302 N.W.2d 711 (1981).

For entry of a summary judgment, the record must show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Reed v. Nice-Pak Products, Inc., 193 Neb. 505, 227 N.W.2d 854 (1975); Larson v. Board of Regents, 189 Neb. 688, 204 N.W.2d 568 (1973); Storz Brewing Co. v. Kuester, 178 Neb. 135, 132 N.W.2d 341 (1965).

Summary judgment is an extreme remedy and should be granted only when issue is clear beyond all doubt. It cannot be granted on cross-motion where only reason for same is that other party had also moved for summary judgment to which he was not entitled. Hiram Scott College v. Insurance Co. of North America, 187 Neb. 290, 188 N.W.2d 688 (1971).

Summary judgment is not a substitute for other remedies. Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N.W.2d 543 (1954).

Function of court on motion is to determine whether genuine issue of fact exists. Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N.W.2d 396 (1953).

Summary judgment is only proper where no genuine issue of fact remains for trial. Illian v. McManaman, 156 Neb. 12, 54 N.W.2d 244 (1952).

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. Where it is not clear from the record whether the trial court relied upon improper evidence, the better course is to reverse a grant of summary judgment. Summary judgment is an extreme remedy because it may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. Kulhanek v. Union Pacific RR. Co., 8 Neb. App. 564, 598 N.W.2d 67 (1999).

2. Motion granted

Where plaintiff was experienced businessman and attorney, who voluntarily and knowingly signed strict pledge agreement to bank, and bank presented enough evidence to demonstrate that agreement language should not be modified, summary judgment in favor of bank was proper. McCormack v. First Westroads Bank, 238 Neb. 881, 473 N.W.2d 102 (1991).

Summary judgment is proper where, as here, there is no genuine issue as to any material fact in the case. Marshall v. Radiology Assoc., 225 Neb. 75, 402 N.W.2d 855 (1987).

The court should sustain a motion for summary judgment if, upon hearing, the pleadings, depositions, admission on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Borg-Warner v. Watton, 215 Neb. 318, 338 N.W.2d 612 (1983); Reifschneider v. Nebraska Methodist Hospital, 212 Neb. 91, 321 N.W.2d 445 (1982); First Mid America Inc. v. MCI Communications Corp., 212 Neb. 57, 321 N.W.2d 424 (1982); Manzer v. Pentico, 209 Neb. 364, 307 N.W.2d 812 (1981).

Summary judgment is proper where adjudication of any right or fact in issue is precluded by res judicata, and an order granting a motion for summary judgment by the municipal court is final and appealable and is not converted to an interlocutory order when reversed and remanded by the district court so as to prohibit an appeal to this court. DeCosta Sporting Goods, Inc. v. Kirkland, 210 Neb. 815, 316 N.W.2d 772 (1982).

Where bond was in effect at time actual demand was made against the principal, but not on earlier date when right to make demand accrued, summary judgment was properly granted to the surety. Stock v. Meissner, 209 Neb. 636, 309 N.W.2d 86 (1981).

Summary judgment was proper in granting the employee's commission where there was no dispute that the employment contract existed, that the employee performed under the contract when he obtained two real estate listings, and that a commission was paid to the employer when the two listings were sold. Oehlrich v. Gateway Realty of Columbus, Inc., 209 Neb. 417, 308 N.W.2d 327 (1981).

Summary judgment for employer was proper when at time of employee's tort he was not acting in kind of work he was employed to perform, within the authorized time and space limits, and his actions were not actuated in any part by a purpose to serve the employer. Johnson v. Evers, 195 Neb. 426, 238 N.W.2d 474 (1976).

The evidence as to whether plaintiff was a passenger or a guest was undisputed and the issue having been decided by the court as a matter of law, summary judgment was proper. Hale v. Taylor, 192 Neb. 298, 220 N.W.2d 378 (1974).

Motion for summary judgment may be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Grantham v. General Tel. Co., 191 Neb. 21, 213 N.W.2d 439 (1973).

Motion for summary judgment is proper if the pleadings and admissions show there is no genuine issue of fact. Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535 (1961).

Where controlling facts are not in substantial dispute and each party moves for summary judgment, entry of such judg-

ment is proper. Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N.W.2d 292 (1960).

Where undisputed showing disclosed that plaintiff's negligence was more than slight when compared with negligence of defendant, summary judgment for defendant was authorized. Miller v. Aitken, 160 Neb. 97, 69 N.W.2d 290 (1955).

Motion for summary judgment is appropriate where no genuine issue of fact exists or court is without jurisdiction of subject matter. Mueller v. Shacklett, 156 Neb. 881, 58 N.W.2d 344 (1953).

Summary judgment was proper on issue of liability alone in libel action. Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N.W.2d 806 (1953).

Where issue of fact does not exist, summary judgment is proper. Mecham v. Colby, 156 Neb. 386, 56 N.W.2d 299 (1953).

3. Motion denied

In this instance, the question of whether sufficient part performance has been established to render an alleged oral agreement enforceable and, if so, on what date this sufficient part performance was completed could not be answered as a matter of law, and therefor a genuine issue of material fact exists rendering the granting of a summary judgment improper. In re Estate of Nicholson, 211 Neb. 805, 320 N.W.2d 739 (1982).

Whether there is a compelling governmental interest for a municipal personnel rule is a question of fact which must be established before a summary judgment may be granted. Voichahoske v. City of Grand Island, 194 Neb. 175, 231 N.W.2d 124 (1975).

Where question of fraudulent intent is involved, motion for summary judgment should be denied. Nine v. Lurz, 191 Neb. 605, 216 N.W.2d 744 (1974).

The burden is upon the party moving for the summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Green v. Village of Terrytown, 189 Neb. 615, 204 N.W.2d 152 (1973).

Entry of summary judgment not proper where there were genuine issues of fact as to existence of warning signs, lighting arrangements, change in floor level, and plaintiff's familiarity with the premises. Snyder v. Fort Kearney Hotel Co., Inc., 182 Neb. 859, 157 N.W.2d 782 (1968).

Where genuine issue of material fact exists, summary judgment should be denied. Fay Smith & Associates, Inc. v. Consumers P. P. Dist., 172 Neb. 681, 111 N.W.2d 451 (1961); Dennis v. Berens, 156 Neb. 41, 54 N.W.2d 259 (1952).

Entry of summary judgment against guardian was not proper where there was a genuine issue of fact as to the correctness of account as a whole. Finn v. Whitten, 172 Neb. 282, 109 N.W.2d 376 (1961).

Where there was a genuine issue of fact, motion for summary judgment in disbarment suit was properly overruled. State ex. rel. Nebraska State Bar Assn. v. Jensen, 171 Neb. 1, 105 N.W.2d 459 (1960).

Where moving party is not entitled to a judgment as a matter of law, motion for summary judgment should be overruled. Rehn v. Bingaman, 157 Neb. 467, 59 N.W.2d 614 (1953).

4. Procedure

A party adverse to a motion for summary judgment may not serve opposing affidavits on the day of the summary judgment hearing. Woodhouse Ford v. Laflan, 268 Neb. 722, 687 N.W.2d 672 (2004).

This section expressly provides that a motion for summary judgment shall be served at least 10 days before the time fixed for the hearing. Malicky v. Heyen, 251 Neb. 891, 560 N.W.2d 773 (1997).

An unsigned affidavit which was not offered until the day of the hearing on the summary judgment motion was properly excluded by the trial court. Medley v. Davis, 247 Neb. 611, 529 N.W.2d 58 (1995).

When it is asserted in a summary judgment motion that an opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings. Ruwe v. Farmers Mut. United Ins. Co., 238 Neb. 67, 469 N.W.2d 129 (1991).

The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. Deutsche Credit Corp. v. Hi-Bo Farms, Inc., 224 Neb. 463, 398 N.W.2d 693 (1987).

Evidence adduced by cross-examination of an affiant in an earlier summary judgment proceeding cannot be considered an affidavit within the meaning of this section. First Nat. Bank of Ord v. Greene Bldg. & Supply, Inc., 220 Neb. 205, 369 N.W.2d 59 (1985).

District court erred in hearing motion for summary judgment where notice provisions of the statute were not complied with. Curley v. Curley, 214 Neb. 780, 336 N.W.2d 103 (1983).

Without a prima facie showing by the movant for a summary judgment, i.e., the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial, which prima facie showing shifts the burden to the opposing party, the opposing party need not present expert witnesses to prove the existence of a doctor's negligence in a medical malpractice action to rebut the doctor's motion for summary judgment. Hanzlik v. Paustian, 211 Neb. 322, 318 N.W.2d 712 (1982).

Where one party moves for a partial summary judgment on certain issues only, the other party should not be expected at the hearing on the motion to present evidence on issues to which the motion does not apply. Schilke v. Walkenhorst, 210 Neb. 583, 316 N.W.2d 294 (1982).

Dialogue and actions by counsel held to constitute a waiver of his objection to a motion for summary judgment not timely heard. Metropolitan Utilities Dist. v. Fidelity & Deposit Co., 200 Neb. 635, 264 N.W.2d 854 (1978).

At hearing on plaintiff's motion for summary judgment, defendant must proceed on the merits immediately when continuance denied. Yunghans v. O'Toole, 199 Neb. 317, 258 N.W.2d 810 (1977).

The right of a party to sue as representative of a class may be raised by a motion for summary judgment. Blankenship v. Omaha P. P. Dist., 195 Neb. 170, 237 N.W.2d 86 (1976).

Affidavits not submitted prior to day of hearing and not offered and received in evidence will not be considered on appeal. Center Bank v. Mid-Continent Meats, Inc., 194 Neb. 665, 234 N.W.2d 902 (1975).

Where no continuance was requested when affidavits were filed late, and they dealt with facts plaintiff did not dispute, error, if any, was harmless. Hi-Point Land & Cattle Co., Inc. v. Schlaphoff, 193 Neb. 276, 226 N.W.2d 926 (1975).

Depositions offered in evidence on motion for summary judgment must be included in bill of exceptions to be reviewed by Supreme Court on appeal. Brown v. Shamberg, 190 Neb. 171, 206 N.W.2d 846 (1973).

Denial of motion for summary judgment is not an appealable order. Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N.W.2d 583 (1960).

In absence of bill of exceptions, affidavits offered in evidence in support of motion for summary judgment cannot be considered. Brierly v. Federated Finance Co., 168 Neb. 725, 97 N.W.2d 253 (1959).

Summary judgment was properly denied even though reply to request for admissions was not made under oath. Greer v. Chelewski, 162 Neb. 450, 76 N.W.2d 438 (1956).

A summary judgment cannot be awarded for an amount in excess of the damages pled and prayed for in the operative

petition. One Pacific Place, Ltd. v. H.T.I. Corp., 6 Neb. App. 62, 569 N.W.2d 251 (1997).

5. Court review

In appellate review of an order granting a summary judgment, the Supreme Court views the evidence in a light most favorable to the party against whom the judgment is granted. Tuttle & Assoc. v. Gendler, 237 Neb. 825, 467 N.W.2d 881 (1991).

A trial court may use appropriate judicial notice in resolving a motion for summary judgment. Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443 (1990).

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. John v. OO (Infinity) S Development Co., 234 Neb. 190, 450 N.W.2d 199 (1990).

On a motion for summary judgment, the court is required to view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom it is directed and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. Mayer v. Howard, 220 Neb. 328, 370 N.W.2d 93 (1985).

In reviewing a summary judgment the court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. Yankton Prod. Credit Assn. v. Larsen, 219 Neb. 610, 365 N.W.2d 430 (1985).

Issue to be tried on motion for summary judgment is whether there is any genuine issue of material fact, not how issue should be decided; court should view evidence in light most favorable to party against whom it is directed. Piper v. Hill, 185 Neb. 568, 177 N.W.2d 509 (1970).

District court possesses authority to render summary judgment, interlocutory in character, on issue of liability alone. Hart v. Ronspies, 181 Neb. 38, 146 N.W.2d 795 (1966).

In the absence of a bill of exceptions, it is presumed that ruling of district court on motion for summary judgment was correct. Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N.W.2d 246 (1959); Peterson v. George, 168 Neb. 571, 96 N.W.2d 627 (1959).

25-1333 Case not fully adjudicated on motion.

If on motion under sections 25-1330 to 25-1336 judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Source: Laws 1951, c. 65, § 4, p. 199.

The right of a party to sue as representative of a class may be raised by a motion for summary judgment. Blankenship v. Omaha P. P. Dist., 195 Neb. 170, 237 N.W.2d 86 (1976).

Where each party files a motion for summary judgment in the district court, the Supreme Court can consider both motions and determine the controversy. Randall v. Erdman, 194 Neb. 390, 231 N.W.2d 689 (1975).

The Summary Judgment Act grants the district court power to enter interlocutory orders eliminating issues upon which no genuine issue of fact is presented and requires a trial and final order or judgment upon the facts that are in good faith controverted. Burroughs Corp. v. James E. Simon Constr. Co., 192 Neb. 272, 220 N.W.2d 225 (1974).

Court may specify the facts that appear without substantial controversy, and which facts are established for the trial. Hart v. Ronspies, 181 Neb. 38, 146 N.W.2d 795 (1966).

Legislature distinguished summary judgment process from a trial. Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N.W.2d 583 (1960).

Summary judgment on issue of liability, and submission of issue of damages to jury, was proper procedure. Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N.W.2d 806 (1953).

25-1334 Form of affidavits; further testimony.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

Source: Laws 1951, c. 65, § 5, p. 200.

The key inquiry under this section, insofar as an expert's opinion and foundational evidence is concerned, is whether such evidence would be admissible at trial, and thus, an expert's

opinion may meet the requirements of this section. Boyle v. Welsh, 256 Neb. 118, 589 N.W.2d 118 (1999).

It was error for court to base decision on affidavits when there was no showing that affidavits were made based on affiant's personal knowledge of the facts set forth therein. First Nat. Bank in Morrill v. Union Ins. Co., 246 Neb. 636, 522 N.W.2d 168 (1994).

Affidavits in support of or in opposition to a motion for summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. White v. Ardan, Inc., 230 Neb. 11, 430 N.W.2d 27 (1988).

Statements in affidavits as to opinion, belief, or conclusions of law are of no effect. In re Estate of Villwok, 226 Neb. 693, 413 N.W.2d 921 (1987).

Administrative manager held competent to testify by affidavit to matters concerning records over which he was in charge. Kosowski v. City Betterment Corp., 197 Neb. 402, 249 N.W.2d 481 (1977).

Affidavit opposing summary judgment must set forth facts. Eden v. Klaas, 165 Neb. 323, 85 N.W.2d 643 (1957).

Under the terms of this section, affidavits offered for the truth of a particular fact (1) shall be made on personal knowledge, (2) shall set forth such facts as would be admissible into evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. Richards v. Meeske, 12 Neb. App. 406, 675 N.W.2d 707 (2004).

Unsworn summaries of facts or arguments and of statements which would be inadmissible in evidence are of no effect in a motion for summary judgment. Kulhanek v. Union Pacific RR. Co., 8 Neb. App. 564, 598 N.W.2d 67 (1999).

To be effective, evidence opposing the rendition of a summary judgment must be made on personal knowledge and show affirmatively that the affiant is competent to testify to the matters stated therein. Statements in affidavits as to opinion, belief, or conclusions of law are of no effect. Holt Cty. Sch. Dist. No. 0025 v. Dixon, 8 Neb. App. 390, 594 N.W.2d 659 (1999).

25-1335 Party unable to justify opposition by affidavit; refusal of order; continuance.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Source: Laws 1951, c. 65, § 6, p. 200.

A continuance authorized by this section is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. Eastroads, Inc. v. City of Omaha, 237 Neb. 837, 467 N.W.2d 888 (1991); DeCamp v. Lewis, 231 Neb. 191, 435 N.W.2d 883 (1989).

An affidavit under this section need not contain evidence going to the merits of the case; rather, the affidavit need only contain reasonable excuse or good cause explaining why a party is presently unable to offer evidence essential to justify opposition to a motion for summary judgment. DeCamp v. Lewis, 231 Neb. 191, 435 N.W.2d 883 (1989).

This section does not provide relief to a party who has been dilatory. DeCamp v. Lewis, 231 Neb. 191, 435 N.W.2d 883 (1989).

This section prescribes a prerequisite for continuance, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion. DeCamp v. Lewis, 231 Neb. 191, 435 N.W.2d 883 (1989).

The purpose of this section is to provide an additional safeguard against an improvident or premature grant of summary judgment. An affidavit need not contain evidence going to the merits of the case; rather, an affidavit must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment. Wachtel v. Beer, 229 Neb. 392, 427 N.W.2d 56 (1988).

Denial of motion for partial summary judgment was not error where basis for such action was not clearly shown. American Province Real Estate Corp. v. Metropolitan Utilities Dist., 178 Neb. 348, 133 N.W.2d 466 (1965).

Where motion for summary judgment had been argued and submitted without objection, motion to amend pleadings thereafter made was properly denied. Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N.W.2d 246 (1959).

As a prerequisite for a continuance or additional time or other relief under this section, a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion. Holt Cty. Sch. Dist. No. 0025 v. Dixon, 8 Neb. App. 390, 594 N.W.2d 659 (1999).

25-1336 Affidavit made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to sections 25-1330 to 25-1336 are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Source: Laws 1951, c. 65, § 7, p. 200.

ARTICLE 14
ABATEMENT AND REVIVOR

(a) SURVIVAL AND ABATEMENT OF CLAIMS AND ACTIONS

(a) SURVIVAL AND ABATEMENT OF CLAIMS AND ACTIONS

25-1401 Causes of action which survive.

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Source: R.S.1867, Code § 454, p. 469; R.S.1913, § 8022; C.S.1922, § 8963; C.S.1929, § 20-1401.

1. Cause of action which survives
2. Applicability of section
3. Miscellaneous

1. Cause of action which survives

Under the provisions of this section, conscious prefatal-injury fear and apprehension of impending death survives a decedent's death as an element of decedent's personal injury action and inures to the benefit of decedent's estate. Nelson v. Dolan, 230 Neb. 848, 434 N.W.2d 25 (1989).

In an action seeking damages for injuries sustained in an automobile collision, the plaintiff's cause of action survives and does not abate on his death. Spradlin v. Myers, 200 Neb. 559, 264 N.W.2d 658 (1978).

Cause of action to establish trust survived death of party to trust agreement. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

Action for injuries may be brought against estate of decedent whose negligence caused injury. In re Grainger's Estate, 121 Neb. 338, 237 N.W. 153 (1931), 78 A.L.R. 597 (1931).

Where, from nature of case, cause of action can continue, as in actions based on negligence, it will not abate, though not mentioned in this section. Levin v. Muser, 107 Neb. 230, 185 N.W. 431 (1921).

Husband's action for loss of services and expenses on account of tort to wife survives, and is assignable. Forbes v. Omaha, 79 Neb. 6, 112 N.W. 326 (1907).

A pending action for personal injuries occasioned by negligence does not abate by the death of the plaintiff. Webster v. City of Hastings, 59 Neb. 563, 81 N.W. 510 (1900).

A claim for attorney's fees is saved by Nebraska's survival statute. Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981).

2. Applicability of section

Survivorship statutes merely preserve and continue the right of action which the decedent had prior to his death and do not create a new cause of action. Thus, where wrongful act results in instantaneous death, no cause of action in the deceased ever comes into being and none can survive. A cause of action which survives under this section may be joined with a wrongful death action; however, no recovery for loss of earnings may be had except those which may be recovered under the wrongful death action. Rhein v. Caterpillar Tractor Co., 210 Neb. 321, 314 N.W.2d 19 (1982).

3. Miscellaneous

As a general rule, a cause of action may be assigned if the action would, on the death of the assignor, survive to the decedent's legal representative under this section. Kimco Addition v. Lower Platte South N.R.D., 232 Neb. 289, 440 N.W.2d 456 (1989).

Where action did not abate, administrator may recover all damages that deceased could have recovered if he had survived, including loss of earning power. Murray v. Omaha Transfer Co., 98 Neb. 482, 153 N.W. 488 (1915), affirming 95 Neb. 175, 145 N.W. 360 (1914).

It is sufficient to charge that party unlawfully in possession refuses to vacate premises on lawful notice so to do. Brown v. Feagins, 37 Neb. 256, 55 N.W. 1048 (1893).

25-1402 Actions which abate by death of defendant.

No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant.

Source: R.S.1867, Code § 455, p. 469; R.S.1913, § 8023; C.S.1922, § 8964; C.S.1929, § 20-1402; R.S.1943, § 25-1402; Laws 1972, LB 1032, § 130.

1. Abatement
2. No abatement
3. Miscellaneous

1. Abatement

On death of either party before decree of divorce becomes final, suit abates and is not subject to revivor. Williams v. Williams, 146 Neb. 383, 19 N.W.2d 630 (1945).

Most liberal construction of this section could not prevent divorce action from abating where death occurs before decree becomes operative. Sovereign Camp, W. O. W. v. Billings, 107 Neb. 218, 185 N.W. 426 (1921).

An inmate's cause of action against the State for alleged violation of his constitutional rights while in prison did not survive his death. Fitzgerald v. Clarke, 9 Neb. App. 898, 621 N.W.2d 844 (2001).

2. No abatement

An action for an accounting is not one of those specifically excepted by the provisions of this section, and therefore such an action does not abate by reason of the death of one of the parties. Willis v. Rose, 223 Neb. 49, 388 N.W.2d 101 (1986).

Cause of action to establish trust did not abate. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

Right of action does not abate on wrongdoer's death before commencement of action. In re Grainger's Estate, 121 Neb. 338, 237 N.W. 153 (1931), 78 A.L.R. 597 (1931).

Action for personal injuries wrongfully inflicted does not abate by death, but may be revived and continued by personal representative. Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N.W. 806 (1922).

Action does not abate where cause of action is such as by nature can continue, though not specifically mentioned in preceding section among those which survive. Levine v. Muser, 107 Neb. 230, 185 N.W. 431 (1921).

Action did not abate, but administrator may recover all damages deceased could have recovered, including loss of earning power. Murray v. Omaha Transfer Co., 98 Neb. 482, 153 N.W. 488 (1915), affirming 95 Neb. 175, 145 N.W. 360 (1914).

A pending action for libel does not abate by death of the plaintiff. Sheibley v. Nelson, 83 Neb. 501, 119 N.W. 1124 (1909).

Action for malicious conspiracy to injure trade does not abate. Cleland v. Anderson, 66 Neb. 252, 92 N.W. 306 (1902), rehearing denied 66 Neb. 273, 96 N.W. 212 (1903), affirmed on rehearing 66 Neb. 276, 98 N.W. 1075 (1902).

Action for personal injuries was not abated by plaintiff's death. Webster v. City of Hastings, 59 Neb. 563, 81 N.W. 510 (1900).

A claim for attorney's fees is saved by Nebraska's survival statute. Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981).

3. Miscellaneous

Survivorship statutes merely preserve and continue the right of action which the decedent had prior to his death and do not create a new cause of action. Thus, where wrongful act results in instantaneous death, no cause of action in the deceased ever comes into being and none can survive. A cause of action which survives under this section may be joined with a wrongful death action; however, no recovery for loss of earnings may be had except those which may be recovered under the wrongful death action. Rhein v. Caterpillar Tractor Co., 210 Neb. 321, 314 N.W.2d 19 (1982).

Section is not applicable as to widow's allowance. In re Samson's Estate, 142 Neb. 556, 7 N.W.2d 60 (1942).

(b) REVIVOR OF ACTION

25-1403 Death of one of several parties; cessation of powers of personal representative; right of action surviving to or against remaining parties; procedure.

Where there are several plaintiffs or defendants in an action and one of them dies, or his powers as a personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers, being stated on the record.

Source: R.S.1867, Code § 456, p. 469; R.S.1913, § 8024; C.S.1922, § 8965; C.S.1929, § 20-1403.

In an action seeking damages for injuries sustained in an automobile collision, the plaintiff's cause of action survives and does not abate on his death. Spradlin v. Myers, 200 Neb. 559, 264 N.W.2d 658 (1978).

Summary method of revivor is not exclusive. Keith v. Bruder, 77 Neb. 215, 109 N.W. 172 (1906).

Section applied to action in Supreme Court on error. Jameson v. Bartlett, 63 Neb. 638, 88 N.W. 860 (1902).

Summary mode of revivor is not exclusive. Hayden v. Huff, 62 Neb. 375, 87 N.W. 184 (1901).

This section applies to actions before justice of peace. Miller v. Curry, 17 Neb. 321, 22 N.W. 559 (1885).

25-1404 Death of one of several parties; cessation of powers of personal representative; right of action not surviving to or against remaining parties; procedure.

Where one of the several plaintiffs or defendants dies, or his powers as a personal representative cease, if the cause of action does not admit of survivorship, and the court is of opinion that the merits of the controversy can be properly determined, and the principles applicable to the case fully settled, it may proceed to try the same as between the remaining parties; but the judgment shall not prejudice any who are not parties at the time of the trial.

Source: R.S.1867, Code § 457, p. 469; R.S.1913, § 8025; C.S.1922, § 8966; C.S.1929, § 20-1404.

25-1405 Death of party; cessation of powers of personal representative; right of action surviving to or against successor; revivor.

Where one of the parties to an action dies, or his powers as a personal representative cease, before the judgment, if the right of action survives in favor of or against his representatives or successor, the action may be revived, and proceed in their names.

Source: R.S.1867, Code § 458, p. 470; R.S.1913, § 8026; C.S.1922, § 8967; C.S.1929, § 20-1405.

Where there is no probate and no personal representative of the original plaintiff, the action may be revived in the names of the heirs-at-law of the original plaintiff. Spradlin v. Myers, 200 Neb. 559, 264 N.W.2d 658 (1978).

Section is not applicable as to revivor sought by executor of widow's estate in claim for widow's allowance. In re Samson's Estate, 142 Neb. 556, 7 N.W.2d 60 (1942).

Where party plaintiff dies before judgment, action can no longer proceed in his name but must be revived. Vogt v. Daily, 70 Neb. 812, 98 N.W. 31 (1904).

Action to recover support for child born out of wedlock may be revived in name of county. Dodge County v. Kemnitz, 28 Neb. 224, 44 N.W. 184 (1889).

Because inmate's cause of action against the State for allegedly violating his constitutional rights did not survive his death, it could not be revived. Fitzgerald v. Clarke, 9 Neb. App. 898, 621 N.W.2d 844 (2001).

25-1406 Revivor; procedure; conditional order.

The revivor shall be, by a conditional order of the court if made in term, or by a judge thereof if made in vacation, that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased; and proceed in favor of or against them.

Source: R.S.1867, Code § 459, p. 470; R.S.1913, § 8027; C.S.1922, § 8968; C.S.1929, § 20-1406.

Where there is no probate and no personal representative of the original plaintiff, the action may be revived in the names of the heirs-at-law of the original plaintiff. Spradlin v. Myers, 200 Neb. 559, 264 N.W.2d 658 (1978).

Procedure for revivor is provided for actions that do not abate. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

Provisions of the civil code relative to abatement and revivor of actions are applicable to revivor of actions in Supreme Court. Keefe v. Grace, 142 Neb. 330, 6 N.W.2d 59 (1942).

If order is made absolute, right of administrator cannot be contested in main action. Missouri P. Ry. Co. v. Fox, 56 Neb. 746, 77 N.W. 130 (1898).

25-1407 Revivor; procedure; motion.

The order may be made on the motion of the adverse party, or of the representatives or successor of the party who died, or whose powers ceased, suggesting his death or the cessation of his powers, which, with the names and capacities of his representatives or successor, shall be stated in the order.

Source: R.S.1867, Code § 460, p. 470; R.S.1913, § 8028; C.S.1922, § 8969; C.S.1929, § 20-1407.

Procedure for revivor is provided for actions that do not abate. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

Provisions of the civil code relative to abatement and revivor of actions are applicable to revivor of actions in Supreme Court. Keefe v. Grace, 142 Neb. 330, 6 N.W.2d 59 (1942).

Action for personal injuries does not abate by death, and administrator may revive. Murray v. Omaha Transfer Co., 95 Neb. 175, 145 N.W. 360 (1914), on rehearing, 98 Neb. 482, 153 N.W. 488 (1915).

Party having no interest in litigation adverse to deceased party cannot make motion. Jameson v. Bartlett, 63 Neb. 638, 88 N.W. 860 (1902).

25-1408 Revivor; procedure; service of order; order by consent.

If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and returned within the same time, as a summons, upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor, the action shall stand revived.

Source: R.S.1867, Code § 461, p. 470; R.S.1913, § 8029; C.S.1922, § 8970; C.S.1929, § 20-1408.

Where the defendant did not object to the conditional order of revivor and allowed it to become final, defendant's subsequent efforts to challenge the revivor action are of no avail. Spradlin v. Myers, 200 Neb. 559, 264 N.W.2d 658 (1978).

Motion for revivor fails when no conditional order is issued and served upon adverse party, and notice of pendency of motion is served only on attorneys. Keefe v. Grace, 142 Neb. 330, 6 N.W.2d 59 (1942).

Statutes regulating revival of actions are permissive, and do not operate to modify the appeal statute, once the latter has commenced to run, but must be subordinated thereto. Independent Lubricating Co. v. Good, 135 Neb. 171, 280 N.W. 460 (1938).

Service on attorney of record is insufficient; general appearance waives. Missouri P. Ry. Co. v. Fox, 56 Neb. 746, 77 N.W. 130 (1898).

25-1409 Revivor; procedure; service of order by publication.

When the plaintiff shall make an affidavit, that the representatives of the defendant, or any of them, in whose name the action may be ordered to be revived, are nonresidents of the state, or have left the same to avoid the service of the order, or so concealed themselves that the order cannot be served upon them, or that the names and residence of the heirs or devisees of the person against whom the action may be ordered to be revived, or some of them, are unknown to the affiant, a notice may be published once in each week for four successive weeks, in the same manner as provided by section 25-519, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show cause why the action should not be revived against them; and if sufficient cause be not shown to the contrary, the action shall stand revived.

Source: R.S.1867, Code § 462, p. 470; R.S.1913, § 8030; C.S.1922, § 8971; C.S.1929, § 20-1409; R.S.1943, § 25-1409; Laws 1971, LB 47, § 2; Laws 1996, LB 299, § 20.

Time for taking an appeal is not suspended until a representative is appointed and revivor had. Independent Lubricating Co. v. Good, 135 Neb. 171, 280 N.W. 460 (1938).

Service by publication in revival of dormant judgment is authorized. White v. Ress, 80 Neb. 749, 115 N.W. 301 (1908).

25-1410 Death of plaintiff; in whose name action revived.

Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.

Source: R.S.1867, Code § 463, p. 470; R.S.1913, § 8031; C.S.1922, § 8972; C.S.1929, § 20-1410.

Where there is no probate and no personal representative of the original plaintiff, the action may be revived in the names of the heirs-at-law of the original plaintiff. Spradlin v. Myers, 200 Neb. 559, 264 N.W.2d 658 (1978).

Action to quiet title to real estate cannot be revived in name of administrator. Egan v. Niemann, 154 Neb. 161, 47 N.W.2d 404 (1951).

Where sole plaintiff in foreclosure proceedings died, leaving a will, revivor should be had in name of devisees. Vybiral v. Schildhauer, 144 Neb. 114, 12 N.W.2d 660 (1944).

Action for personal injuries does not abate by death, and administrator may revive. Murray v. Omaha Transfer Co., 95 Neb. 175, 145 N.W. 360 (1914), on rehearing, 98 Neb. 482, 153 N.W. 488 (1915).

Section is applicable to cases pending in Supreme Court. Sheibley v. Nelson, 83 Neb. 501, 119 N.W. 1124 (1909); Schmitt & Bros. Co. v. Mahoney, 60 Neb. 20, 82 N.W. 99 (1900).

Judgment should not be revived in name of administrator where he has not succeeded to rights of deceased. Vogt v. Binder, 76 Neb. 361, 107 N.W. 383 (1906).

Where sole plaintiff dies, proceedings are suspended until revived. Street v. Smith, 75 Neb. 434, 106 N.W. 472 (1906).

Where rights pass to heirs, heirs become necessary parties. Urlau v. Ruhe, 63 Neb. 883, 89 N.W. 427 (1902).

25-1411 Death of defendant; against whom action revived.

Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may also be against the heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them.

Source: R.S.1867, Code § 464, p. 471; R.S.1913, § 8032; C.S.1922, § 8973; C.S.1929, § 20-1411.

Where a cause of action or several causes of action may properly lie against a personal representative of a deceased defendant as well as against the heir of the deceased an order of revivor against only one of the parties, if proper, for some of the relief sought is not defective, and the cause of action may proceed against that party. Willis v. Rose, 223 Neb. 49, 388 N.W.2d 101 (1986).

Action to enforce trust was properly revived. Workman v. Workman, 167 Neb. 857, 95 N.W.2d 186 (1959).

To be a lien upon land descending to heirs of deceased judgment debtor, judgment must be revived against heirs, not against administrator. Dougherty v. White, 112 Neb. 675, 200 N.W. 884 (1924).

Dormant federal court judgment can be revived only in court where rendered. Holmes v. Webster, 98 Neb. 105, 152 N.W. 312 (1915).

In real estate mortgage foreclosure action, where party dies while proceedings are pending in Supreme Court, revivor should be had against heirs. Urlau v. Ruhe, 63 Neb. 883, 89 N.W. 427 (1902).

On motion to revive, merits of action cannot be heard; revivor is matter of right. Gillette v. Morrison, 7 Neb. 263 (1878).

25-1412 Death of defendant in actions to recover real property; against whom action revived.

Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor may be forthwith made in the manner directed in the preceding sections of this chapter.

Source: R.S.1867, Code § 465, p. 471; R.S.1913, § 8033; C.S.1922, § 8974; C.S.1929, § 20-1412.

If a decree of foreclosure is obtained during the lifetime of the mortgagor, sale and confirmation after his death without revivor is voidable only and not subject to collateral attack. Wendt v. Jones, 145 Neb. 667, 17 N.W.2d 887 (1945).

25-1413 Revivor as to defendant; time; limitation.

An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made.

Source: R.S.1867, Code § 466, p. 471; R.S.1913, § 8034; C.S.1922, § 8975; C.S.1929, § 20-1413.

Requirement of revivor within one year is not exclusive and has no application to dormant judgment. Rich v. Cooper, 136 Neb. 463, 286 N.W. 383 (1939).

Statutes regulating revival of action are permissive in quality and do not operate to suspend or interrupt time in which an appeal can be taken. Independent Lubricating Co. v. Good, 135 Neb. 171, 280 N.W. 460 (1938).

Successor of deceased judgment creditor may revive by original bill. Keith v. Bruder, 77 Neb. 215, 109 N.W. 172 (1906).

This section does not provide exclusive method. Plaintiff may revive by supplemental petition after one year, in discretion of court. Hayden v. Huff, 62 Neb. 375, 87 N.W. 184 (1901).

Limitation of one year is not applicable to revival of dormant judgments. School Dist. No. 34, Adams County v. Kountze Bros., 3 Neb. Unof. 690, 92 N.W. 597 (1902).

25-1414 Revivor as to plaintiff; time; limitation; revivor as to both parties.

An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased in the meantime, the order of revivor on both sides may be made in the period limited in section 25-1413.

Source: R.S.1867, Code § 467, p. 471; R.S.1913, § 8035; C.S.1922, § 8976; C.S.1929, § 20-1414.

Where the defendant did not object to the conditional order of revivor and allowed it to become final, defendant's subsequent efforts to challenge the revivor action are of no avail. Spradlin v. Myers, 200 Neb. 559, 264 N.W.2d 658 (1978).

In case of the death of a party after final judgment and before an appeal is taken, revivor statutes do not suspend the running of time in which an appeal can be taken. Independent Lubricating Co. v. Good, 135 Neb. 171, 280 N.W. 460 (1938).

Where the sole defendant dies after filing notice of appeal and supersedeas bond, his attorney does not confer jurisdiction on Supreme Court by filing transcript after defendant's death, and court cannot substitute administrator of his estate. Independent Lubricating Co. v. Good, 133 Neb. 431, 275 N.W. 668 (1937).

25-1415 Abatement of actions by death or cessation of powers of representative; duty of court.

When it appears to the court by affidavit that either party to an action has been dead, or where a party sues or is sued as a personal representative, that his powers have ceased for a period so long that the action cannot be revived in the names of his representatives or successor, without the consent of both parties, it shall order the action to be stricken from the docket.

Source: R.S.1867, Code § 468, p. 471; R.S.1913, § 8036; C.S.1922, § 8977; C.S.1929, § 20-1415.

When no effort has been made to revive, and cause is stricken from docket, the action is terminated. Humfeldt v. Moles, 63 Neb. 448, 88 N.W. 655 (1902).

Striking cause from docket is a suspension but not a dismissal of action. Hayden v. Huff, 62 Neb. 375, 87 N.W. 184 (1901).

Where cause of action cannot be revived, it must be stricken from the docket. Fitzgerald v. Clarke, 9 Neb. App. 898, 621 N.W.2d 844 (2001).

25-1416 Death of plaintiff; right of defendant to compel revivor.

At any term of the court succeeding the death of the plaintiff, while the action remains on the docket, the defendant having given to the plaintiff's proper representatives, in whose names the action might be revived, ten days' notice of the application therefor, may have an order to strike the action from the docket

and for costs against the estate of the plaintiff, unless the action is forthwith revived.

Source: R.S.1867, Code § 469, p. 471; R.S.1913, § 8037; C.S.1922, § 8978; C.S.1929, § 20-1416.

25-1417 Revived action; when tried.

When, by the provisions of sections 25-1405 to 25-1416, an action stands revived, the trial thereof shall not be postponed by reason of the revivor, if the action would have stood for trial at the term the revivor is complete, had no death or cessation of powers taken place.

Source: R.S.1867, Code § 470, p. 471; R.S.1913, § 8038; C.S.1922, § 8979; C.S.1929, § 20-1417.

(c) REVIVOR OF JUDGMENT; NEW PARTIES

25-1418 Joint debtors not originally summoned made judgment debtors.

When a judgment is recovered against one or more persons jointly indebted upon contract, those who were not originally summoned may be made parties to the judgment by action.

Source: R.S.1867, Code § 471, p. 472; R.S.1913, § 8039; C.S.1922, § 8980; C.S.1929, § 20-1418.

Where revivor of dormant judgment was had, want of jurisdiction in obtaining original judgment on joint promissory note could not be raised by injunction. Haynes v. Aultman, Miller & Co., 36 Neb. 257, 54 N.W. 511 (1893).

25-1419 Death of parties after judgment; revivor in name of representatives of deceased.

If either or both the parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives real or personal, or both, of such deceased party.

Source: R.S.1867, Code § 472, p. 472; R.S.1913, § 8040; C.S.1922, § 8981; C.S.1929, § 20-1419.

To be a lien upon land descending to heirs of deceased judgment debtor, judgment must be revived against heirs, not against administrator. Dougherty v. White, 112 Neb. 675, 200 N.W. 884 (1924).

Proceedings should not be in name of administrator unless he has succeeded to right of deceased. Vogt v. Binder, 76 Neb. 361, 107 N.W. 383 (1906).

Execution is void unless judgment is revived after plaintiff's death. Vogt v. Daily, 70 Neb. 812, 98 N.W. 31 (1904).

Fact that one or more parties cannot be found will not abate action as against those found and properly served. Clark v. Commercial Nat. Bank of Columbus, 68 Neb. 764, 94 N.W. 958 (1903).

The word ''manner'' does not include the element of time. Bankers' Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N.W. 484 (1899).

Administrator may prosecute error proceedings without order of revivor. Webster v. City of Hastings, 56 Neb. 245, 76 N.W. 565 (1898).

If judgment is joint, liability must be revived in that form. Fox v. Abbott, 12 Neb. 328, 11 N.W. 303 (1882).

25-1420 Dormant judgment; revivor; time limitation.

If a judgment becomes dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment; *Provided*, no judgment shall be revived unless action to revive the same be commenced within ten years after such judgment became dormant.

Source: R.S.1867, Code § 473, p. 472; Laws 1909, c. 154, § 1, p. 557; R.S.1913, § 8041; C.S.1922, § 8982; C.S.1929, § 20-1420.

1. Limitation
2. Jurisdiction
3. Proceeding
4. Lien
5. Miscellaneous

1. Limitation

Alimony decree does not become dormant by lapse of time. Nowka v. Nowka, 157 Neb. 57, 58 N.W.2d 600 (1953).

A decree for child support rendered in a divorce action does not become dormant because of a failure to issue execution thereon for more than five years. In re Application of Miller, 139 Neb. 242, 297 N.W. 91 (1941).

A proceeding to revive a dormant judgment may be instituted at any time within ten years after it becomes dormant. Baker Steel & Machinery Co. v. Ferguson, 137 Neb. 578, 290 N.W. 449 (1940).

Judgment not revived within ten years after becoming dormant is forever barred. Farmers & Merchants Bank v. Merryman, 126 Neb. 684, 254 N.W. 428 (1934).

Notwithstanding this section limiting revivor to ten years, domestic judgment is specialty, and action thereon is barred after five years. Armstrong v. Patterson, 97 Neb. 871, 152 N.W. 311 (1915).

Decree of foreclosure does not become dormant by failure to issue order of sale within five years. St. Paul Harvester Works v. Huckfeldt, 96 Neb. 552, 148 N.W. 153 (1914).

General statute of limitations does not apply. Moline, Milburn & Stoddard Co. v. Van Boskirk, 78 Neb. 728, 111 N.W. 605 (1907).

Limitation of one year for revivor of action does not apply to revivor of judgments. School Dist. No. 34, Adams County v. Kountze Bros., 3 Neb. Unof. 690, 92 N.W. 597 (1902).

2. Jurisdiction

A defendant in revival proceedings does not have the right to have a jury decide whether the original judgment was entered without personal jurisdiction. Cave v. Reiser, 268 Neb. 539, 684 N.W.2d 580 (2004).

While a defendant in revival proceedings may not use extrinsic evidence to relitigate the merits of the case, the defendant can introduce extrinsic evidence to show that the original judgment was void because the court entered it without jurisdiction. Cave v. Reiser, 268 Neb. 539, 684 N.W.2d 580 (2004).

Order of revival of alimony decree was proper. Miller v. Miller, 160 Neb. 766, 71 N.W.2d 478 (1955).

Decree for child support is not a judgment within the meaning of this section. Miller v. Miller, 153 Neb. 890, 46 N.W.2d 618 (1951).

A decree for alimony is not a judgment within the meaning of this section. Lippincott v. Lippincott, 152 Neb. 374, 41 N.W.2d 232 (1950).

Revivor must be in court where judgment rendered, not in court to which transcripted. Bank of Miller v. Moore, 98 Neb. 843, 154 N.W. 731 (1915).

A judgment of the federal court, when dormant, can only be revived in the court where it was rendered. Holmes v. Webster, 98 Neb. 105, 152 N.W. 312 (1915).

District court may revive transcripted judgment from inferior court though judgment became dormant before transcripted. Bussing v. Taggert, 73 Neb. 787, 103 N.W. 430 (1905).

District court may revive judgment transcripted from county court. Creighton & Morgan v. Gorum, 23 Neb. 502, 37 N.W. 76 (1888).

Revivor by county court is not error. Garrison v. Aultman & Co., 20 Neb. 311, 30 N.W. 61 (1886).

County court may revive judgment rendered by it; if transcripted to district court, latter should revive. Dennis v. Omaha Nat. Bank, 19 Neb. 675, 28 N.W. 512 (1886).

Section is applicable to judgments rendered by justice of peace. Miller v. Curry, 17 Neb. 321, 22 N.W. 559 (1885).

3. Proceeding

Defendant primarily liable, with other defendants, for aliquot part of judgment and surety for the others as to the remainder, may pay judgment and take assignment thereof, and, as assignee, is entitled to revive same in its entirety. Orchard & Wilhelm Co. v. Sexson, 119 Neb. 370, 229 N.W. 17 (1930).

This section applies to judgment rendered before as well as those rendered after its adoption. Atkinson v. Uttley, 98 Neb. 722, 154 N.W. 247 (1915).

Proceedings to revive and action upon judgment are cumulative remedies; judgment if valid and unpaid will be revived. Young v. City of Broken Bow, 94 Neb. 470, 143 N.W. 742 (1913).

No objections which go behind original judgment will be heard. American Freehold Land Mortgage Co. v. Smith, 84 Neb. 237, 120 N.W. 1113 (1909).

Assignee of judgment may have same revived. Brunke v. Gruben, 84 Neb. 14, 120 N.W. 435 (1909).

Judgment debtor cannot plead as a defense a setoff or counterclaim. Lashmett v. Prall, 83 Neb. 732, 120 N.W. 206 (1909).

Revivor of judgment void on its face is nullity. Minnesota Thresher Mfg. Co. v. L'Heureux, 82 Neb. 692, 118 N.W. 565 (1908).

While a revivor proceeding is not in one sense the commencement of a new action, it is the commencement of new and different proceeding. St. Paul Harvester Co. v. Mahs, 82 Neb. 336, 117 N.W. 702 (1908).

Judgment creditor must rebut presumption of payment. Platte County Bank v. Clark, 81 Neb. 255, 115 N.W. 787 (1908).

Judgment of revivor can be rendered against a nonresident upon service by publication. White v. Ress, 80 Neb. 749, 115 N.W. 301 (1908).

May impeach officer's return of service in original action. Johnson v. Carpenter, 77 Neb. 49, 108 N.W. 161 (1906).

Order of revivor is sufficient though without awarding execution. Thornhill v. Hargreaves, 76 Neb. 582, 107 N.W. 847 (1906).

Affidavit alleging judgment, nonpayment, that it is dormant, and prayer for order is sufficient. Furer v. Holmes, 73 Neb. 393, 102 N.W. 764 (1905).

All jointly liable should be made defendants. Clark v. Commercial Nat. Bank of Columbus, 68 Neb. 764, 94 N.W. 958 (1903).

Attorney having lien may intervene and revive in own name to extent of lien proper. Greek v. McDaniel, 68 Neb. 569, 94 N.W. 518 (1903).

Plea of payment admits validity of judgment. McCormick v. Carey, 62 Neb. 494, 87 N.W. 172 (1901).

Proceeding is continuation of original action. Bankers' Life Ins. Co. v. Robbins, 59 Neb. 170, 80 N.W. 484 (1899).

This section is substitute for writ of scire facias. Broadwater v. Foxworthy, 57 Neb. 406, 77 N.W. 1103 (1899).

4. Lien

Judgment when revived is lien only on realty then owned by debtor. Halmes v. Dovey, 64 Neb. 122, 89 N.W. 631 (1902).

Lien is renewed from date of revivor. Horbach v. Smiley, 54 Neb. 217, 74 N.W. 623 (1898).

5. Miscellaneous

The only defenses available against an application to revive are (1) there is no judgment to revive, (2) the purported judgment is void, and (3) the judgment was paid or otherwise discharged. Cave v. Reiser, 268 Neb. 539, 684 N.W.2d 580 (2004).

ARTICLE 15

EXECUTIONS AND EXEMPTIONS

(a) EXECUTIONS

Section

Section

(e) JUDGMENT OF JUSTICE OF THE PEACE

25-1583. Repealed. Laws 1972, LB 1032, § 287.
25-1584. Repealed. Laws 1972, LB 1032, § 287.
25-1585. Repealed. Laws 1972, LB 1032, § 287.
25-1586. Repealed. Laws 1972, LB 1032, § 287.

(f) NEBRASKA UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

25-1587. Repealed. Laws 1993, LB 458, § 15.
25-1587.01. Act, how cited.
25-1587.02. Foreign judgment, defined.
25-1587.03. Filing and status of foreign judgments.
25-1587.04. Notice of filing.
25-1587.05. Stay.
25-1587.06. Fees.
25-1587.07. Optional procedure.
25-1587.08. Uniformity of interpretation.
25-1587.09. Foreign judgments registered under prior law.
25-1588. Repealed. Laws 1993, LB 458, § 15.
25-1589. Repealed. Laws 1993, LB 458, § 15.
25-1590. Repealed. Laws 1993, LB 458, § 15.
25-1591. Repealed. Laws 1993, LB 458, § 15.
25-1592. Repealed. Laws 1993, LB 458, § 15.
25-1593. Repealed. Laws 1993, LB 458, § 15.
25-1594. Repealed. Laws 1993, LB 458, § 15.
25-1595. Repealed. Laws 1993, LB 458, § 15.
25-1596. Repealed. Laws 1993, LB 458, § 15.
25-1597. Repealed. Laws 1993, LB 458, § 15.
25-1598. Repealed. Laws 1993, LB 458, § 15.
25-1599. Repealed. Laws 1993, LB 458, § 15.
25-15,100. Repealed. Laws 1993, LB 458, § 15.
25-15,101. Repealed. Laws 1993, LB 458, § 15.
25-15,102. Repealed. Laws 1993, LB 458, § 15.
25-15,103. Repealed. Laws 1993, LB 458, § 15.
25-15,104. Repealed. Laws 1993, LB 458, § 15.

(g) BANKRUPTCY

25-15,105. Federal exemptions; rejected.

(a) EXECUTIONS

25-1501 Executions; by whom issued; how directed.

Executions shall be deemed process of the court, and shall be issued by the clerk and directed to the sheriff of the county. They may be directed to different counties at the same time.

Source: R.S.1867, Code § 474, p. 472; R.S.1913, § 8042; C.S.1922, § 8983; C.S.1929, § 20-1501.

Cross References

Execution against partnership or unincorporated associations, see section 25-316.

Divorce decree which provides for child's support is subject to the power of the district court over all its decrees and processes. Wassung v. Wassung, 136 Neb. 440, 286 N.W. 340 (1939).

No second order of sale shall issue against property sold under previous order, where first sale is confirmed. Storey v. Miles, 86 Neb. 827, 126 N.W. 517 (1910).

Execution issued without seal is void. Taylor v. Courtnay, 15 Neb. 190, 16 N.W. 842 (1883).

Execution cannot issue after supersedeas bond is filed. State Bank of Nebraska v. Green, 8 Neb. 297, 1 N.W. 210 (1879).

25-1502 Kinds of executions.

Executions are of two kinds: (1) Against the property of the judgment debtor, and (2) for delivery of the possession of real property with damages for withholding the same and costs.

Source: R.S.1867, Code § 475, p. 472; R.S.1913, § 8043; C.S.1922, § 8984; C.S.1929, § 20-1502.

25-1503 Property subject to levy and sale.

Lands, tenements, goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution and sold as hereinafter provided.

Source: R.S.1867, Code § 476, p. 472; R.S.1913, § 8044; C.S.1922, § 8985; C.S.1929, § 20-1503.

Automobile of nonresident defendant could be seized to pay modified judgment for alimony. Miller v. Miller, 153 Neb. 890, 46 N.W.2d 618 (1951).

Attachment affects actual interest of defendant only. Westervelt v. Hagge, 61 Neb. 647, 85 N.W. 852 (1901).

Chattels levied on and replevied cannot be levied on again for claim against said debtor. Beagle v. Smith, 50 Neb. 446, 69 N.W. 956 (1897).

25-1504 Lien of judgment; when attaches; lands within county where entered; other lands; chattels.

The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution; *Provided*, that a judgment shall be considered as rendered when such judgment has been entered on the judgment record.

Source: R.S.1867, Code § 477, p. 473; R.S.1913, § 8045; C.S.1922, § 8986; Laws 1927, c. 59, § 1, p. 221; Laws 1929, c. 83, § 3, p. 333; C.S.1929, § 20-1504.

1. Priority
2. When attaches
3. Other lands

1. Priority

Lien of a prior judgment attaches the instant the judgment debtor acquires property. Glissmann v. McDonald, 128 Neb. 693, 260 N.W. 182 (1935).

Against subsequent purchaser, judgment is not a lien until properly indexed. German Nat. Bank of Beatrice v. Atherton, 64 Neb. 610, 90 N.W. 550 (1902).

Judgment is a lien on interest of vendor who has not yet given deed. Doe v. Startzer, 62 Neb. 718, 87 N.W. 535 (1901).

Lien on subsequently purchased land attaches as soon as title vests in debtor. Lessert v. Sieberling, 59 Neb. 309, 80 N.W. 900 (1899).

Lien is inferior to inchoate right of dower. Butler v. Fitzgerald, 43 Neb. 192, 61 N.W. 640 (1895).

Judgment lien is inferior to prior unrecorded deed. Pearson v. Davis, 41 Neb. 608, 59 N.W. 885 (1894).

Prior unrecorded deed made in good faith is superior, if recorded before deed based on judgment. Harral & Ure v. Gray, 10 Neb. 186, 4 N.W. 1040 (1880).

Judgment is not a specific lien, but is a general lien subject to all prior liens legal or equitable. Metz v. State Bank of Brownville, 7 Neb. 165 (1878).

Creditor of national bank, suing after insolvency but before appointment of receiver, is not entitled to judgment lien on bank's real estate. Steel v. Randall, 19 F.2d 40 (8th Cir. 1927).

2. When attaches

A lien on personal property is acquired at the time the property is seized in execution. Credit Bureau of Broken Bow, Inc. v. Moninger, 204 Neb. 679, 284 N.W.2d 855 (1979).

A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, if the officer in express terms asserts his dominion over the property by virtue of such writ. Credit Bureau of Broken Bow, Inc. v. Moninger, 204 Neb. 679, 284 N.W.2d 855 (1979).

A judgment of the district court becomes a lien against real estate in that county from the time of its entry on the judgment record, and the judgment first entered is superior. Pontiac Improvement Co. v. Leisy, 144 Neb. 705, 14 N.W.2d 384 (1944).

A judgment becomes dormant and ceases to be a lien on real estate in five years from date thereof unless execution is sued out within such period, and a judgment revived is a lien on the real estate of judgment debtor from date of the order of revivor. Glissmann v. Happy Hollow Club, 132 Neb. 223, 271 N.W. 431 (1937).

To constitute sufficient levy, officer should have property under his control and openly and expressly assert dominion over it by virtue of writ, and where debtor promised to surrender automobile for purpose of levy, seizure of it at later date was not a sufficient levy as of time of promise. Miller v. Crosson, 131 Neb. 88, 267 N.W. 145 (1936).

Judgment in equity case affirmed on appeal is lien on debtor's land in county where rendered from date of rendition. Guaranty Fund Commission v. Teichmeier, 119 Neb. 387, 229 N.W. 121 (1930).

Federal court judgments are liens on real estate only in county where rendered; in other counties are liens where transcript filed and entered on judgment record. Rathbone Co. v. Kimball, 117 Neb. 229, 220 N.W. 244 (1928).

Lien of judgment is not perpetual and is subject to the limitations contained in the code. Glenn v. Glenn, 79 Neb. 68, 112 N.W. 321 (1907).

Lien on amount due vendor, who retains legal title, commences at date of filing judgment. First Nat. Bank of Falls City v. Edgar, 65 Neb. 340, 91 N.W. 404 (1902).

Lien is operative on homestead when abandoned. Horbach v. Smiley, 54 Neb. 217, 74 N.W. 623 (1898).

Judgment lien attached only to actual interest of debtor, though legal title in his name. Roberts v. Robinson, 49 Neb. 717, 68 N.W. 1035 (1896).

Lien is dependent upon rendition of judgment, and court cannot continue lien upon setting aside of judgment. Farmers Loan & Trust Co. v. Killinger, 46 Neb. 677, 65 N.W. 790 (1896).

3. Other lands

Judgment rendered against bank while in hands of state banking authorities or receiver creates no lien upon its real estate as against those in possession. Brownell v. Svoboda, 118 Neb. 76, 223 N.W. 641 (1929).

Judgment transcribed from justice court is lien on after acquired property. Jones v. Knosp, 91 Neb. 224, 135 N.W. 1049 (1912).

Judgment is not a lien on equitable interest in land. Flint v. Chaloupka, 72 Neb. 34, 99 N.W. 825 (1904).

Vendee in possession is bound from time of actual notice. Wehn v. Fall, 55 Neb. 547, 76 N.W. 13 (1898).

Bona fide mortgagee of lands, not in name of judgment debtor, is protected. Reed v. Rice, 48 Neb. 586, 67 N.W. 459 (1896).

Mortgagor's bankruptcy trustee seeking to set aside mortgage and subsequent deed conveying mortgaged land to mortgagee occupied position of lienholder rather than unsecured creditor. Troyer v. Mundy, 60 F.2d 818 (8th Cir. 1932).

25-1505 Stay of execution; maximum period.

No stay of execution or order of sale upon any judgment or decree shall be granted for a longer time than nine months after the entry of such judgment or decree.

Source: Laws 1875, § 1, p. 49; R.S.1913, § 8046; C.S.1922, § 8987; C.S.1929, § 20-1505; R.S.1943, § 25-1505; Laws 1999, LB 43, § 5.

Legislature had in mind the matter of stays of execution on judgments and decrees where the ultimate purpose was the recovery of money only, and not payments for child support in divorce decree. Wassung v. Wassung, 136 Neb. 440, 286 N.W. 340 (1939).

Where defendants avail themselves of the statutory stay of execution, they are estopped from attacking such judgment in any way. Bowman v. Caldwell, 135 Neb. 554, 283 N.W. 194 (1939).

Divorced wife may continue to claim homestead interest. Federal Credit Co. v. Reynolds, 132 Neb. 495, 272 N.W. 397 (1937).

Taking stay is an appearance, and waives all prior defects or error. Party is estopped to attack judgment. Franse v. Armbuster, 28 Neb. 467, 44 N.W. 481 (1890); Miller v. Hyers, 11 Neb. 474, 9 N.W. 645 (1881).

Mortgage debtor has right to nine months stay. Rafert v. Federal Farm Mortgage Corporation, 152 F.2d 193 (8th Cir. 1945).

25-1506 Order of sale of mortgaged premises; how stayed; length of stay.

The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months after the entry of such decree, whenever the defendant shall, within twenty days after the entry of such decree, file with the clerk of the court a written request for the same. If the defendant makes no such request within twenty days, the order of sale may issue immediately after the expiration thereof. As to any mortgage executed after September 28, 1959, if the original maturity of indebtedness secured by the mortgage is more than twenty years after the date of the filing of the complaint to foreclose the mortgage and the mortgage covered a lot or lots, or any part thereof, in a regularly platted subdivision, or parcel of residential property not exceeding three acres in area, the stay period shall be three months, and, as to such a mortgage executed after October 9, 1961, if such original maturity is more than ten years but not more than twenty years from and after the date of the filing of the foreclosure complaint, the stay period shall be six months.

Source: Laws 1875, § 2, p. 49; R.S.1913, § 8047; C.S.1922, § 8988; C.S.1929, § 20-1506; R.S.1943, § 25-1506; Laws 1959, c. 105, § 1, p. 432; Laws 1961, c. 112, § 1, p. 351; Laws 1999, LB 43, § 6; Laws 2002, LB 876, § 26.

1. Time for filing
2. Who may file
3. Effect on appeal
4. Miscellaneous

1. Time for filing

Request for stay must be filed within twenty days after rendition of decree. Alexander v. Oman, 137 Neb. 495, 289 N.W. 847 (1940).

District court is without power to extend time for filing request for stay of order of sale beyond 20 days as provided herein. Columbus Land, Loan & Bldg. Assn. v. Phillips, 124 Neb. 672, 247 N.W. 600 (1933).

Request for stay, filed before entry of decree, is continuing. May be filed by owner of equity of redemption after sale of his interest in mortgaged premises. Jenkins Land & Live Stock Co. v. Attwood, 80 Neb. 806, 115 N.W. 305 (1908).

Court cannot extend time; filing supersedeas bond does not suspend order. State ex rel. Harris v. Laflin, 40 Neb. 441, 58 N.W. 936 (1894).

2. Who may file

Word ''defendant'' in statute means the mortgagor or one in privity with him. Welty v. Schmutte, 128 Neb. 415, 258 N.W. 873 (1935).

Defendants in foreclosure are not entitled to a second stay because of filing of supplemental decree touching personal liability and not affecting foreclosure. Prudential Ins. Co. v. Nethaway, 127 Neb. 330, 255 N.W. 26 (1934).

When vendor fails to convey, and purchaser sues in equity on the contract and accepts decree granting him a lien for the money paid as if it were a mortgage, vendor is entitled to a stay upon filing request therefor. Hawkins v. Mullen, 119 Neb. 567, 230 N.W. 252 (1930).

Word ''defendant'' applies to mortgagor, not cross-petitioners. Clark v. Pahl, 75 Neb. 161, 106 N.W. 420 (1905).

Stay cannot be taken in strict foreclosure. Harrington v. Birdsall, 38 Neb. 176, 56 N.W. 961 (1893).

Mortgagee's right to determine time of foreclosure sale is absolute, except for nine month's stay which must be granted on mortgagor's request. United States Nat. Bank of Omaha v. Pamp, 83 F.2d 493 (8th Cir. 1936).

Where, after decree of foreclosure of real estate mortgage, the mortgagor files petition in bankruptcy and to effect a composition with creditors, bankruptcy court has power to restrain mortgagee from further proceedings in foreclosure case. United States Nat. Bank of Omaha v. Pamp, 77 F.2d 9 (8th Cir. 1935).

3. Effect on appeal

When a defendant requests a stay of sale pursuant to this section, that request precludes that defendant from appealing from the foreclosure decree. Production Credit Assn. of the Midlands v. Schmer, 233 Neb. 785, 448 N.W.2d 141 (1989).

Filing request for stay precludes taking an appeal. Carley v. Morgan, 123 Neb. 498, 243 N.W. 631 (1932).

Request for stay inadvertently filed before decree is entered of record in foreclosure action will not defeat appeal. Theisen v. Peterson, 114 Neb. 154, 211 N.W. 19 (1926).

4. Miscellaneous

The original maturity of indebtedness, referred to herein, is the date on which the final payment is due without acceleration. Central Savings Bank of New York v. First Cadco Corp., 186 Neb. 112, 181 N.W.2d 261 (1970).

25-1507 Execution; how stayed.

On all judgments for the recovery of money only, except those rendered in any court on an appeal or writ of error thereto or against any officer or person or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution if the defendant therein shall, within twenty days after the entry of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs, from the time of entering judgment until paid as follows: (1) If the sum for which judgment was rendered, exclusive of costs, does not exceed fifty dollars, three months; (2) if the sum for which judgment was rendered, exclusive of costs, exceeds fifty dollars and does not exceed one hundred dollars, six months; and (3) if the sum for which judgment was rendered, exclusive of costs, exceeds one hundred dollars, nine months.

Source: Laws 1875, § 3, p. 49; R.S.1913, § 8048; C.S.1922, § 8989; C.S.1929, § 20-1507; R.S.1943, § 25-1507; Laws 1999, LB 43, § 7.

Where a stay bond becomes dormant, it may be revived the same as a judgment. Baker Steel & Machinery Co. v. Ferguson, 137 Neb. 578, 290 N.W. 449 (1940).

Sureties when sued on bond cannot plead lack of legal qualifications. Heater v. Pearce, 59 Neb. 583, 81 N.W. 615 (1900).

Stay bond is a proceeding and may be amended. State ex rel. Cleary v. Russell, 17 Neb. 201, 22 N.W. 455 (1885).

25-1508 Stay bonds; approval; justification of sureties.

Officers approving stay bonds shall require the affidavits of the signers of such bonds that they own real estate not exempt from execution, and aside from encumbrance, to the value of twice the amount of the judgment.

Source: Laws 1875, § 4, p. 50; R.S.1913, § 8049; C.S.1922, § 8990; C.S.1929, § 20-1508.

In action on constable's bond, it is sufficient to assign the breach in the language of the statute. Adams v. Weisberger, 62 Neb. 325, 87 N.W. 16 (1901).

Officer who approves stay bond without requiring affidavits of signers, is liable for damage. Heater v. Pearce, 59 Neb. 583, 81 N.W. 615 (1900).

25-1509 Stay of execution; surety on stay bond excepted; no appeal after stay.

No proceedings in errors or appeal shall be allowed after such stay has been taken, nor shall a stay be taken on a judgment entered as herein contemplated, against one who is surety in the stay of execution.

Source: Laws 1875, § 5, p. 50; R.S.1913, § 8050; C.S.1922, § 8991; C.S.1929, § 20-1509.

Taking of stay is a general appearance and a waiver of all prior errors in the proceedings. Ohio Nat. Life Ins. Co. v. Baxter, 139 Neb. 648, 298 N.W. 530 (1941).

Party taking stay of order of sale in foreclosure proceedings cannot appeal hereunder. Carley v. Morgan, 123 Neb. 498, 243 N.W. 631 (1932).

Request for stay inadvertently filed before decree entered of record in foreclosure action will not defeat appeal. Theisen v. Peterson, 114 Neb. 150, 211 N.W. 19 (1925).

Taking stay of sale under decree of foreclosure is waiver of prior error. Ecklund v. Willis, 42 Neb. 737, 60 N.W. 1026 (1894).

25-1510 Stay of execution; sureties; approval; bond tantamount to judgment confessed.

The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in the case of other judgments.

Source: Laws 1875, § 6, p. 50; R.S.1913, § 8051; C.S.1922, § 8992; C.S.1929, § 20-1510.

Stay bond, when recorded, is a judgment within purview of statute providing for revivor of dormant judgments. Baker Steel & Machinery Co. v. Ferguson, 137 Neb. 578, 290 N.W. 449 (1940).

25-1511 Stay of execution; recall of writ; duties of clerk and sheriff.

When the surety is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution, with his doings thereon.

Source: Laws 1875, § 7, p. 50; R.S.1913, § 8052; C.S.1922, § 8993; C.S.1929, § 20-1511.

25-1512 Stay of execution; property and undertakings relinquished.

All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer upon stay of execution being entered.

Source: Laws 1875, § 8, p. 50; R.S.1913, § 8053; C.S.1922, § 8994; C.S.1929, § 20-1512.

25-1513 Stay of execution; expiration; writ to issue; duty of clerk.

At the expiration of the stay the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein.

Source: Laws 1875, § 9, p. 51; R.S.1913, § 8054; C.S.1922, § 8995; C.S.1929, § 20-1513.

Mandamus will lie to compel issuance of execution against both principal and sureties. State ex rel. Thorn v. Fleming, 21 Neb. 321, 32 N.W. 73 (1887).

25-1514 Stay of execution; judgment liens not released.

Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due. The officer holding the execution shall return thereon what amount was made from the principal debtor, and how much from the sureties.

Source: Laws 1875, § 10, p. 51; R.S.1913, § 8055; C.S.1922, § 8996; C.S.1929, § 20-1514.

Remedy in aid of execution does not exclude relief in equity. Parsons v. Cathers, 92 Neb. 525, 138 N.W. 747 (1912).

25-1515 Judgment; when dormant.

If execution is not sued out within five years after the date of entry of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment, and all taxable costs in the action in which such judgment was obtained, shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor.

Source: R.S.1867, Code § 482, p. 473; R.S.1913, § 8056; C.S.1922, § 8997; Laws 1927, c. 67, § 1, p. 230; C.S.1929, § 20-1515; R.S.1943; § 25-1515; Laws 2000, LB 921, § 11.

1. When applicable
2. When dormant
3. Effect

1. When applicable

This section is a statute of limitations. Buffalo County v. Kizzier, 250 Neb. 180, 548 N.W.2d 757 (1996).

Section applied to judgment for alimony. Miller v. Miller, 160 Neb. 766, 71 N.W.2d 478 (1955).

Statute of limitations is not a bar to enforcement of alimony decree. Nowka v. Nowka, 157 Neb. 57, 58 N.W.2d 600 (1953).

Decree for child support is not a judgment within the meaning of this section. Miller v. Miller, 153 Neb. 890, 46 N.W.2d 618 (1951).

A decree for alimony is not a judgment within the meaning of this section. Lippincott v. Lippincott, 152 Neb. 374, 41 N.W.2d 232 (1950).

This section does not apply to a decree for the sale of specific real estate. Stanton v. Stanton, 146 Neb. 71, 18 N.W.2d 654 (1945); Medland v. Van Etten, 75 Neb. 794, 106 N.W. 1022 (1906); Herbage v. Ferree, 65 Neb. 451, 91 N.W. 408 (1902).

A decree for child support, rendered in a divorce action, does not become dormant because of the failure to issue execution thereon for more than five years. In re Application of Miller, 139 Neb. 242, 297 N.W. 91 (1941).

This section is not applicable to decree of foreclosure. Jenkins Land & Live Stock Co. v. Kimsey, 99 Neb. 308, 156 N.W. 499 (1916); St. Paul Harvester Works v. Huckfeldt, 96 Neb. 552, 148 N.W. 153 (1914).

Claim against insolvent estate is not a judgment. Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N.W. 50 (1904).

This section applies to judgments against a municipal corporation. Alter v. State ex rel. Kountze Bros., 62 Neb. 239, 86 N.W. 1080 (1901).

2. When dormant

Issuance and return of execution without a levy is sufficient to prevent judgment from becoming dormant. Hein v. W. T. Rawleigh Co., 167 Neb. 176, 92 N.W.2d 185 (1958).

Where executions were issued within five years, judgment did not become dormant. Filley v. Mancuso, 146 Neb. 493, 20 N.W.2d 318 (1945).

Commencement of suit to foreclose a judgment lien before judgment becomes dormant does not operate to continue the judgment in force beyond the period of five years from date of last execution. Rich v. Cooper, 136 Neb. 463, 286 N.W. 383 (1939).

Repeal of statute permitting recovery of a deficiency judgment does not prevent action to revive a dormant deficiency judgment. McCormack v. Murray, 133 Neb. 125, 274 N.W. 383 (1937).

A judgment becomes dormant and ceases to be a lien on real estate in five years from date thereof unless execution is sued out within such period, and a judgment revived is a lien on the real estate of judgment debtor from date of the order of revivor. Glissmann v. Happy Hollow Club, 132 Neb. 223, 271 N.W. 431 (1937).

Issuance and return of execution without actual levy are sufficient as against judgment debtor to preserve priority of lien. Glenn v. Glenn, 79 Neb. 68, 112 N.W. 321 (1907).

Sale of real estate under an execution issued on a dormant judgment is void as to purchaser from judgment debtor. Harvey v. Godding, 77 Neb. 289, 109 N.W. 220 (1906).

Filing transcript of judgment of justice in district court does not extend life of such judgment. Farmer's State Bank v. Bales, 64 Neb. 870, 90 N.W. 945 (1902).

Judgment becomes dormant when no execution is issued before expiration of five years. Dillon v. Chicago, K. & N. R. R. Co., 58 Neb. 472, 78 N.W. 927 (1899).

When a judgment becomes dormant, its lien is lost as against a mortgage made by the debtor during the life of the judgment. Flagg v. Flagg, 39 Neb. 229, 58 N.W. 109 (1894).

The count for dormancy begins on the date that the foreign judgment is brought to a state and registered. St. Joseph Dev. Corp. v. Sequenzia, 7 Neb. App. 759, 585 N.W.2d 511 (1998).

3. Effect

When a judgment becomes dormant, the lien is lost as to judgment debtor's grantee and is not revived by a new execution. Lammers Land & Cattle Co. v. Hans, 213 Neb. 243, 328 N.W.2d 759 (1983).

Where party fails to revive judgment within ten years after it becomes dormant, right of revivor is lost. Farmers & Merchants Bank v. Merryman, 126 Neb. 684, 254 N.W. 428 (1934).

Where face of petition shows cause of action barred by statute of limitations, and there are no allegations tolling the statute, general demurrer will lie. Reed v. Occidental Bldg. & Loan Assn., 122 Neb. 817, 241 N.W. 769 (1932).

Sale of real estate under execution on dormant judgment will be enjoined at suit of one who acquired title to property during life of judgment lien. Lincoln Upholstering Co. v. Baker, 82 Neb. 592, 118 N.W. 321 (1908).

Judgment ceases to be a lien upon real estate where more than five years have elapsed after rendition of judgment without any execution having been issued thereon. Allen v. Holt County, 81 Neb. 198, 115 N.W. 775 (1908).

Time in which injunction stood against the judgment would be excluded. Cotton v. First Nat. Bank of Superior, 51 Neb. 751, 71 N.W. 711 (1897).

Sale of real estate to satisfy dormant judgment is voidable only, and cannot be assailed in collateral proceeding. Link v. Connell, 48 Neb. 574, 67 N.W. 475 (1896)

Tax cannot be levied for payment of dormant judgment against municipality. State ex rel. Craig v. School Dist. No. 2 of Phelps County, 25 Neb. 301, 41 N.W. 155 (1888); Reynolds v. Cobb, 15 Neb. 378, 19 N.W. 502 (1884).

25-1516 Writ of execution; levy on real property; when; service upon debtor; procedure; State Court Administrator; duties; claim of exemption; hearing; valuation of motor vehicle.

(1) The writ of execution against the property of the debtor issuing from any court of record in this state shall command the officer to whom it is directed that of the goods and chattels of the debtor he or she cause to be made the money specified in the writ, and for want of goods and chattels he or she cause the same to be made of the lands and tenements of the debtor. The exact amount of the debt, damages, and costs for which the judgment is entered shall be endorsed on the execution.

(2) The writ of execution and a notice of exemptions form shall be issued by the clerk and served upon the debtor by the officer to whom the writ of execution is directed in the manner provided for service of process in civil cases, except that service by certified mail shall not be permitted unless the debtor is a nonresident of the State of Nebraska, in which event service shall be made by any method provided by law for service of process in civil cases.

(3) The State Court Administrator shall adopt and promulgate rules and regulations which specify uniform writs of execution and notice of exemptions forms for use in all courts in this state. The forms shall include the writ of execution and a notice of exemptions form.

(4) The notice of exemptions form shall include the following information:

(a) The caption of the lawsuit and the mailing address of the clerk of the court issuing the writ of execution; and

(b) The following notice to the debtor, in substantially the form below, which shall be printed in all capital letters immediately below the caption of the lawsuit and the address of the clerk of the court issuing the writ of execution:

NOTICE TO THE DEBTOR

YOU ARE HEREBY NOTIFIED THAT THIS COURT ISSUED A WRIT OF EXECUTION IN THIS CASE DIRECTING THAT SOME OF YOUR PROPERTY

BE SOLD ACCORDING TO LAW AND THE PROCEEDS OF THE SALE BE DELIVERED TO THE CLERK OF THIS COURT TO BE USED TO SATISFY PART OR ALL OF YOUR DEBT TO THE CREDITOR. THE LAW OF NEBRASKA AND THE LAW OF THE UNITED STATES PROVIDES THAT CERTAIN PROPERTY CANNOT BE TAKEN FROM YOU AND SOLD TO PAY A DEBT. THE KINDS OF PROPERTY THAT CANNOT BE TAKEN FROM YOU AND THE PROCEDURE FOR CLAIMING THE EXEMPTION ARE SET FORTH BELOW.

THE LAW EXEMPTS FROM EXECUTION YOUR INTEREST IN OR RIGHT TO PROPERTY SET OUT IN LAW AS FOLLOWS: (THE NOTICE SHALL INCLUDE A SCHEDULE OF EXEMPTIONS AND MUST INCLUDE THOSE EXEMPTIONS LISTED IN SECTIONS 25-1552, 25-1556, 25-1559, 25-1563.01, 25-1563.02, 40-101, 44-371, AND 44-1089).

IF YOU BELIEVE THAT SOME OF YOUR PROPERTY IS EXEMPT FROM EXECUTION YOU MAY REQUEST A HEARING BY CHECKING THE BOX ON THIS FORM AND MAILING OR DELIVERING THIS FORM TO THE OFFICE OF THE CLERK OF THIS COURT SET FORTH ABOVE. YOU MAY ALSO HAVE TO PROVIDE A LIST OF YOUR PROPERTY AND THE VALUE OF YOUR PROPERTY AT THE TIME YOU MAIL OR DELIVER YOUR REQUEST FOR HEARING. FAILURE TO CLAIM THE EXEMPTION WITHIN TWENTY DAYS OF THE DATE YOU RECEIVE THIS NOTICE MAY MEAN THAT THE PROPERTY SEIZED WILL BE SOLD AND THE PROCEEDS APPLIED TO YOUR DEBT.

IF YOU REQUEST A HEARING THE HEARING WILL BE CONDUCTED NO LATER THAN TEN DAYS AFTER THE COURT RECEIVES YOUR REQUEST, UNLESS YOU REQUEST AN EARLIER HEARING DATE DUE TO AN EMERGENCY, IN WHICH CASE THE COURT SHALL SCHEDULE THE HEARING AS SOON AS PRACTICABLE.

IF YOU WANT LEGAL REPRESENTATION YOU SHOULD CONTACT YOUR LAWYER IMMEDIATELY. IF YOU NEED THE NAME OF A LAWYER, CONTACT THE LOCAL BAR ASSOCIATION OR YOUR LOCAL LEGAL AID OR LEGAL SERVICES OFFICE.

. . . . . .

REQUEST FOR HEARING

I believe that some of my seized property may be exempt from execution in this matter and request that a hearing be held no later than ten days after the delivery of this request to the court.

.....
Debtor
.....
Address
.....
Telephone Number
.....
Signature

(5) The debtor desiring to claim an exemption from execution shall file a request for hearing.

(6) The clerk of the court which issued the writ of execution shall provide notice of the filing of the request for hearing and the date and time of any hearing to the person holding the writ and to all parties. There shall be a

hearing held within ten days of the filing of the request for hearing unless the need for hearing is an emergency, in which case the court shall schedule the hearing as soon as practicable after the request is made. The hearing may be by conference telephone call if permitted by the court.

(7) At the hearing, the court shall determine the debtor's entitlement to the claimed exemption, whether the amount is owed on the judgment, and the value of the property claimed to be exempt and shall issue an exemption order after the hearing ordering the officer to sell the nonexempt property according to law and return the exempt property to the debtor immediately.

(8) If any of the personal property claimed to be exempt from execution by the debtor is a motor vehicle as defined in section 60-638, the cash value of such motor vehicle for purposes of the exemption may be determined by reference to a source of relevant fact commonly used in the motor vehicle industry to determine such value.

Source: R.S.1867, Code § 483, p. 474; R.S.1913, § 8057; C.S.1922, § 8998; C.S.1929, § 20-1516; R.S.1943, § 25-1516; Laws 1993, LB 458, § 10.

One holding judgment as trustee of an express trust is entitled to enforce same for beneficial owners. German Nat. Bank of Hastings v. First Nat. Bank of Hastings, 59 Neb. 7, 80 N.W. 48 (1899).

If personal property is insufficient to pay debt, sheriff may at same time levy on real property, personal property being sold first. Runge v. Brown, 29 Neb. 116, 45 N.W. 271 (1890).

A civil writ of execution by itself does not justify the search of a home which would otherwise be an illegal search. State v. Griess, 11 Neb. App. 389, 651 N.W.2d 859 (2002).

25-1517 Several writs of execution; preference.

When two or more writs of execution against the same debtor are delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money is not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases the writ of execution first delivered to the officer shall be first satisfied; and it shall be the duty of the officer to endorse on every writ of execution the time when he or she received the writ. This section shall not be construed as to affect any preferable lien which one or more of the judgments on which execution issued may have on the lands of the judgment debtor.

Source: R.S.1867, Code § 484, p. 474; R.S.1913, § 8058; C.S.1922, § 8999; C.S.1929, § 20-1517; R.S.1943, § 25-1517; Laws 2000, LB 921, § 12.

Judgments transcripted from justice court do not prorate with judgments rendered during term. Moores v. Peycke, 44 Neb. 405, 62 N.W. 1072 (1895).

Hour of receipt is not required on execution from justice or county court. Johnson v. Walker, 23 Neb. 736, 37 N.W. 639 (1888).

Executions delivered to officer on same day prorate and apply to proceedings before justice of peace. State ex rel. Philpott v. Hunger, 17 Neb. 216, 22 N.W. 457 (1885).

25-1518 Levy of execution.

The officer to whom a writ of execution is delivered shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall endorse on the writ of execution no goods, and forthwith levy the writ of execution upon the lands and tenements of the debtor, which may be liable to satisfy the judgment.

Source: R.S.1867, Code § 485, p. 474; R.S.1913, § 8059; C.S.1922, § 9000; C.S.1929, § 20-1518.

Cross References

Execution against partnership or unincorporated associations, see section 25-316.

Absent exigent circumstances, the rule which applies before an officer may enter a home to seize property or arrest a person also applies to entering to secure property in satisfaction of a judgment. Such execution warrant should be obtained in a manner similar to that provided in sections 29-830 to 29-835 relating to inspection warrants. State v. Hinchey, 220 Neb. 825, 374 N.W.2d 14 (1985).

Where execution is levied on real estate fraudulently transferred, execution creditor may proceed in equity to set aside sale; return not necessary. Howard v. Raymers, 64 Neb. 213, 89 N.W. 1004 (1902).

Levy is effective though officer trespasses. Battle Creek Valley Bank v. First Nat. Bank of Madison, 62 Neb. 825, 88 N.W. 145 (1901).

Growing crops are personal property. Sims v. Jones, 54 Neb. 769, 75 N.W. 150 (1898).

Where personalty is sold before realty, latter may be levied on before advertisement and sale of former. Runge v. Brown, 29 Neb. 116, 45 N.W. 271 (1890).

Levy upon growing crops does not require any act on the part of the officer which, but for the protection of the writ, would make him a trespasser. Johnson v. Walker, 23 Neb. 736, 37 N.W. 639 (1888).

Return of execution after levy without sale does not prevent plaintiff from issuing another execution on same property. Reynolds v. Cobb, 15 Neb. 378, 19 N.W. 502 (1884).

A manual interference with chattels is not essential to a valid levy thereon. State v. Griess, 11 Neb. App. 389, 651 N.W.2d 859 (2002).

25-1519 Repealed. Laws 1967, c. 147, § 1, p. 444.

25-1520 Repealed. Laws 1967, c. 147, § 1, p. 444.

25-1521 Intervening claimants; proceedings to ascertain title.

If the officer, by virtue of any writ of execution issued from any court of record in this state, shall levy the same on any goods and chattels claimed by any person other than the defendant, it shall be the duty of said officer forthwith to give notice in writing to the court, in which shall be set forth the names of the plaintiff and defendant, together with the name of the claimant; and at the same time he shall furnish the court with a schedule of the property claimed. It shall be the duty of the court, immediately upon the receipt of such notice and schedule, to make an entry of the same upon the docket, and determine the right of the claimant to the property in controversy.

Source: R.S.1867, Code § 486, p. 474; R.S.1913, § 8062; C.S.1922, § 9003; C.S.1929, § 20-1521; R.S.1943, § 25-1521; Laws 1972, LB 1032, § 131; Laws 1973, LB 226, § 13.

Sheriff does not receive additional compensation for services under this section. Muinch v. Hull, 181 Neb. 571, 149 N.W.2d 527 (1967).

Failure of sheriff to comply with this section, when property is claimed by third person, does not fix liability on sheriff. Miller v. Crosson, 131 Neb. 88, 267 N.W. 145 (1936).

Sheriff may bring suit hereunder to try claim to personal property attached by him. Leadabrand v. State, 121 Neb. 836, 238 N.W. 656 (1931).

An intervening claimant does not have a statutory right to a jury trial pursuant to the provisions of this section through section 25-1523. Eli's, Inc. v. Commercial Lithographing, Inc., 8 Neb. App. 752, 601 N.W.2d 795 (1999).

25-1522 Intervening claimants; proceedings to ascertain title; procedure; judgment; effect.

If the court shall find the right to said goods and chattels, or any part thereof, to be in the claimant, the court shall also find the value thereof, and shall render judgment for the claimant, that he recover his costs against the plaintiff in execution, or other party to the same for whose benefit the execution issued, and also that he have restitution of said goods and chattels, or any part thereof. But if the right of the goods and chattels, and every part thereof, shall not be in the claimant, then the court shall render judgment on such finding, in favor of the plaintiff in execution, or other party for whose benefit the same was issued and levied, against the claimant for costs, and award execution thereon. Such judgment for the claimant, unless an undertaking shall be executed as provided in section 25-1523, shall be a justification of the officer in returning no goods to

the writ of execution by virtue of which the levy has been made, as to such part of the goods and chattels as were found to belong to such claimant.

Source: R.S.1867, Code § 487, p. 475; R.S.1913, § 8063; C.S.1922, § 9004; C.S.1929, § 20-1522; R.S.1943, § 25-1522; Laws 1972, LB 1032, § 132; Laws 1973, LB 226, § 14.

Order by justice for restitution of the property is not judicial order but is only to apprise officer of result of inquisition. Fidler v. Adair, 109 Neb. 404, 191 N.W. 683 (1922).

Procedure after verdict stated. Bray v. Saaman, 13 Neb. 518, 14 N.W. 474 (1882); Storms v. Eaton, 5 Neb. 453 (1877).

25-1523 Intervening claimants; proceedings before jury to ascertain title; levy notwithstanding verdict; bond.

If the jury shall find the property, or any part thereof, to be in the claimant, and the plaintiff in execution shall, at any time within three days after said trial, tender to the sheriff or other officer having such property in his custody on execution, an undertaking, with good and sufficient sureties, payable to such claimant, in double the amount of the value of such property as assessed by the jury, to the effect that they will pay all damages sustained by reason of the detention or sale of such property, then the sheriff or other officer shall deliver said undertaking to claimant, and proceed to sell such property as if no such trial of the right of property had taken place, and shall not be liable to the claimant therefor.

Source: R.S.1867, Code § 488, p. 475; R.S.1913, § 8064; C.S.1922, § 9005; C.S.1929, § 20-1523.

Proceedings are not final adjudication of claimant's rights. Fidler v. Adair, 109 Neb. 404, 191 N.W. 683 (1922).

25-1524 Goods unsold; delivery bond.

In all cases where a sheriff, coroner, or other officer, shall by virtue of an execution, levy upon any goods and chattels which shall remain upon his hands unsold, for want of bidders, for the want of time to advertise and sell, or any other reasonable cause, the officer may, for his own security, take of the defendant an undertaking, with security in such sum as he may deem sufficient, to the effect that the said property shall be delivered to the officer holding an execution for the sale of the same, at the time and place appointed by said officer, either by notice given in writing to said defendant in execution, or by advertisement, published in a newspaper printed in the county, naming therein the day and place of sale. If the defendant shall fail to deliver the goods and chattels at the time and place mentioned in the notice to him given, or to pay to the officer holding the execution, the full value of said goods and chattels, or the amount of said debts and costs, the undertaking, given as aforesaid, shall be considered as broken, and may be proceeded on as in other cases.

Source: R.S.1867, Code § 489, p. 476; R.S.1913, § 8065; C.S.1922, § 9006; C.S.1929, § 20-1524.

25-1525 Goods unsold; additional writ; notice of sale.

The officer who levies upon goods and chattels by virtue of an execution issued by a court of record, before he proceeds to sell the same, shall cause public notice to be given of the time and place of sale. The notice shall be given by publication once in each week for four successive weeks in some newspaper printed in the county, or in case no newspaper be printed therein, by posting notice in five public places in the county, two in the precinct where the sale is

to be held. Where goods and chattels levied upon cannot be sold for want of bidders, the officer making such return shall annex to the execution a true and perfect inventory of such goods and chattels, and the plaintiff in such execution may thereupon sue out another writ of execution, directing the sale of the property levied upon as aforesaid; but such goods and chattels shall not be sold unless public notice of the time and place of sale has been given as hereinbefore provided.

Source: R.S.1867, Code § 490, p. 476; R.S.1913, § 8066; C.S.1922, § 9007; C.S.1929, § 20-1525; R.S.1943, § 25-1525; Laws 1971, LB 47, § 3.

This section adopts the writ of venditioni exponas under which an officer is commanded to sell property already levied upon. Burkett v. Clark, 46 Neb. 466, 64 N.W. 1113 (1895).

25-1526 Additional writ; goods unsold insufficient; further levy and sale.

When any writ shall issue, directing the sale of property previously taken in execution, the officer issuing said writ shall, at the request of the person entitled to the benefit thereof, his agent or attorney, add thereto a command to the officer to whom such writ shall be directed, that if the property remaining in his hands not sold shall, in his opinion, be insufficient to satisfy the judgment, he shall levy the same upon the lands and tenements, goods and chattels, or either, as the law shall permit, being the property of the judgment debtor, sufficient to satisfy the debt.

Source: R.S.1867, Code § 491, p. 476; R.S.1913, § 8067; C.S.1922, § 9008; C.S.1929, § 20-1526.

25-1527 Sale of land; prior sale set aside; readvertisement.

The officer holding such writ shall immediately advertise and sell said real estate, lands and tenements agreeable to the provisions of this chapter, and shall readvertise and sell the same in case a prior sale has been set aside by the district court or a judge thereof. In case the real estate offered for sale shall not be sold for want of bidders, the sheriff shall, at the request of the plaintiff, readvertise and again offer said property for sale under the said writ.

Source: Laws 1875, § 4, p. 61; R.S.1913, § 8071; Laws 1915, c. 149, § 1, p. 319; C.S.1922, § 9009; C.S.1929, § 20-1527.

Amendatory act of 1915 was not unconstitutional; appraisal is no longer prerequisite to sale of land under execution of foreclosure decree. Conservative Savings & Loan Assn. of Omaha v. Anderson, 116 Neb. 627, 218 N.W. 423 (1928); Norris v. Tower, 102 Neb. 434, 167 N.W. 728 (1918).

Until bid is accepted it is a mere proposal and may be withdrawn by bidder. Strode v. Hoagland, 76 Neb. 542, 107 N.W. 754 (1906).

Notice of sale, published every issue of weekly newspaper for thirty days before sale, is sufficient. Cuyler v. Tate, 67 Neb. 317, 93 N.W. 675 (1903).

There is no statutory authority for adjournment of sale. Fraaman v. Fraaman, 64 Neb. 472, 90 N.W. 245 (1902).

Sale must be made in accordance with terms of decree, and terms cannot be changed by agreement of parties. Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 281, 58 N.W. 695 (1894).

Rule requiring bidder to put up fifty dollars as guarantee of good faith before acceptance of bid was not unreasonable. Michigan Mut. L. Ins. Co. v. Klatt, 5 Neb. Unof. 305, 98 N.W. 436 (1904).

Tract of two hundred acres, mortgaged as a whole, may be sold in one tract. Pierce v. Reed, 3 Neb. Unof. 874, 93 N.W. 154 (1903).

If plaintiff is purchaser, cash payment is not essential. Campbell v. Gawlewicz, 3 Neb. Unof. 321, 91 N.W. 569 (1902).

Sheriff may be justified in refusing to sell on account of complicated condition of title. Porter v. Trompen, 2 Neb. Unof. 76, 96 N.W. 226 (1901).

25-1528 Successive executions or orders of sale; when authorized.

Successive executions or orders of sale may issue at any time after the return of the officer not sold for want of bidders at the request of the plaintiff or his attorney.

Source: R.S.1867, Code § 495, p. 477; R.S.1913, § 8073; Laws 1915, c. 149, § 2, p. 319; C.S.1922, § 9010; C.S.1929, § 20-1528.

Amendatory act of 1915 was not unconstitutional; appraisement is no longer prerequisite to sale of land under execution of foreclosure decree. Conservative Savings & Loan Assn. of Omaha v. Anderson, 116 Neb. 627, 218 N.W. 423 (1928).

25-1529 Sale of land; notice; publication; effect of failure to publish.

Lands and tenements taken in execution shall not be sold until the officer causes public notice of the time and place of sale to be given. The notice shall be given by publication once each week for four successive weeks in some newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by posting a notice on the courthouse door, and in five other public places in the county, two of which shall be in the precinct where such lands and tenements lie. All sales made without such notice shall be set aside on motion, by the court to which the execution is returnable.

Source: R.S.1867, Code § 497, p. 478; R.S.1913, § 8075; C.S.1922, § 9011; C.S.1929, § 20-1529; R.S.1943, § 25-1529; Laws 1971, LB 47, § 4.

1. Publication
2. Sufficiency
3. Confirmation
4. Effect

1. Publication

The requirements of section 25-520.01 apply to a publication of notice given under this section governing sales on execution. KLH Retirement Planning v. Okwumuo, 263 Neb. 760, 642 N.W.2d 801 (2002).

Notice is required to be published during the thirty days. State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N.W. 294 (1908), affirmed on rehearing 80 Neb. 738, 117 N.W. 412 (1908); Young v. Figg, 76 Neb. 526, 107 N.W. 788 (1906).

''Newspaper'' defined. Merrill v. Conroy, 77 Neb. 228, 109 N.W. 175 (1906); Turney v. Blomstrom, 62 Neb. 616, 87 N.W. 339 (1901); Hanscom v. Meyer, 60 Neb. 68, 82 N.W. 114 (1900).

Notice must be published in all regular issues. Stevens v. Naylor, 75 Neb. 325, 106 N.W. 446 (1905).

Publication in every issue of weekly newspaper for thirty days before sale is sufficient. Cuyler v. Tate, 67 Neb. 317, 93 N.W. 675 (1903).

If sale is postponed it must be readvertised. Fraaman v. Fraaman, 64 Neb. 472, 90 N.W. 245 (1902).

''Printed'' is equivalent to ''published''; no objection that paper is partly printed out of county. Aetna Life Ins. Co. v. Wortaszewski, 63 Neb. 636, 88 N.W. 855 (1902).

In weekly newspaper, notice should be published in every issue for five consecutive weeks; affidavit should be after last publication. Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co., 52 Neb. 410, 72 N.W. 357 (1897).

Paper need not have general circulation in any particular city or portion of county. Smith v. Foxworthy, 39 Neb. 214, 57 N.W. 994 (1894).

Sale on thirtieth day after first publication is improper. Wyant v. Tuthill, 17 Neb. 495, 23 N.W. 342 (1885).

Posting notices is unnecessary if notice was published. Parrat v. Neligh, 7 Neb. 456 (1878).

Return of sheriff is prima facie proof of due publication. Advertising more for sale than authorized does not invalidate notice. Northwestern Mut. Life Ins. Co. v. Marshall, 1 Neb. Unof. 36, 95 N.W. 357 (1901).

2. Sufficiency

The phrase ''on the courthouse door'', as found in this section, is to be given a practical and reasonable interpretation, rather than a literal and technical construction, and a notice of public sale posted on a bulletin board near the courthouse door satisfies the statute's requirements. Kleeb v. Kleeb, 210 Neb. 637, 316 N.W.2d 583 (1982).

Notice first published thirty days before sale and continued in every issue until sale, without publication on day of sale, is sufficient. Publisher's affidavit, presumption. Mallory v. Patterson, 63 Neb. 429, 88 N.W. 686 (1902).

Notice correctly designating land by county, town, range and part of section is sufficient. Cross v. Leidich, 63 Neb. 420, 88 N.W. 667 (1902).

Notice is sufficient if description of property is reasonably certain. Stull v. Seymour, 63 Neb. 87, 88 N.W. 174 (1901).

Notice stating sale was under decree in case, giving title, is sufficient. Pearson v. Badger Lumber Co., 60 Neb. 167, 82 N.W. 374 (1900).

Description following decree is generally sufficient. Miller v. Lanham, 35 Neb. 886, 53 N.W. 1010 (1892).

One notice thirty days prior is insufficient. Lawson v. Gibson, 18 Neb. 137, 24 N.W. 447 (1885).

Proper but unnecessary to state amount of foreclosure decree. Gallentine v. Cummings, 4 Neb. Unof. 690, 96 N.W. 178 (1903).

3. Confirmation

Sale of lands upon execution must be conducted substantially in manner prescribed in notice and in accordance with the

decree, and court should refuse to confirm sale not so conducted. Farmers Security Bank of Maywood v. Wood, 132 Neb. 175, 271 N.W. 349 (1937).

Where sale is confirmed without objection, confirmation settles and adjudicates sufficiency of publication in absence of fraud. Fisher v. Kellogg, 128 Neb. 248, 258 N.W. 404 (1935).

Objections to confirmation of sale not urged in trial court are not available on appeal. Philadelphia Mortgage & Trust Co. v. Mockett, 55 Neb. 323, 75 N.W. 845 (1898).

4. Effect

Notice required by this section is to inform the public of the nature of the property, place, date, and terms of sale. Hollstein v. Adams, 187 Neb. 781, 194 N.W.2d 216 (1972).

25-1530 Foreclosure; redemption of land from levy and sale; rights of mortgagor; terminated, when.

(1) The owners of any real estate against which a decree of foreclosure has been rendered in any court of record, or any real estate levied upon to satisfy any judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be confirmed by a court of competent jurisdiction by paying into court the amount of such decree or judgment together with all interests and costs. If such real estate has been sold to any person not a party plaintiff to the suit, the person so redeeming the same shall pay to such purchaser twelve percent interest on the amount of the purchase price from the date of the sale to the date of redemption or deposit the same with the clerk of the court where the decree or judgment was rendered.

(2) Subject to the right of redemption under subsection (1) of this section and the confirmation of the sale under section 25-1531, all right, title, interest, and claim of the mortgagor and his or her successors in interest, and of all persons claiming by, through, and under the mortgagor and his or her successors in interest, in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the mortgagor or his or her successors in interest subsequent to the execution of the mortgage, shall be deemed terminated as of the time the sheriff or master commissioner accepts the highest bid at the sale.

Source: Laws 1875, § 1, p. 57; R.S.1913, § 8076; C.S.1922, § 9012; C.S.1929, § 20-1530; R.S.1943, § 25-1530; Laws 2004, LB 999, § 22.

1. Rights of purchaser
2. Rights to redeem
3. Time to redeem

1. Rights of purchaser

Owner may redeem at any time before confirmation by payment of decree, interest and costs, and where land is sold to a person not a party plaintiff, interest to the purchaser at twelve per cent per annum on the purchase price. County of Madison v. Crippen, 143 Neb. 474, 10 N.W.2d 260 (1943).

Owner of foreclosed real estate has right to redeem before sale by paying amount of decree, but after sale must, in addition, pay to bidder twelve percent interest on amount of bid. Knox County v. Perry, 142 Neb. 678, 7 N.W.2d 475 (1943).

2. Rights to redeem

Equity of redemption of defendant is an interest in the land which judgment creditor has right to sell on execution to satisfy its lien. Farmers Security Bank of Maywood v. Wood, 132 Neb. 175, 271 N.W. 349 (1937).

After decree of foreclosure of a prior mortgage, in action to which junior encumbrancer was a party, the latter cannot then redeem from the prior mortgage and claim a decree of subrogation; his rights are sufficiently protected by the opportunity to purchase at the sale, or pay off prior encumbrance before sale. Keller v. Boehmer, 130 Neb. 763, 266 N.W. 577 (1936).

Redemption is allowable by Supreme Court pending appeal; amount party seeking must pay and what he must do to redeem stated; right is not affected by discharge in bankruptcy. Lincoln Savings & Loan Assn. v. Anderson, 115 Neb. 199, 212 N.W. 210 (1927).

Mortgagor owing duty to pay taxes, cannot purchase property at tax foreclosure sale. Pitman v. Boner, 81 Neb. 736, 116 N.W. 778 (1908).

Supreme Court on appeal may entertain application to redeem, and determine amount due. Thesing v. Westergren, 75 Neb. 387, 106 N.W. 438 (1905).

Plaintiff in action for redemption may redeem his interest by paying his equitable proportion of debt. Dougherty v. Kubat, 67 Neb. 269, 93 N.W. 317 (1903).

Upon redemption from lien, cotenant is subrogated to rights of lien creditor. Epp v. Bicknell, 138 F.2d 735 (8th Cir. 1943).

3. Time to redeem

Owners of real estate may redeem from tax sale at any time prior to confirmation, and provision for redemption is not violative of the Constitution. Lincoln County v. Shuman, 138 Neb. 84, 292 N.W. 30 (1940).

Owner may redeem from sale under tax lien before final order on appeal in Supreme Court; amount payable is the same as for redemption from mortgage foreclosure. Mummert v. Grant, 118 Neb. 651, 225 N.W. 773 (1929).

Action to redeem may be brought any time before the statutory bar of ten years is complete. Dickson v. Stewart, 71 Neb. 424, 98 N.W. 1085 (1904).

When appeal from order of confirmation is taken and bond given, mortgagor may redeem any time prior to decision by Supreme Court. Philadelphia Mortgage & Trust Co. v. Gustus, 55 Neb. 435, 75 N.W. 1107 (1898).

An action to redeem from foreclosure by an owner, not a party and not served, may be brought any time within ten years after cause of action accrued. Dorsey v. Conrad, 49 Neb. 443, 68 N.W. 645 (1896).

Title to foreclosed land remains in mortgagor or his grantee until actual execution of sheriff's deed in foreclosure. In re Worley, 50 F.Supp. 611 (D. Neb. 1943).

25-1531 Mortgage foreclosure; confirmation of sale; grounds for refusing to confirm; time; motion; notice.

If the court, upon the return of any writ of execution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this chapter and that the said property was sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make the purchaser a deed of such lands and tenements. Prior to the confirmation of sale pursuant to this section, the party seeking confirmation of sale shall, except in the circumstances described in section 40-103, provide notice to the debtor informing him or her of the homestead exemption procedure available pursuant to Chapter 40, article 1. The notice shall be given by certified mailing at least ten days prior to any hearing on confirmation of sale. The officer on making such sale may retain the purchase money in his or her hands until the court shall have examined his or her proceedings as aforesaid, when he or she shall pay the same to the person entitled thereto, agreeable to the order of the court. If such sale pertains to mortgaged premises being sold under foreclosure proceedings and the amount of such sale is less than the amount of the decree rendered in such proceedings, the court may refuse to confirm such sale, if, in its opinion, such mortgaged premises have a fair and reasonable value equal to or greater than the amount of the decree. The court shall in any case condition the confirmation of such sale upon such terms or under such conditions as may be just and equitable. The judge of any district court may confirm any sale at any time after such officer has made his or her return, on motion and ten days' notice to the adverse party or his or her attorney of record, if made in vacation and such notice shall include information on the homestead exemption procedure available pursuant to Chapter 40, article 1. When any sale is confirmed in vacation the judge confirming the same shall cause his or her order to be entered on the journal by the clerk. Upon application to the court by the judgment debtor within sixty days of the confirmation of any sale confirmed pursuant to this section, such sale shall be set aside if the court finds that the party seeking confirmation of sale failed to provide notice to the judgment debtor regarding homestead exemption procedures at least ten days prior to the confirmation of sale as required by this section.

Source: R.S.1867, Code § 498, p. 478; Laws 1875, § 1, p. 38; R.S.1913, § 8077; Laws 1915, c. 149, § 3, p. 319; C.S.1922, § 9013; C.S.1929, § 20-1531; Laws 1933, c. 45, § 1, p. 254; C.S.Supp.,1941, § 20-1531; R.S.1943, § 25-1531; Laws 1983, LB 107, § 1; Laws 1983, LB 447, § 42.

1. Adequacy of price
2. Notice
3. Confirmation
4. Grounds for refusing to confirm
5. Miscellaneous

1. Adequacy of price

Confirmation of a mortgage foreclosure sale will not be reversed for inadequacy of price, in the absence of a showing of fraud, or shocking discrepancy between the value and sale price, or prospects of a higher bid on resale. Nebraska Federal Savings & Loan Assn. v. Patterson, 212 Neb. 29, 321 N.W.2d 71 (1982); Forsythe v. Bermel, 138 Neb. 802, 295 N.W. 693 (1941); Lincoln Nat. Life Ins. Co. v. Curry, 138 Neb. 741, 295 N.W. 282 (1940).

Confirmation of tax sale should be vacated during same term where sale price was inadequate. County of Scotts Bluff v. Bristol, 159 Neb. 634, 68 N.W.2d 197 (1955).

Where sale price is inadequate, it is duty of court to deny confirmation of execution sale. Ehlers v. Campbell, 147 Neb. 572, 23 N.W.2d 727 (1946).

Confirmation of sale should be reversed where plaintiff offers no positive evidence as to value and defendant's evidence shows sale price was far below the land's value. Federal Farm Mtg. Corp. v. Popham, 137 Neb. 529, 290 N.W. 423 (1940).

Inadequacy of price will not prevent confirmation of a sheriff's sale of land under a decree foreclosing a mortgage thereon, unless the price is so low as to shock the conscience of the court or to evidence fraud. Home Owners' Loan Corporation v. Smith, 135 Neb. 618, 283 N.W. 371 (1939); Conservative Savings & Loan Assn. v. Mancuso, 134 Neb. 779, 279 N.W. 725 (1938).

Mere inadequacy of price will not preclude a confirmation of a judicial sale, unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud. Department of Banking v. Modrow, 134 Neb. 336, 278 N.W. 559 (1938); Buchanan v. Rahmeyer, 134 Neb. 331, 278 N.W. 558 (1938); United States Nat. Bank of Omaha v. Pamp, 83 F.2d 493 (8th Cir. 1936).

On motion to confirm sale, a finding that a subsequent sale would not realize a greater amount is sufficient to sustain decree of confirmation without a further finding that said property sold for fair value. Erwin v. Brunke, 133 Neb. 745, 277 N.W. 48 (1938).

There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained. Occidental Bldg. & Loan Assn. v. Beal, 122 Neb. 40, 239 N.W. 202 (1931).

2. Notice

Court should refuse to confirm sale upon proper objections, where it is evident sale was not conducted in substantial conformance with the notice and with decree. Farmers Security Bank of Maywood v. Wood, 132 Neb. 175, 271 N.W. 349 (1937).

Notice is not necessary to confirmation at chambers of administrator's sale to pay debts. Brusha v. Phipps, 86 Neb. 822, 126 N.W. 856 (1910).

Ten days' notice is jurisdictional to confirmation in vacation. Armstrong v. Middlestadt, 22 Neb. 711, 36 N.W. 151 (1888).

3. Confirmation

Only matters which can be inquired into upon confirmation of sale are the steps which the law requires shall be had for satisfaction of the decree. Scotts Bluff County v. Frank, 144 Neb. 512, 13 N.W.2d 900 (1944).

A bid at an execution sale, made to be effective upon confirmation of sale and possession, is an unconditional bid, and is properly confirmed. Holferty v. Wortman, 135 Neb. 732, 283 N.W. 855 (1939).

Confirmation of a mortgage foreclosure sale of realty will not be disturbed unless there is such inadequacy of price as to show fraud or mistake. Lorenzen v. Stobbe, 134 Neb. 796, 279 N.W. 774 (1938).

Allowing bidder to increase bid on hearing for confirmation of mortgage foreclosure sale was not error, if owner is not injured. Gordon State Bank v. Hinchley, 117 Neb. 211, 220 N.W. 243 (1928).

Sale should be confirmed though order of sale was not returned within sixty days of issuance. Siwooganock Guaranty Sav. Bank v. Feltz, 84 Neb. 706, 121 N.W. 967 (1909).

Ordinarily duty is to confirm sale. Omaha Loan & Building Assn. v. Hendee, 77 Neb. 12, 108 N.W. 190 (1906); Strode v. Hoagland, 76 Neb. 542, 107 N.W. 754 (1906).

Interest runs until confirmation. Trompen v. Hammond, 61 Neb. 446, 85 N.W. 436 (1901).

Confirmation should be made by court only after careful examination of proceedings, and being satisfied that law has been complied with. Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co., 54 Neb. 228, 74 N.W. 583 (1898).

Adjudicates only regularity of proceedings by sheriff in levy, appraisement, advertising, making and returning sale. Best v. Zutavern, 53 Neb. 619, 74 N.W. 81 (1898).

Confirmation may be had at chambers. Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900, 65 N.W. 1059 (1896).

Confirmation may be made at adjourned term. Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 281, 58 N.W. 695 (1894).

Confirmation cures all irregularities in proceedings. O'Brien v. Gaslin, 20 Neb. 347, 30 N.W. 274 (1886).

Conditional confirmation is unauthorized. Fitch & Co. v. Minshall, 15 Neb. 328, 18 N.W. 80 (1883).

Purchaser is bound by confirmation; entitled to order to compel sheriff to make deed and may be compelled to take same. Phillips v. Dawley, 1 Neb. 320 (1871).

At chambers, authority is limited to confirmation of sale; cannot grant writ of assistance. Hartsuff v. Huss, 2 Neb. Unof. 145, 95 N.W. 1070 (1901).

4. Grounds for refusing to confirm

Defect of parties defendant was not ground for refusing confirmation of mortgage foreclosure sale. Prudential Ins. Co. v. Diefenbaugh, 129 Neb. 59, 260 N.W. 689 (1935).

Confirmation by judge who as attorney commenced foreclosure is void. Harrington v. Hayes County, 81 Neb. 231, 115 N.W. 773 (1908).

Confirmation does not validate void sale. Jenkins Land & Live Stock Co. v. Attwood, 80 Neb. 806, 115 N.W. 305 (1908).

5. Miscellaneous

A court retains jurisdiction after confirmation of a judicial sale when there are special situations which have worked an injustice unknown to the complaining party, such as fraud, accident, or mistake. Travelers Indemnity Co. v. Heim, 223 Neb. 75, 388 N.W.2d 106 (1986).

Decree complied with requirements of the statute. Curyea v. Fry, 133 Neb. 894, 277 N.W. 598 (1938).

Amendatory act of 1915 was not unconstitutional; appraisal is no longer prerequisite to sale of land under execution of foreclosure decree. Conservative Savings & Loan Assn. v. Anderson, 116 Neb. 627, 218 N.W. 423 (1928); Norris v. Tower, 102 Neb. 434, 167 N.W. 728 (1918).

Court is vendor and may reject any bid or vacate any erroneous or improvident order. Prudential Real Estate Co. v. Hall, 79 Neb. 808, 116 N.W. 40 (1908).

Plaintiff is not entitled to proceeds until sale is confirmed. Craw v. Abrams, 68 Neb. 546, 94 N.W. 639 (1903), affirmed on rehearing 68 Neb. 553, 97 N.W. 296 (1903).

Finding that sale was conducted legally was substantial compliance with this section. Nebraska Land, Stock-Growing and Investment Co. v. Cutting, 51 Neb. 647, 71 N.W. 312 (1897).

Statute contemplates that officer making sale shall distribute proceeds. Fire Association of Philadelphia v. Ruby, 49 Neb. 584, 68 N.W. 939 (1896).

Must affirmatively appear that all statutory provisions have been complied with or sale is invalid. Gundry v. Brown, 1 Neb. Unof. 877, 96 N.W. 610 (1901).

Farm debtor was entitled to injunction restraining sheriff from executing writ of assistance, where debtor, after sale, filed petition for composition or extension. In re Kalina, 9 F.Supp. 170 (D. Neb. 1934).

25-1532 Sale upon execution; deed to purchaser.

The sheriff or other officer who, upon such writ or writs of execution, shall sell lands and tenements, or any part thereof, shall make to the purchaser or purchasers thereof as good and sufficient a deed of conveyance of lands and tenements sold as the person or persons against whom such writ or writs of execution were issued could have made of the same at the time they became liable to the judgment, or at any time thereafter.

Source: R.S.1867, Code § 499, p. 478; R.S.1913, § 8078; C.S.1922, § 9014; C.S.1929, § 20-1532.

Sheriff's deed of homestead on judgment against husband alone will not divest debtor of title. Van Doren v. Wiedeman, 68 Neb. 243, 94 N.W. 124 (1903).

Unless decreed otherwise foreclosure transfers to purchaser every right and interest in the property of all parties to action. Hart v. Beardsley, 67 Neb. 145, 93 N.W. 423 (1903).

Where judgment is prematurely entered, error must be brought to attention of court entering it before action can be reviewed on appeal. Ley v. Pilger, 59 Neb. 561, 81 N.W. 507 (1900).

Purchaser at execution sale becomes vested with such title and right as were in the judgment debtor at the time the lien of the judgment attached. Orr v. Broad, 52 Neb. 490, 72 N.W. 850 (1897).

Where no supersedeas bond is filed, sale of property vests title in purchaser which is not affected by reversal of judgment. Green v. Hall, 43 Neb. 275, 61 N.W. 605 (1895).

On execution sale, owner retains title and is entitled to possession, rents and profits until final confirmation. Yeazel v. White, 40 Neb. 432, 58 N.W. 1020 (1894).

Successor to sheriff may make deed. Phillips v. Dawley, 1 Neb. 320 (1871).

25-1533 Sale upon execution; deed to purchaser; form; estate conveyed.

The deed shall be sufficient evidence of the legality of such sale and the proceedings therein until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment. Such deed of conveyance to be made by the sheriff or other officer, shall recite the execution or executions, or the substance thereof, and the names of the parties, the amount, and the date of term of rendition of each judgment, by virtue whereof the said lands and tenements were sold as aforesaid; and shall be executed, acknowledged and recorded as is or may be provided by law, to perfect the conveyance of real estate in other cases.

Source: R.S.1867, Code § 500, p. 478; R.S.1913, § 8079; C.S.1922, § 9015; C.S.1929, § 20-1533.

1. Deed to purchaser
2. Estate conveyed
3. Miscellaneous

1. Deed to purchaser

Sheriff's deed is prima facie evidence of validity of judgment. Everson v. State, 66 Neb. 154, 92 N.W. 137 (1902).

The office of description in sheriff's deed is not to identify lands but to provide means of identification. Abbott v. Coates, 62 Neb. 247, 86 N.W. 1058 (1901).

Imperfect recitals in sheriff's deed of the facts required in this section do not render deed void. Lamb v. Sherman, 19 Neb. 681, 28 N.W. 319 (1886).

2. Estate conveyed

Purchaser of real property at judicial sale buys at his peril. Hitchcock County v. Cole, 80 Neb. 375, 114 N.W. 276 (1907).

Grantee of a purchaser at a judicial sale may in proper case have a writ of assistance to place him in possession. Clark & Leonard Inv. Co. v. Lindgren, 76 Neb. 59, 107 N.W. 116 (1906).

If record discloses that court had no jurisdiction party cannot claim to be bona fide purchaser. Albers v. Kozeluh, 68 Neb. 522, 94 N.W. 521 (1903), affirmed on rehearing 68 Neb. 529, 97 N.W. 646 (1903).

Every right and interest of parties to action is transferred by sale. Hart v. Beardsley, 67 Neb. 145, 93 N.W. 423 (1903).

Purchaser is entitled to rents, from date of deed. Clark v. Missouri, Kansas & Texas Trust Co., 59 Neb. 53, 80 N.W. 257 (1899).

Water power, race, etc., pass with sheriff's deed. Hoover v. Hale, 56 Neb. 67, 76 N.W. 457 (1898).

Deed conveys only the estate which a quitclaim deed from the execution debtor to purchaser would have conveyed. Peterborough Savings Bank v. Pierce, 54 Neb. 712, 75 N.W. 20 (1898).

Deed based on sale for husband's debt does not bar wife of dower. Butler v. Fitzgerald, 43 Neb. 192, 61 N.W. 640 (1895).

Tenant, who pending action of foreclosure takes a lease of premises, is charged with notice of suit. McLean v. McCormick, 4 Neb. Unof. 187, 93 N.W. 697 (1903).

Purchaser at execution sale is entitled to all crops planted after confirmation. Jaques v. Dawes, 3 Neb. Unof. 752, 92 N.W. 570 (1902).

3. Miscellaneous

Upon confirmation of judicial sale and delivery of the deed to the purchaser, legal title to the land passes from the previous landowner to the purchaser. Nuttelman v. Julch, 228 Neb. 750, 424 N.W.2d 333 (1988).

Wild hay cut after sale and before confirmation did not pass to purchaser. Yeazel v. White, 40 Neb. 432, 58 N.W. 1020 (1894).

25-1534 Sale of lands and chattels; printer's fees to be advanced; effect of noncompliance.

The officer who levies upon goods and chattels, or lands and tenements, or who is charged with the duty of selling the same by virtue of any writ or execution, may refuse to publish a notice of the sale thereof by advertisement in a newspaper until the party for whose benefit such execution issued, his agent or attorney, shall advance to such officer so much money as will be sufficient to discharge the fees of the printer for publishing such notice.

Source: R.S.1867, Code § 501, p. 479; R.S.1913, § 8080; C.S.1922, § 9016; C.S.1929, § 20-1534.

25-1535 Sale of lands and chattels; printer's fees; officer must demand.

Before any officer shall be excused from giving the notification mentioned in section 25-1534 he shall demand of the party for whose benefit the execution was issued, his agent or attorney, provided either of them resides in the county, the fees in said section specified.

Source: R.S.1867, Code § 502, p. 479; R.S.1913, § 8081; C.S.1922, § 9017; C.S.1929, § 20-1535.

25-1536 Sales of lands or tenements; where held; officer disqualified to purchase.

All sales of lands or tenements under execution shall be held at the courthouse, if there be one in the county in which such lands and tenements are situated, and if there be no courthouse, then at the door of the house in which the district court was last held. No sheriff or other officer making the sale of property, either personal or real, or any appraiser of such property, shall, either directly or indirectly, purchase the same; and every purchase so made shall be considered fraudulent and void.

Source: R.S.1867, Code § 503, p. 479; R.S.1913, § 8082; C.S.1922, § 9018; C.S.1929, § 20-1536.

A judicial sale advertised for the front door of the courthouse may be held at the front of the steps on the first floor inside the courthouse. Hollstein v. Adams, 187 Neb. 781, 194 N.W.2d 216 (1972).

Sale advertised to be held at the south door of a courthouse is sufficient. Peck v. Starks, 64 Neb. 341, 89 N.W. 1040 (1902).

Sale of lands under mortgage foreclosure decree must take place at courthouse. Smith Bros. Loan & Trust Co. v. Weiss, 56 Neb. 210, 76 N.W. 564 (1898).

Sale made to one of appraisers was void. Best v. Zutavern, 53 Neb. 604, 74 N.W. 64 (1898).

25-1537 Lands unsold; additional writs.

If lands and tenements levied on as aforesaid are not sold upon one execution, other executions may be issued to sell the lands so levied upon.

Source: R.S.1867, Code § 504, p. 479; R.S.1913, § 8083; C.S.1922, § 9019; C.S.1929, § 20-1537.

Legislature has made writ of venditioni exponas applicable to sales of real estate. Burkett v. Clark, 46 Neb. 466, 64 N.W. 1113 (1895).

25-1538 Several writs of execution; levy on real property; how made; preference.

In all cases when two or more executions shall be put into the hands of any sheriff or other officer, and it shall be necessary to levy on real estate to satisfy the same, and either of the judgment creditors in whose favor one or more of said executions is issued shall require the sheriff, or other officer, to make a separate levy to satisfy his execution or executions, it shall be the duty of the sheriff, or other officer, to levy said execution, or so many thereof as may be required, on separate parcels of real property of the judgment debtor or debtors, giving to the officer making the levy on behalf of the creditor whose execution may, by the provisions of this chapter, be entitled to a preference, the choice of such part of the real property of the judgment debtor or debtors, as will be sufficient to satisfy the same. In all cases where two or more executions, which are entitled to no preference over each other, are put into the hands of the same officer, it shall be the duty of the officer, when required, to levy the same on separate parcels of real property of the judgment debtor or debtors, when the same may be divided without material injury; and if the real property of said debtors will not be sufficient to satisfy all the executions chargeable thereon, such part of the same shall be levied on to satisfy each execution as will bear the same proportion in value to the whole as the amount due on the execution bears to the amount of all the executions chargeable thereon.

Source: R.S.1867, Code § 505, p. 479; R.S.1913, § 8084; C.S.1922, § 9020; C.S.1929, § 20-1538.

25-1539 Sale of lands and tenements; deed by sheriff's successor.

If the term of service of the sheriff, or other officer, who has made or shall hereafter make sale of any lands and tenements, shall expire, or if the sheriff or officer shall be absent, or be rendered unable, by death or otherwise, to make a deed of conveyance of the same, any succeeding sheriff or other officer, on receiving a certificate from the court from which the execution issued for the sale of said lands and tenements, signed by the clerk, by order of said court, setting forth that sufficient proof has been made to the court that such sale was fairly and legally made, and on tender of the purchase money, or if the same or any part thereof be paid, then, on proof of such payment and tender of the balance, if any, may execute to the said purchaser or purchasers, or his or their legal representative, a deed of conveyance of said lands and tenements so sold. Such deed shall be as good and valid in law and have the same effect as if the sheriff or other officer who made the sale had executed the same.

Source: R.S.1867, Code § 506, p. 480; R.S.1913, § 8085; C.S.1922, § 9021; C.S.1929, § 20-1539.

25-1540 Sale on execution; disposition of proceeds.

If on any sale made as aforesaid, there shall be in the hands of the sheriff or other officer more money than is sufficient to satisfy the writ or writs of execution, with interest and costs, the sheriff or other officer shall, on demand, pay the balance to the defendant in execution, or his legal representatives.

Source: R.S.1867, Code § 507, p. 480; R.S.1913, § 8086; C.S.1922, § 9022; C.S.1929, § 20-1540.

Sheriff is custodian of funds from date of sale until confirmation. Craw v. Abrams, 68 Neb. 546, 94 N.W. 639 (1903), affirmed on rehearing 68 Neb. 553, 97 N.W. 296 (1903).

It is duty of sheriff to pay proceeds directly to party entitled thereto unless court orders same paid into court. Fire Assn. of Philadelphia v. Ruby, 49 Neb. 584, 68 N.W. 939 (1896); Luce v. Foster, 42 Neb. 818, 60 N.W. 1027 (1894).

25-1541 Sale of lands or tenements; reversal of judgment; title of purchaser; restitution.

If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such case, restitution shall be made by the judgment creditor, of the money for which such lands or tenements were sold, with lawful interest from the day of sale.

Source: R.S.1867, Code § 508, p. 480; R.S.1913, § 8087; C.S.1922, § 9023; C.S.1929, § 20-1541.

1. Reversal of judgment
2. Bona fide purchaser

1. Reversal of judgment

There is no sale as contemplated by the statute until order of confirmation is entered and time for superseding the order has elapsed and, where defendant appeals from order confirming sale, said order being superseded, and judgment is reversed, an order may be entered quashing the levy and vacating the sale. Baxter v. National Mortgage Loan Co., 130 Neb. 256, 264 N.W. 675 (1936).

Payment of judgment made by defendant to avoid sale of his property on execution does not waive his right to appeal. Burke v. Dendinger, 120 Neb. 594, 234 N.W. 405 (1931).

Upon reversal of judgment which has been executed, it is duty of court to compel restitution. Hier v. Anheuser-Busch Brewing Assn., 60 Neb. 320, 83 N.W. 77 (1900).

Title of stranger through sale under judgment is not defeated by subsequent reversal of judgment. Manfull v. Graham, 55 Neb. 645, 76 N.W. 19 (1898).

Where judgment creditor purchases at execution sale on judgment which is subsequently reversed, it is his duty to make restitution. Nelson v. City of Beatrice, 2 Neb. Unof. 47, 96 N.W. 288 (1901).

2. Bona fide purchaser

Bona fide purchaser under decree of partition, no fraud being shown, is protected hereunder although judgment is thereafter reversed. Schleuning v. Tatro, 122 Neb. 3, 238 N.W. 741 (1931).

Only good faith purchaser is protected. Pauley v. Knouse, 109 Neb. 716, 192 N.W. 195 (1923).

Purchaser defined; one who made bona fide contract to purchase land sold under erroneous judgment is protected to extent of money paid, with interest. Coon v. O'Brien, 107 Neb. 427, 186 N.W. 340 (1922).

One who purchases knowing that proceedings are fraudulent, and that he is assisting in the fraud, does not get good title. Coates v. O'Connor, 102 Neb. 602, 168 N.W. 102 (1918), rehearing denied 102 Neb. 606, 169 N.W. 239 (1918).

Bona fide purchaser under judicial decree is protected by this section, though judgment is thereafter reversed. Kazebeer v. Nunemaker, 82 Neb. 732, 118 N.W. 646 (1908).

Purchaser should recover from redemptioner purchase money paid. Hitchcock County v. Cole, 80 Neb. 375, 114 N.W. 276 (1907).

25-1542 Judgment lien; when lost.

No judgment on which execution has not been taken out and levied before the expiration of five years after its entry shall operate as a lien upon the estate of any debtor to the preference of any other bona fide judgment creditor or purchaser, but when judgment has been or may be rendered in the Court of Appeals or Supreme Court and any special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for five years after the first day of the next term of the district court to which such mandate may be directed. Nothing in this section shall be construed to defeat the lien of any judgment creditor who fails to take out execution and cause a levy to be made as provided in this section when such

failure is occasioned by appeal, proceedings in error, or injunction or by a vacancy in the office of sheriff and coroner or the inability of such officers until one year after such disability is removed.

Source: R.S.1867, Code § 509, p. 480; Laws 1901, c. 81, § 1, p. 474; R.S.1913, § 8088; C.S.1922, § 9024; C.S.1929, § 20-1542; R.S.1943, § 25-1542; Laws 1991, LB 732, § 50; Laws 2000, LB 921, § 13.

To preserve priority of judgment lien against bona fide creditor or purchaser, actual levy of execution must be made. Hein v. W. T. Rawleigh Co., 167 Neb. 176, 92 N.W.2d 185 (1958).

Lien of foreclosure decree is not lost by failure to have order of sale issued within five years. Jenkins Land & Live Stock Co. v. Kimsey, 99 Neb. 308, 156 N.W. 499 (1916).

Priority of a judgment lien may be continued as against other bona fide judgment creditors and purchasers only by the issuance of an execution and an actual levy within the time limited by statute. Glenn v. Glenn, 79 Neb. 68, 112 N.W. 321 (1907).

An appeal by judgment defendant does not in absence of a supersedeas, operate to prolong lien of judgment. Harvey v. Godding, 77 Neb. 289, 109 N.W. 220 (1906).

Lien of judgment created by mandate of Supreme Court continues for five years. Medland v. Van Etten, 75 Neb. 794, 106 N.W. 1022 (1906).

Right of judgment creditor to execution is a substantial one and can only be taken away by some act done in compliance with law. Halmes v. Dovey, 64 Neb. 122, 89 N.W. 631 (1902).

Execution levied but returned unsatisfied before sale by order of plaintiff prevents judgment from becoming dormant. Godman v. Boggs, 12 Neb. 13, 10 N.W. 403 (1881).

25-1543 Writ of execution; when returnable.

The sheriff or other officer to whom any writ of execution is directed shall return such writ to the court to which the writ is returnable as soon as practicable after the writ has been served.

Source: R.S.1867, Code § 510, p. 480; R.S.1913, § 8089; C.S.1922, § 9025; C.S.1929, § 20-1543; R.S.1943, § 25-1543; Laws 1993, LB 458, § 11.

Failure to return order of sale within sixty days will not defeat confirmation. Philadelphia Mortgage & Trust Co. v. Buckstaff Bros. Mfg. Co., 61 Neb. 54, 84 N.W. 416 (1900).

Section is not applicable to orders of sale. Jarrett v. Hoover, 54 Neb. 65, 74 N.W. 429 (1898).

This provision is mandatory. Buckley v. Mason, 52 Neb. 639, 72 N.W. 1043 (1897).

Officer must return execution stating what he has done under it. Burkett v. Clark, 46 Neb. 466, 64 N.W. 1113 (1895).

25-1544 Judgment against principal and surety; how entered; how executed.

In all cases where judgment is rendered in any court of record within this state upon any instrument in writing in which two or more persons are jointly and severally bound, and it shall be made to appear to the court by parol or other testimony that one or more of said persons so bound signed the same as surety or bail for his or their codefendant, it shall be the duty of the clerk of said court in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail. The clerk of the court aforesaid shall issue execution on such judgment, commanding the sheriff or other officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor, but for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution.

Source: R.S.1867, Code § 511, p. 481; R.S.1913, § 8090; C.S.1922, § 9026; C.S.1929, § 20-1544.

1. Scope
2. Liability of surety

1. Scope

Purpose of statute was to enlarge the legal rights of the surety by requiring the property of the principal to be first exhausted before levy on the property of the surety. Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N.W.2d 403 (1946).

Above section does not control procedure on entering judgment on bond guaranteeing fidelity of employee. Luther College v. Benson, 126 Neb. 410, 253 N.W. 421 (1934).

Statute applies generally to judgments on supersedeas bonds which stay proceedings pending appeals from district court to Supreme Court. Sonneman v. Dolan, 124 Neb. 830, 248 N.W. 402 (1933).

In action on injunction bond, judgment against principal and surety should be entered under this section. Trester v. Pike, 60 Neb. 510, 83 N.W. 676 (1900).

Judgment otherwise joint is not rendered several by finding entered under this section. Farney v. Hamilton County, 54 Neb. 797, 75 N.W. 44 (1898).

2. Liability of surety

It is not the duty of the jury to find which of the defendants is principal and which is surety. Smith v. Roehrig, 90 Neb. 262, 133 N.W. 230 (1911).

Vacation of judgment as to principal vacates as to surety. Sturgis, Cornish & Burn Co. v. Miller, 79 Neb. 404, 112 N.W. 595 (1907).

Surety paying judgment and taking assignment, may have execution against principal. Nelson v. Webster, 72 Neb. 332, 100 N.W. 411 (1904).

Failure of clerk to certify that some were principals and others were sureties, was reversible error, although matter was not brought to attention of trial court. Blaco v. State, 58 Neb. 557, 78 N.W. 1056 (1899).

Failure of judgment to distinguish between principal and surety does not extinguish relation. Drexel v. Pusey, 57 Neb. 30, 77 N.W. 351 (1898).

This section cannot be invoked in determining liability of surety to obligee. It applies only after judgment. Kroncke v. Madsen, 56 Neb. 609, 77 N.W. 202 (1898).

Liabilities of sureties will not be extended beyond terms of their agreements. Godfrey v. City of Beatrice, 51 Neb. 272, 70 N.W. 914 (1897).

In action on supersedeas bond judgment should show which defendant is principal debtor. Van Etten v. Kosters, 48 Neb. 152, 66 N.W. 1106 (1896).

Where agreement is made to exhaust one debtor's property first, its violation may be enjoined. Gibson v. McClay, 47 Neb. 900, 66 N.W. 851 (1896).

Surety discharging debt is entitled to contribution from cosurety. Smith v. Mason, 44 Neb. 610, 63 N.W. 41 (1895).

25-1545 Execution; sheriff; amercement; causes; procedure.

If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed which has come to his hands; or shall neglect or refuse to sell any goods and chattels, lands and tenements; or shall neglect to call an inquest and return a copy thereof forthwith to the clerk's office; or shall neglect to return any writ of execution to the proper court, on or before the return day thereof; or shall neglect to return a just and perfect inventory of all and singular the goods and chattels by him taken in execution, unless the said sheriff or other officer shall return that he has levied and made the amount of the debt, damages and costs; or shall refuse or neglect on demand to pay over to the plaintiff, his agent or attorney of record, all money by him collected or received, for the use of said party, at any time after collecting or receiving the same, except as provided in section 25-1531; or shall neglect or refuse on demand made by the defendant, his agent or attorney of record, to pay over all money by him received for any sale made, beyond what is sufficient to satisfy the writ or writs of execution, with interest and legal costs, such sheriff or officer shall, on motion in court and two days' notice thereof in writing, be amerced in the amount of said debt, damages and costs, with ten percent thereon, to and for the use of said plaintiff or defendant, as the case may be.

Source: R.S.1867, Code § 513, p. 482; R.S.1913, § 8092; C.S.1922, § 9028; C.S.1929, § 20-1546.

Inquiry is permitted whether the debt could have been collected, and whether its collection has been prejudiced by the acts of the officer. Ehlers v. Gallagher, 147 Neb. 97, 22 N.W.2d 396 (1946).

Judgment of amercement against sheriff, without notice, is void. Fire Assn. of Philadelphia v. Ruby, 58 Neb. 730, 79 N.W. 723 (1899).

Court may permit sheriff to amend return to conform to facts upon proper showing. Phoenix Ins. Co. v. King, 52 Neb. 562, 72 N.W. 855 (1897); Shufeldt & Co. v. Barlass, 33 Neb. 785, 51 N.W. 134 (1892).

Sheriff disburses money received on execution, and is not required to pay it into court. Luce v. Foster, 42 Neb. 818, 60 N.W. 1027 (1894).

Sureties on sheriffs bond are liable in an action upon judgment of amercement. McNee v. Sewell, 14 Neb. 532, 16 N.W. 827 (1883).

25-1546 Clerk of court; amercement; causes; procedure.

If any clerk of the court shall neglect or refuse, on demand made by the persons entitled thereto, his agent, or attorney of record, to pay over all money

by him received, in his official capacity, for the use of such person, every such clerk may be amerced; and the proceedings against him and his sureties shall be the same as provided for in section 25-1545 against sheriffs and their sureties.

Source: R.S.1867, Code § 514, p. 482; R.S.1913, § 8093; C.S.1922, § 9029; C.S.1929, § 20-1547.

Receipt of money by clerk is an official act. Moore v. Boyer, 52 Neb. 446, 72 N.W. 586 (1897); McDonald v. Atkins, 13 Neb. 568, 14 N.W. 532 (1882).

25-1547 Amercement; amount; limit.

When the cause of amercement is for refusing to pay over money collected as aforesaid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld, with ten percent thereon.

Source: R.S.1867, Code § 515, p. 482; R.S.1913, § 8094; C.S.1922, § 9030; C.S.1929, § 20-1548.

25-1548 Execution to another county; return by mail; effect upon liability of officer.

When execution shall be issued in any county in this state, and directed to the sheriff or coroner of another county, it shall be lawful for such sheriff or coroner having the execution, after having discharged all the duties required of him by law, to enclose such execution by mail to the clerk of the court who issued the same. On proof being made by such sheriff or coroner that the execution was mailed soon enough to have reached the office where it was issued within the time prescribed by law, the sheriff or coroner shall not be liable for any amercement or penalty if it does not reach the office in due time.

Source: R.S.1867, Code § 516, p. 483; R.S.1913, § 8095; C.S.1922, § 9031; C.S.1929, § 20-1549.

25-1549 Amercement; motion; notice; effect of entry; transmission of money.

No sheriff shall forward by mail any money made on any such execution, unless he shall be specially instructed to do it by the plaintiff, his agent or attorney of record. In all cases of a motion to amerce a sheriff or other officer of any county other than the one from which the execution issued, notice in writing shall be given to such officer, as hereinbefore required, by leaving it with him, or at his office, at least fifteen days before the first day of the term at which such motion shall be made, or by transmitting the notice by mail at least sixty days prior to the first day of the term at which such motion shall be made. All amercements, so procured, shall be entered on the record of the court, and shall have the same force and effect as a judgment.

Source: R.S.1867, Code § 517, p. 483; R.S.1913, § 8096; C.S.1922, § 9032; C.S.1929, § 20-1550.

25-1550 Amercement; judgment; liability of sureties; execution.

Every surety of any sheriff or other officer may be made a party to the judgment rendered as aforesaid, against the sheriff or other officer, by action, to be commenced and prosecuted as in other cases. But the goods and chattels, lands and tenements of any such surety shall not be liable to be taken on

execution, when sufficient goods and chattels, lands and tenements of the sheriff or other officer, against whom execution may be issued, can be found to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer by attachment, at his election.

Source: R.S.1867, Code § 518, p. 483; R.S.1913, § 8097; C.S.1922, § 9033; C.S.1929, § 20-1551.

25-1551 Amercement; execution on original judgment; rights of officer.

In cases where a sheriff or other officer may be amerced, and shall not have collected the amount of the original judgment, he shall be permitted to sue out an execution, and collect the amount of said judgment in the name of the original plaintiff, for his own use.

Source: R.S.1867, Code § 519, p. 483; R.S.1913, § 8098; C.S.1922, § 9034; C.S.1929, § 20-1552.

(b) EXEMPTIONS

25-1552 Personal property except wages; debtors; claim of exemption; procedure.

Each natural person residing in this state shall have exempt from forced sale on execution the sum of two thousand five hundred dollars in personal property, except wages. The provisions of this section do not apply to the exemption of wages, that subject being fully provided for by section 25-1558. In proceedings involving a writ of execution, the exemption from execution under this section shall be claimed in the manner provided by section 25-1516. The debtor desiring to claim an exemption from execution under this section shall, at the time the request for hearing is filed, file a list of the whole of the property owned by the debtor and an indication of the items of property which he or she claims to be exempt from execution pursuant to this section and section 25-1556, along with a value for each item listed. The debtor or his or her authorized agent may select from the list an amount of property not exceeding the value exempt from execution under this section according to the debtor's valuation or the court's valuation if the debtor's valuation is challenged by a creditor.

Source: R.S.1867, Code § 521, p. 484; Laws 1913, c. 52, § 1, p. 158; R.S.1913, § 8099; C.S.1922, § 9035; C.S.1929, § 20-1553; R.S. 1943, § 25-1552; Laws 1973, LB 16, § 1; Laws 1977, LB 60, § 1; Laws 1980, LB 940, § 2; Laws 1993, LB 458, § 12; Laws 1997, LB 372, § 1.

1. Scope
2. Head of family
3. Homestead
4. Exemptions

1. Scope

Section should receive liberal construction. Wife contributing to support of dependent husband ordinarily qualifies as head of the family within meaning of this section. Grassman v. Jensen, 183 Neb. 147, 158 N.W.2d 673 (1968).

Exemption of wages from execution or attachment is not controlled by this section. Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N.W. 515 (1939).

This section is as inclusive as a statutory provision for stay is exclusive. Wassung v. Wassung, 136 Neb. 440, 286 N.W. 340 (1939).

This section must be taken into consideration in determining the rights of an heir. Goodwin v. Freadrich, 135 Neb. 203, 280 N.W. 917 (1938).

Statute is to be liberally construed; and exemption claimed hereunder is paramount to cross-claim of judgment creditor. State ex rel. Sorensen v. Bank of Crab Orchard, 122 Neb. 210, 239 N.W. 836 (1932).

Exemption allowed by this section is additional to property specially exempted by law. Johnson v. Bartek, 56 Neb. 422, 76 N.W. 878 (1898).

''Subject to exemption'' applies to lands, and lots as well as houses. Widemair v. Woolsey, 53 Neb. 468, 73 N.W. 947 (1898).

Right to homestead defeats exemption under this section, even though title is merely contract of sale, or mortgaged to full value. State ex rel. Hilton v. Townsend, 17 Neb. 530, 23 N.W. 509 (1885).

Exemptions of debtor's property are determinable upon basis of facts as they exist at time of filing of petition in bankruptcy. In re Burden, 83 F.Supp. 416 (D. Neb. 1949).

2. Head of family

Divorced husband, although remarried, cannot claim exemptions hereunder as against former wife's judgment for alimony. Winter v. Winter, 95 Neb. 335, 145 N.W. 709 (1914).

Personal property not exceeding five hundred dollars in value is exempt to head of family who does not have homestead. McCormick Harvesting Machine Co. v. Dunn, 63 Neb. 81, 88 N.W. 159 (1901).

Every head of family not owning exempt real estate may claim benefit of section. Widemair v. Woolsey, 53 Neb. 468, 73 N.W. 947 (1898).

Wife with disabled husband, supporting family, is ''head.'' State ex rel. Lucas v. Houck, 32 Neb. 525, 49 N.W. 462 (1891); Schaller v. Kurtz, 25 Neb. 655, 41 N.W. 642 (1889).

Wife, where husband has absconded from state, and who supports family, is ''head.'' State ex rel. Scoville v. Wilson, 31 Neb. 462, 48 N.W. 147 (1891).

Divorced husband continuing to support children is entitled to exemption. Roberts v. Moudy, 30 Neb. 683, 46 N.W. 1013 (1890).

Head of family may claim property as exempt even though ordered sold under attachment. State ex rel. Stevens v. Carson, 27 Neb. 501, 43 N.W. 361 (1889).

Resident alien is entitled to exemptions though family have not yet moved here. People ex rel. Dobson v. McClay, 2 Neb. 7 (1873).

3. Homestead

Husband cannot claim exemption as long as he has homestead exemption. Creason v. Wells, 158 Neb. 78, 62 N.W.2d 327 (1954).

Consent of a wife to selection of a homestead from her property will be presumed from actual use of the premises as homestead, and she cannot claim allowance of five hundred dollars under this section in lieu of homestead. In re Estate of Nielsen, 135 Neb. 110, 280 N.W. 246 (1938).

Husband cannot claim exemption under this section though homestead in wife's name. Stout v. Rapp, 17 Neb. 462, 23 N.W. 364 (1885).

If family has homestead, cannot claim under this section. Axtell v. Warden, 7 Neb. 182 (1878).

4. Exemptions

A debtor engaged in the business of agriculture is not within the terms of the statute exempting tools and instruments of a mechanic, miner, or other person. Miller v. Dixon, 176 Neb. 659, 127 N.W.2d 203 (1964).

Five hundred dollar exemption in lieu of homestead may include wages due, or to become due, to the extent of ninety percent. Lyons v. Austin, 126 Neb. 248, 252 N.W. 908 (1934).

Nonresident of the state is not entitled to any part of the five hundred dollar exemption. Woolfson v. Mead, 96 Neb. 528, 148 N.W. 153 (1914).

There is no exemption until partnership's debts are paid. Miller v. Waite, 59 Neb. 319, 80 N.W. 907 (1899).

When debtor files inventory under oath, officer must call appraisers and setoff exemptions. Daley v. Peters, 47 Neb. 848, 66 N.W. 862 (1896).

Exemption may consist of judgment. Mace v. Heath, 34 Neb. 54, 51 N.W. 317 (1892).

Member of partnership cannot claim firm property as exempt against creditors of firm. Lynch v. Englehardt Winning Davison Merchantile Co., 1 Neb. Unof. 528, 96 N.W. 524 (1901).

United States is not entitled to object to exemption allowed bankrupt on ground that state taxes were not paid. United States v. Bernstein, 16 F.2d 233 (8th Cir. 1926).

25-1553 Federal or state earned income tax credit refund; when exempt.

In bankruptcy and in the collection of a money judgment, the full amount of any federal or state earned income tax credit refund shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors.

Source: Laws 2004, LB 1207, § 6.

25-1554 Repealed. Laws 1993, LB 458, § 15.

25-1555 Exemptions; not applicable to tax sales.

Nothing in this chapter shall be considered as exempting any real or personal property from levy and sale for taxes.

Source: R.S.1867, Code § 524, p. 484; R.S.1913, § 8102; C.S.1922, § 9038; C.S.1929, § 20-1556.

This section applies only to property of private persons or corporations, and not to that of the state or its governmental subdivisions. Madison County v. School Dist. No. 2 of Madison County, 148 Neb. 218, 27 N.W.2d 172 (1947).

There is no exemption of any class or kind of personalty from distress or seizure for taxes except as specifically provided for by statute. Ryder v. Livingston, 145 Neb. 862, 18 N.W.2d 507 (1945).

United States is not entitled to object to exemption allowed bankrupt on ground that state taxes were not paid. United States v. Bernstein, 16 F.2d 233 (8th Cir. 1926).

25-1556 Specific exemptions; personal property; selection by debtor.

No property hereinafter mentioned shall be liable to attachment, execution, or sale on any final process issued from any court in this state, against any person being a resident of this state: (1) The immediate personal possessions of the debtor and his or her family; (2) all necessary wearing apparel of the debtor and his or her family; (3) the debtor's interest, not to exceed an aggregate fair market value of one thousand five hundred dollars, in household furnishings, household goods, household computers, household appliances, books, or musical instruments which are held primarily for personal, family, or household use of such debtor or the dependents of such debtor; (4) the debtor's interest, not to exceed an aggregate fair market value of two thousand four hundred dollars, in implements, tools, or professional books or supplies held for use in the principal trade or business of such debtor or his or her family, which may include one motor vehicle used by the debtor in connection with his or her principal trade or business or to commute to and from his or her principal place of trade or business; and (5) the debtor's interest in any professionally prescribed health aids for such debtor or the dependents of such debtor. The specific exemptions in this section shall be selected by the debtor or his or her agent, clerk, or legal representative in the manner provided in section 25-1552.

Source: R.S.1867, Code § 530, p. 485; R.S.1913, § 8103; C.S.1922, § 9039; C.S.1929, § 20-1557; R.S.1943, § 25-1556; Laws 1969, c. 187, § 1, p. 778; Laws 1973, LB 16, § 2; Laws 1977, LB 60, § 2; Laws 1997, LB 372, § 2.

Cross References

For other provisions for exempting burial lots and mausoleums, see sections 12-517, 12-520, and 12-605.

1. Who may claim exemptions
2. Property exempt

1. Who may claim exemptions

A widow is not entitled to claim all farm machinery as exempt. Thomas v. Sternhagen, 178 Neb. 578, 134 N.W.2d 237 (1965).

Only residents and heads of families are entitled; physicians, attorneys, and other professional men, not heads of families, are not entitled to exemption. Howells State Bank v. Arps, 117 Neb. 110, 219 N.W. 844 (1928).

Debtor may also claim benefits of other statutes allowing specific exemptions. Johnson v. Bartek, 56 Neb. 422, 76 N.W. 878 (1898).

Debtor may make selection. Conway v. Roberts, 38 Neb. 456, 56 N.W. 980 (1893).

Where husband absconds, wife may claim benefit of statute. Frazier v. Syas, 10 Neb. 115, 4 N.W. 934 (1880).

2. Property exempt

A combine exceeding the value of fifty dollars is not exempt to one engaged in agriculture. Miller v. Dixon, 176 Neb. 659, 127 N.W.2d 203 (1964).

Property is specifically exempted under this section, irrespective of homestead exemption, and need not be appraised. Johnson v. Bartek, 56 Neb. 422, 76 N.W. 878 (1898).

Growing crops are personal property. Sims v. Jones, 54 Neb. 769, 75 N.W. 150 (1898).

Library of lawyer is not exempt where judgment is for money collected for client. Shreck v. Gilbert, 52 Neb. 813, 73 N.W. 276 (1897).

Exempt property is not subject to fraudulent alienation. Bloedorn v. Jewell, 34 Neb. 649, 52 N.W. 367 (1892).

Homestead exemption does not bar claim under this section. Axtell v. Warden, 7 Neb. 182 (1878).

Team of mules instead of horses may be claimed. State ex rel. Metz v. Cunningham, 6 Neb. 90 (1877).

Term ''plow'' includes any plow, even though too large for operation by two horses. Clay Center Bank v. McKelvie, 19 F.2d 308 (8th Cir. 1927).

Dealer in eggs and poultry, which he buys at farmers' houses and takes to his place of business, is entitled to hold as exempt a horse, harness, wagon and office furniture, scales, coops, etc., necessary to be used in conducting his business. In re Conley, 162 F. 806 (D. Neb. 1907).

Truck used by painter in carrying on business was exempt in bankruptcy court. In re Bailey, 172 F.Supp. 925 (D. Neb. 1959).

Exemption of truck as tool for carrying on business allowed in bankruptcy court. In re Burden, 83 F.Supp. 416 (D. Neb. 1949).

25-1557 Actions in which exemptions limited or not allowed.

Nothing in this chapter shall be so construed as to exempt any property in this state from execution or attachment for unpaid wages; for money due and owing by an attorney at law for money or other valuable consideration received

by such attorney for any person or persons; or for enforcement of an award of or judgment for child support, alimony, or maintenance or a judgment for property division awarded to a former spouse.

Source: R.S.1867, Code § 531, p. 486; Laws 1869, § 1, p. 66; Laws 1887, c. 95, § 1, p. 649; R.S.1913, § 8104; C.S.1922, § 9040; C.S. 1929, § 20-1558; R.S.1943, § 25-1557; Laws 1977, LB 60, § 3; Laws 1997, LB 372, § 3.

Judgment need not disclose nature of claim. Shreck v. Gilbert, 52 Neb. 813, 73 N.W. 276 (1897).

This section is not applicable to property exempt by homestead laws. Money due independent contractor is not ''wages.'' Fox v. McClay, 48 Neb. 820, 67 N.W. 888 (1896).

Money due contractor furnishing his own and other labor is not exempt as wages. Henderson v. Nott, 36 Neb. 154, 54 N.W. 87 (1893).

''Necessaries of life'' do not include goods furnished boarding house. Lehnoff v. Fisher, 32 Neb. 107, 48 N.W. 821 (1891).

Laborers wages were exempt. Snyder v. Brune, 22 Neb. 189, 34 N.W. 364 (1887).

Proviso in this section does not limit value of specific property exemption under preceding section. Clay Center Bank v. McKelvie, 19 F.2d 308 (8th Cir. 1927).

25-1558 Wages; subject to garnishment; amount; exceptions.

(1) Except as provided in subsection (2) of this section, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment shall not exceed the lesser of the following amounts:

(a) Twenty-five percent of his or her disposable earnings for that week;

(b) The amount by which his or her disposable earnings for that week exceed thirty times the federal minimum hourly wage prescribed by 29 U.S.C. 206(a)(1) in effect at the time earnings are payable; or

(c) Fifteen percent of his or her disposable earnings for that week, if the individual is a head of a family.

(2) The restrictions of subsection (1) of this section shall not apply in the case of:

(a) Any order of any court for the support of any persons;

(b) Any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act; or

(c) Any debt due for any state or federal tax.

(3) No court shall make, execute, or enforce any order or process in violation of this section. The exemptions allowed in this section shall be granted to any person so entitled without any further proceedings.

(4) For the purposes of this section:

(a) Earnings shall mean compensation paid or payable by an employer to an employee for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program;

(b) Disposable earnings shall mean that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld;

(c) Garnishment shall mean any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt; and

(d) Head of a family shall mean an individual who actually supports and maintains one or more individuals who are closely connected with him or her by blood relationship, relationship by marriage, by adoption, or by guardian-

ship, and whose right to exercise family control and provide for the dependent individuals is based upon some moral or legal obligation.

(5) Every assignment, sale, transfer, pledge, or mortgage of the wages or salary of an individual which is exempted by this section, to the extent of the exemption provided by this section, shall be void and unenforceable by any process of law.

(6) No employer shall discharge any employee by reason of the fact that his or her earnings have been subjected to garnishment for any one indebtedness.

(7) In the case of earnings for any pay period other than a week, the Commissioner of Labor shall by regulation prescribe a multiple of the federal minimum hourly wage equivalent in effect to that set forth in this section.

Source: Laws 1869, § 1, p. 170; G.S.1873, c. 57, § 1021, p. 715; Laws 1907, c. 160, § 1, p. 494; R.S.1913, § 8105; C.S.1922, § 9041; C.S.1929, § 20-1559; R.S.1943, § 25-1558; Laws 1969, c. 188, § 1, p. 779; Laws 1972, LB 1032, § 133; Laws 2001, LB 489, § 4.

1. Exemption of wages
2. Miscellaneous

1. Exemption of wages

The wage exemption this section provides to debtor wage earners is personal to the debtor and cannot be utilized for the garnishee's benefit. Spaghetti Ltd. Partnership v. Wolfe, 264 Neb. 365, 647 N.W.2d 615 (2002).

This section is constitutional, and controls exemption of wages from execution or attachment. Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N.W. 515 (1939).

Statute controls exemption from execution or attachment of wages of judgment debtor. Lyons v. Austin, 126 Neb. 248, 252 N.W. 908 (1934).

Surviving wife is entitled to exempt wages. Dobney v. Chicago & N. W. Ry. Co., 120 Neb. 824, 235 N.W. 585 (1931).

Traveling salesman's salary is exempt as wages. William Deering Co. v. Ruffner, 32 Neb. 845, 49 N.W. 771 (1891).

Exempt wages are not subject to fraudulent assignment. Union Pacific Ry. Co. v. Smersh, 22 Neb. 751, 36 N.W. 139 (1888).

This section, passed as independent act, controls subject of exemption of wages. Snyder v. Brune, 22 Neb. 189, 34 N.W. 364 (1887).

Garnishee must set up facts showing wages are exempt. Turner v. Sioux City & Pacific R. R. Co., 19 Neb. 241, 27 N.W. 103 (1886).

Debtor may recover of creditor exempt wages applied on judgment by garnishment. Albrecht v. Treitschke, 17 Neb. 205, 22 N.W. 418 (1885).

2. Miscellaneous

This section applies though employee is nonresident. Wright v. Chicago, B. & Q. R. R. Co., 19 Neb. 175, 27 N.W. 90 (1886).

25-1559 Pensions of disabled soldiers and sailors; property purchased therewith; limit.

In addition to the exemptions otherwise provided for, there shall also be exempt from levy and sale upon execution or attachment, to every resident of the State of Nebraska, who became disabled in the service of the United States as a soldier, sailor or marine, all pension money hereafter received and all property hereafter purchased and improved exclusively therewith, not exceeding two thousand dollars in value, of and belonging to such soldier, sailor or marine.

Source: Laws 1887, c. 101, § 1, p. 656; R.S.1913, § 8106; C.S.1922, § 9042; C.S.1929, § 20-1560.

Pension money is exempt, and exemption covers property bought therewith, exchanged, and increase up to two thousand dollars. Dargan v. Williams, 66 Neb. 1, 91 N.W. 862 (1902).

25-1560 Exempt wages; interstate business; attachment or garnishment by method to avoid exemption laws; unlawful.

It is hereby declared unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any

laborer, servant, clerk, or other employee, of any corporation, firm or individual in this state engaged in interstate business, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation or institution, or to institute, in this state or elsewhere, or prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk or employee by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding, for the purpose of avoiding the effect of the laws of the State of Nebraska concerning exemptions.

Source: Laws 1889, c. 25, § 1, p. 369; R.S.1913, § 8107; C.S.1922, § 9043; C.S.1929, § 20-1561.

Nonresident cannot claim benefits of this and following sections. McCormack v. Tincher, 77 Neb. 857, 110 N.W. 547 (1906).

Act, of which this section was part, is constitutional. Gordon Bros. v. Wageman, 77 Neb. 185, 108 N.W. 1067 (1906).

Foreign corporations are subject to operation of act; exemption laws where wages earned apply. Singer Mfg. Co. v. Fleming, 39 Neb. 679, 58 N.W. 226 (1894).

25-1561 Exempt wages; interstate business; law violation; aiders; abettors.

It is hereby declared unlawful for any person or persons to aid, assist, abet or counsel a violation of section 25-1560, for any purpose whatever.

Source: Laws 1889, c. 25, § 2, p. 370; R.S.1913, § 8108; C.S.1922, § 9044; C.S.1929, § 20-1562.

25-1562 Exempt wages; interstate business; violation of sections; evidence.

In any proceeding, civil or criminal, growing out of a breach of sections 25-1560 and 25-1561 or either of them, proof of the institution of a suit or service of garnishment summons by any person, firm or individual, in any court of any state, or territory, other than this state, or in this state to seize by process of garnishment or otherwise, any of the wages of such persons as defined in section 25-1560 shall be deemed prima facie evidence of an evasion of the laws of the State of Nebraska and a breach of the provisions of such sections on the part of the creditor or resident in Nebraska causing the same to be done.

Source: Laws 1889, c. 25, § 3, p. 370; R.S.1913, § 8109; C.S.1922, § 9045; C.S.1929, § 20-1563.

Principal is not liable for unauthorized suit by agent. Satterlee v. First Nat. Bank of Columbus, 78 Neb. 691, 111 N.W. 591 (1907).

Suit by assignee is prima facie evidence in action against assignor; rebuttal. Gordon Bros. v. Wageman, 77 Neb. 185, 108 N.W. 1067 (1906).

Good faith of assignor is question for jury. Karnes v. Dovey, 53 Neb. 725, 74 N.W. 311 (1898).

25-1563 Exempt wages; interstate business; violation; penalty.

Any persons, firm, company, corporation or business institution guilty of a violation of section 25-1560 or 25-1561, shall be liable to the party injured through such violation thereof for the amount of the debt sold, assigned, transferred, garnished or sued upon with all costs and expenses and reasonable attorney's fee, to be recovered in any court of competent jurisdiction in this state, and shall further be guilty of a Class IV misdemeanor.

Source: Laws 1889, c. 25, § 4, p. 370; R.S.1913, § 8110; C.S.1922, § 9046; C.S.1929, § 20-1564; R.S.1943, § 25-1563; Laws 1977, LB 40, § 100.

Debtor, to claim benefit of act, must have residence in this state. Corliss v. Plano Mfg. Co., 80 Neb. 366, 114 N.W. 413 (1907).

Petition was sufficient to state cause of action under this section. Gordon Bros. v. Wageman, 77 Neb. 185, 108 N.W. 1067 (1906).

Section is constitutional; must allege plaintiff is head of family and wages are exempt. State ex rel. Green v. Power, 63 Neb. 496, 88 N.W. 769 (1902).

25-1563.01 Stock, pension, or similar plan or contract; exempt from certain process; when.

In bankruptcy and in the collection of a money judgment, the following benefits shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors: To the extent reasonably necessary for the support of the debtor and any dependent of the debtor, an interest held under a stock bonus, pension, profit-sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service unless:

(1) Within two years prior to bankruptcy or to entry against the individual of a money judgment which thereafter becomes final, such plan or contract was established or was amended to increase contributions by or under the auspices of the individual or of an insider that employed the individual at the time the individual's rights under such plan or contract arose; or

(2) Such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 408A of the Internal Revenue Code.

For purposes of this section, unless the context otherwise requires, insider shall have the meaning provided in 11 U.S.C. 101.

Source: Laws 1987, LB 335, § 4; Laws 1995, LB 574, § 38; Laws 1999, LB 23, § 1.

Individual Retirement Accounts are generally protected from attachment and garnishment to the extent the funds contained therein are reasonably necessary for the support of the debtor or any dependent of the debtor. Novak v. Novak, 245 Neb. 366, 513 N.W.2d 303 (1994).

25-1563.02 Lump-sum settlement; structured settlement; exempt from certain process; when.

(1) Except as provided in subsection (2) of this section, all proceeds and benefits, including interest earned thereon, which are paid either in a lump sum or are accruing under any structured settlement providing periodic payments, which lump-sum settlement or periodic payments are made as compensation for personal injuries or death, shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors of the beneficiary or the beneficiary's surviving dependents unless a written assignment to the contrary has been obtained by the claimant.

(2) All proceeds and benefits, including interest earned thereon, which are paid for personal injuries may be garnished by a county attorney or authorized attorney pursuant to section 43-512.03 or garnished for child support as defined in section 43-1705 by an obligee as defined in section 43-1713.

Source: Laws 1987, LB 335, § 5; Laws 1993, LB 118, § 1; Laws 1994, LB 1224, § 37.

(c) PROCEEDINGS IN AID OF EXECUTION

25-1564 Property of debtor other than lands and chattels subject to payment of judgment.

Where a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint-stock company, or any interest he may have in any money, contracts, claims or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods or effects which he may have in possession of any person, body politic or corporate, shall be subject to the payment of such judgment by proceedings in equity, or as in this chapter prescribed.

Source: R.S.1867, Code § 532, p. 486; R.S.1913, § 8111; C.S.1922, § 9047; C.S.1929, § 20-1565.

1. Scope
2. Proceeding

1. Scope

This section authorizes a creditor's bill in Nebraska. Doksansky v. Norwest Bank Neb., N.A., 260 Neb. 100, 615 N.W.2d 104 (2000).

This and succeeding sections provide remedy where discovery of property of judgment debtor is sought through evidence from others than a garnishee. Orchard & Wilhelm Co. v. North, 125 Neb. 723, 251 N.W. 895 (1933).

Where creditor has exhausted legal remedies he may proceed in equity to reach interest of debtor in corporation. Fuchs v. Chambers, 89 Neb. 538, 131 N.W. 975 (1911).

This section does not supersede remedy in equity. First Nat. Bank of Plattsmouth v. Gibson, 69 Neb. 21, 94 N.W. 965 (1903).

This section takes place of bill of discovery. Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N.W. 104 (1896).

2. Proceeding

Any interest a judgment debtor may have in any money or choses in action due, or to become due, is subject to the payment of the judgment against him. Emerson-Brantingham Implement Co. v. Hallgren, 146 Neb. 530, 20 N.W.2d 501 (1945).

In proceedings in aid of execution, the judgment creditor proceeds directly against the debtor, citing him into court for an examination of his assets. Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N.W. 515 (1939).

Creditors suit is proper to impress a lien upon distributive share of judgment debtor in decedent's estate in process of administration. Fremont Farmers Union Coop. Assn. v. Markussen, 136 Neb. 567, 286 N.W. 784 (1939).

Proceedings in aid of execution afford ample remedy to judgment creditor where debtor makes false affidavit and procures release, as exempt, of property taken in execution; replevin is not proper remedy. France v. Larkin, 96 Neb. 365, 148 N.W. 86 (1914).

Creditor must have had actionable demand against his debtor when suit commenced. German Nat. Bank of Hastings v. First Nat. Bank of Hastings, 59 Neb. 7, 80 N.W. 48 (1899).

Equity court has power to subject to judgment property not reached by legal execution. Arlington State Bank v. Paulsen, 57 Neb. 717, 78 N.W. 303 (1899).

Creditor's bill is still available; not entitled to jury trial therein. Monroe v. Reid, Murdock & Co., 46 Neb. 316, 64 N.W. 983 (1895).

25-1565 Discovery of property of debtor; order to appear and answer.

At any time after the entry of judgment against the judgment debtor, or one of several debtors in the same action, the judgment creditor is entitled to an order from the county court or the district court of the county (1) in which the debtor resides, (2) if the debtor does not reside in the state, where judgment was rendered, or (3) in which a transcript of judgment has been filed, requiring the debtor to appear and answer concerning his or her property before the judge of such court or a referee appointed by the judge of such court at a time and place specified in the order within the county to which the order was issued.

Source: R.S.1867, Code § 533, p. 487; R.S.1913, § 8112; C.S.1922, § 9048; C.S.1929, § 20-1566; R.S.1943, § 25-1565; Laws 1972, LB 1032, § 134; Laws 1992, LB 1059, § 11; Laws 2004, LB 1207, § 7.

Provisions of the code pertaining to compulsory discovery do not relate to the subject of pleading. Marshall v. Rowe, 126 Neb. 817, 254 N.W. 480 (1934).

Making of order is authorized only after return of execution unsatisfied. Clarke v. Nebraska Nat. Bank, 57 Neb. 314, 77 N.W. 805 (1899).

Proceedings in aid of execution were designed to take the place of bill of discovery. Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N.W. 104 (1896).

Execution must issue to lay foundation for contempt proceedings. Hawthorne v. State, 45 Neb. 871, 64 N.W. 359 (1895).

Affidavit is unnecessary to obtain order; it is sufficient if execution is returned unsatisfied. English v. Smith, 1 Neb. Unof. 670, 96 N.W. 60 (1901).

25-1566 Discovery of property of debtor; warrant for arrest; examination; undertaking; punishment for contempt.

Instead of the order requiring the attendance of the judgment debtor, as provided in section 25-1565, the judge may, upon proof to his satisfaction by affidavit of the party or otherwise, that there is danger of the debtor leaving the state or concealing himself to avoid the examination herein mentioned, issue a warrant, requiring the sheriff to arrest him and bring him before such judge within the county in which the debtor may be arrested. Such warrant can be issued only by a county judge or a judge of the district court of the county in which such debtor resides or may be arrested. Upon being brought before the judge, he shall be examined on oath, and other witnesses may be examined on either side, and if on such examination it appears that there is danger of the debtor leaving the state, and that he has property which he unjustly refuses to apply to such judgment, he may be ordered to enter into an undertaking, in such sum as the judge may prescribe, with one or more sureties, that he will from time to time attend for examination before the judge or referee as shall be directed. In default of entering into such undertaking, he may be committed to the jail of the county by warrant of the judge, as for a contempt.

Source: R.S.1867, Code § 535, p. 487; R.S.1913, § 8114; C.S.1922, § 9050; C.S.1929, § 20-1568.

Intention to leave state alone is insufficient; but danger that citation will not be obeyed, is ground. Bank of Miller v. Richmon, 68 Neb. 731, 94 N.W. 998 (1903).

Affidavit upon information and belief is insufficient. Clarke v. Nebraska Nat. Bank, 57 Neb. 314, 77 N.W. 805 (1899).

25-1567 Discovery of property of debtor; examination; debtor's incriminating answers; not privileged; immunity.

No person shall, on examination pursuant to sections 25-1564 to 25-1580, be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answer shall not be used as evidence against him in a prosecution for such fraud.

Source: R.S.1867, Code § 536, p. 488; R.S.1913, § 8115; C.S.1922, § 9051; C.S.1929, § 20-1569.

25-1568 Execution; satisfaction; payment by debtors of judgment debtor.

After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid or directed to be credited by the judgment creditor on the execution.

Source: R.S.1867, Code § 537, p. 488; R.S.1913, § 8116; C.S.1922, § 9052; C.S.1929, § 20-1570.

This section relates to examination of the judgment debtor's debtor. Clarke v. Nebraska Nat. Bank, 57 Neb. 314, 77 N.W. 805 (1899).

25-1569 Debtors of judgment debtor; examination; notice.

After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him, the

judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, within the county in which such person or corporation may be served with the order to answer, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party in the action, in such manner as may seem to him proper.

Source: R.S.1867, Code § 538, p. 488; R.S.1913, § 8117; C.S.1922, § 9053; C.S.1929, § 20-1571.

Notice is to be given in the manner which the court deems proper. Emerson-Brantingham Implement Co. v. Hallgren, 146 Neb. 530, 20 N.W.2d 501 (1945).

This section applies to garnishment proceedings after judgment and return of execution nulla bona. Mercer v. Armstrong, 98 Neb. 645, 154 N.W. 219 (1915).

25-1570 Discovery of property of debtor; examination; witnesses.

Witnesses may be required, upon the order of the judge or by a subpoena issued by the clerk of the court, to appear and testify upon any proceedings under sections 25-1564 to 25-1580 in the same manner as upon the trial of an issue.

Source: R.S.1867, Code § 539, p. 488; R.S.1913, § 8118; C.S.1922, § 9054; C.S.1929, § 20-1572; R.S.1943, § 25-1570; Laws 1992, LB 1059, § 12.

Witnesses may be required to appear and testify in the same manner as upon the trial of an issue. Orchard & Wilhelm Co. v. North, 125 Neb. 723, 251 N.W. 895 (1933).

25-1571 Discovery of property of debtor; examination; oath; referee.

The party or witness may be required to attend before the judge or before a referee appointed by the court or judge. If before a referee, the examination must be taken by the referee and certified by the judge. All examinations and answers before a judge or referee under sections 25-1564 to 25-1580 must be on oath, but when a corporation answers, the answer must be on the oath of an officer thereof.

Source: R.S.1867, Code § 540, p. 488; R.S.1913, § 8119; C.S.1922, § 9055; C.S.1929, § 20-1573.

It is the duty of the district court, in a proceeding in aid of execution, when it is disclosed by the administrator of an estate that a judgment debtor has an interest in a distributive share of such estate, to impress a lien upon such share. Emerson-Brantingham Implement Co. v. Hallgren, 146 Neb. 530, 20 N.W.2d 501 (1945).

Judgment debtor may be a witness. Orchard & Wilhelm Co. v. North, 125 Neb. 723, 251 N.W. 895 (1933).

25-1572 Discovery of property of debtor; disposition by judge.

The judge may order any property of the judgment debtor, not exempt by law, in the hands of either himself or any other person or corporation, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

Source: R.S.1867, Code § 541, p. 489; R.S.1913, § 8120; C.S.1922, § 9056; C.S.1929, § 20-1574.

This section was not amended by act exempting ninety per cent of wages, and applies to proceedings against debtor in aid of execution. Live Stock Nat. Bank v. Jackson, 137 Neb. 161, 288 N.W. 515 (1939).

Order may be enforced by the ordinary legal methods of procedure. In re Havlik, 45 Neb. 747, 64 N.W. 234 (1895).

25-1573 Discovery of property of debtor; appointment of receiver; transfer of nonexempt property; power of court to prevent.

The judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, in the

same manner and with the like authority as if the appointment were made by the court. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, and any interference therewith.

Source: R.S.1867, Code § 542, p. 489; R.S.1913, § 8121; C.S.1922, § 9057; C.S.1929, § 20-1575.

25-1574 Discovery of property of debtor; receiver; liability of officer and sureties; undertaking; oath.

If the sheriff shall be appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as such receiver; if any other person shall be appointed receiver, he shall give a written undertaking, in such sum as shall be prescribed by the judge, with one or more sureties, to the effect that he will faithfully discharge his duties of receiver, and he shall also take an oath to the same effect before acting as such receiver. The undertaking mentioned in this section shall be to the State of Nebraska, and actions may be prosecuted for a breach thereof, by any person interested, in the same manner as upon a sheriff's official bond.

Source: R.S.1867, Code § 543, p. 489; R.S.1913, § 8122; C.S.1922, § 9058; C.S.1929, § 20-1576.

25-1575 Discovery of property of debtor; proceedings; continuance.

The judge or referee, acting under the provisions of sections 25-1564 to 25-1580, shall have power to continue his proceedings from time to time until they are completed.

Source: R.S.1867, Code § 544, p. 489; R.S.1913, § 8123; C.S.1922, § 9059; C.S.1929, § 20-1577.

25-1576 Discovery of property of debtor; reference.

The judge may in his discretion order a reference to a referee agreed upon or appointed by him, to report the evidence of the facts.

Source: R.S.1867, Code § 545, p. 489; R.S.1913, § 8124; C.S.1922, § 9060; C.S.1929, § 20-1578.

25-1577 Discovery of property of debtor; disobedience of order of court; penalty.

If any person, party or witness disobey an order of the judge or referee, duly served, such person, party or witness may be punished by the judge as for contempt, and if a party, he shall be committed to the jail of the county wherein the proceedings are pending until he shall comply with such order; or, in case he has, since the service of such order upon him, rendered it impossible for him to comply therewith, until he has restored to the opposite party what such party has lost by such disobedience, or until discharged by due course of law.

Source: R.S.1867, Code § 546, p. 489; Laws 1875, § 1, p. 39; R.S.1913, § 8125; C.S.1922, § 9061; C.S.1929, § 20-1579.

Failure to pay money is not punishable, unless party is able to pay or willfully unable. Hawthorne v. State, 45 Neb. 871, 64 N.W. 359 (1895).

Third person refusing to turn over property in his possession is not punishable. In re Havlik, 45 Neb. 747, 64 N.W. 234 (1895).

25-1578 Discovery of property of debtor; orders to judgment debtors and witnesses; service; filing; record.

The orders to judgment debtors and witnesses, provided for in sections 25-1564 to 25-1580, shall be in writing and signed by the judge making the same, and shall be served as a summons in other cases. The judge shall reduce all his orders to writing, which, together with a minute of his proceedings, signed by himself, shall be filed with the clerk of the court of the county in which the judgment is rendered, or the transcript of the justice filed, and the clerk shall enter on his execution docket the time of filing the same.

Source: R.S.1867, Code § 547, p. 489; R.S.1913, § 8126; C.S.1922, § 9062; C.S.1929, § 20-1580.

25-1579 Discovery of property of debtor; proceedings; fees; taxation as costs.

The judge shall allow to sheriffs, referees, receivers, and witnesses such compensation as is allowed for like service in other cases, to be taxed as costs in the case, and shall enforce by order the collection thereof from such party or parties as ought to pay the same.

Source: R.S.1867, Code § 548, p. 489; R.S.1913, § 8127; C.S.1922, § 9063; C.S.1929, § 20-1581; R.S.1943, § 25-1579; Laws 1959, c. 140, § 2, p. 546.

25-1580 Discovery of property of debtor; proceedings; county judge; fees.

The county judge shall be allowed for his or her services, under sections 25-1564 to 25-1580, the sum of five dollars in each case, and such fees as are allowed by law to clerks of the district court for similar services.

Source: R.S.1867, Code § 549, p. 490; R.S.1913, § 8128; C.S.1922, § 9064; C.S.1929, § 20-1582; R.S.1943, § 25-1580; Laws 1982, LB 928, § 19.

(d) EXECUTION FOR DELIVERY OF REAL ESTATE

25-1581 Execution; contents; satisfaction of damages and costs.

If the execution be for the delivery of the possession of real property, it shall require the officer to deliver the same, particularly describing the property, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered in the same judgment, out of the goods and chattels of the party against whom it was rendered, and for want of such goods and chattels, then out of the lands and tenements, and in this respect it shall be deemed an execution against the property.

Source: R.S.1867, Code § 559, p. 491; R.S.1913, § 8129; C.S.1922, § 9065; C.S.1929, § 20-1583.

25-1582 Judgment other than for the recovery of money or real property; enforcement by attachment or rule of court; notice.

When the judgment is not for the recovery of money or real property, the same may be enforced by attachment by the court rendering the judgment, upon motion made, or by a rule of the court upon the defendant; but in either case, notice of the motion, or service of a copy of the rule, shall be made on the defendant a reasonable time before the order of attachment is made.

Source: R.S.1867, Code § 560, p. 491; R.S.1913, § 8130; C.S.1922, § 9066; C.S.1929, § 20-1584.

Judgment becomes lien on after-acquired property. Jones v. Knosp, 91 Neb. 224, 135 N.W. 1049 (1912).

(e) JUDGMENT OF JUSTICE OF THE PEACE

25-1583 Repealed. Laws 1972, LB 1032, § 287.

25-1584 Repealed. Laws 1972, LB 1032, § 287.

25-1585 Repealed. Laws 1972, LB 1032, § 287.

25-1586 Repealed. Laws 1972, LB 1032, § 287.

(f) NEBRASKA UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

25-1587 Repealed. Laws 1993, LB 458, § 15.

25-1587.01 Act, how cited.

Sections 25-1587.01 to 25-1587.09 shall be known and may be cited as the Nebraska Uniform Enforcement of Foreign Judgments Act.

Source: Laws 1993, LB 458, § 1.

While Nebraska courts are prohibited from reviewing the merits of a foreign judgment, Nebraska courts may examine whether the foreign judgment was rendered with proper jurisdiction and may refuse to register and enforce a foreign judgment rendered without jurisdiction over the parties or the subject matter. Walksalong v. Mackey, 250 Neb. 202, 549 N.W.2d 384 (1996).

25-1587.02 Foreign judgment, defined.

For purposes of the Nebraska Uniform Enforcement of Foreign Judgments Act, foreign judgment means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

Source: Laws 1993, LB 458, § 2.

25-1587.03 Filing and status of foreign judgments.

A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed on or after January 1, 1994, in the office of the clerk of any court of this state having jurisdiction of such action. The clerk shall treat the foreign judgment in the same manner as a judgment of a court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner.

Source: Laws 1993, LB 458, § 3.

The filing of a foreign judgment in a Nebraska court pursuant to this section is not an action upon a foreign judgment within the meaning of section 25-205. A foreign judgment filed in a Nebraska court pursuant to this section may be collaterally attacked on the ground that the court which entered the judgment lacked jurisdiction to do so, and the resolution of the issue must be made by the Nebraska court. Deuth v. Ratigan, 256 Neb. 419, 590 N.W.2d 366 (1999).

25-1587.04 Notice of filing.

(a) At the time of the filing of the foreign judgment, the judgment creditor or his or her lawyer shall make and file with the clerk of the court an affidavit setting forth the name and last-known post office address of the judgment debtor and the judgment creditor.

(b) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

Source: Laws 1993, LB 458, § 4.

25-1587.05 Stay.

(a) If the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(b) If the judgment debtor shows the court any ground upon which enforcement of a judgment of any court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period upon requiring the same security for satisfaction of the judgment which is required in this state.

Source: Laws 1993, LB 458, § 5.

25-1587.06 Fees.

Any person filing a foreign judgment or a judgment from another court in this state shall pay to the clerk of the district or county court a fee as provided in section 33-106 or 33-123 for filing a transcript of judgment. Fees for docketing, transcription, or other enforcement proceedings shall be as provided for judgments of the courts of this state.

Source: Laws 1993, LB 458, § 6; Laws 1995, LB 270, § 1.

25-1587.07 Optional procedure.

The right of a judgment creditor to bring an action to enforce his or her judgment instead of proceeding under the Nebraska Uniform Enforcement of Foreign Judgments Act remains unimpaired.

Source: Laws 1993, LB 458, § 7.

25-1587.08 Uniformity of interpretation.

The Nebraska Uniform Enforcement of Foreign Judgments Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Source: Laws 1993, LB 458, § 8.

25-1587.09 Foreign judgments registered under prior law.

Sections 25-1587.01 to 25-1587.08 do not apply to foreign judgments registered prior to January 1, 1994, pursuant to sections 25-1587 to 25-15,104 as such sections existed immediately prior to such date. Sections 25-1587 to 25-15,104 shall remain effective on and after January 1, 1994, only for the purpose of enforcement of foreign judgments registered prior to such date pursuant to sections 25-1587 to 25-15,104 as such sections existed immediately prior to such date.

Source: Laws 1993, LB 458, § 9.

25-1588 Repealed. Laws 1993, LB 458, § 15.

25-1589 Repealed. Laws 1993, LB 458, § 15.

25-1590 Repealed. Laws 1993, LB 458, § 15.

25-1591 Repealed. Laws 1993, LB 458, § 15.

25-1592 Repealed. Laws 1993, LB 458, § 15.

25-1593 Repealed. Laws 1993, LB 458, § 15.

25-1594 Repealed. Laws 1993, LB 458, § 15.

25-1595 Repealed. Laws 1993, LB 458, § 15.

25-1596 Repealed. Laws 1993, LB 458, § 15.

25-1597 Repealed. Laws 1993, LB 458, § 15.

25-1598 Repealed. Laws 1993, LB 458, § 15.

25-1599 Repealed. Laws 1993, LB 458, § 15.

25-15,100 Repealed. Laws 1993, LB 458, § 15.

25-15,101 Repealed. Laws 1993, LB 458, § 15.

25-15,102 Repealed. Laws 1993, LB 458, § 15.

25-15,103 Repealed. Laws 1993, LB 458, § 15.

25-15,104 Repealed. Laws 1993, LB 458, § 15.

(g) BANKRUPTCY

25-15,105 Federal exemptions; rejected.

The federal exemptions provided in 11 U.S.C. 522, subsection (d), are hereby rejected by the State of Nebraska. The State of Nebraska elects to retain the personal exemptions provided under Nebraska statutes and the Nebraska Constitution and to have such exemptions apply to any bankruptcy petition filed in Nebraska after April 17, 1980.

Source: Laws 1980, LB 940, § 1.

Cross References

Exemptions, see section 25-1552 et seq.
Homestead exemption, see section 40-101.
Insurance exemption, see section 44-371.

ARTICLE 16
JURY

Section

25-1601 Jurors; competency; disqualified; excused, when.

(1) All citizens of the United States residing in any of the counties of this state who are over the age of nineteen years, able to read, speak, and understand the English language, and free from all disqualifications set forth under this section and from all other legal exceptions are and shall be competent persons to serve on all grand and petit juries in their respective counties. Persons disqualified to serve as either grand or petit jurors are: (a) Judges of any court, (b) clerks of the Supreme or district courts, (c) sheriffs, (d) jailers, (e) persons, or the wife or husband of any such person, who are parties to suits pending in the district court of the county of his, her, or their then residence for trial at that jury panel, (f) persons who have been convicted of a criminal offense punishable by imprisonment in a Department of Correctional Services adult correctional facility, when such conviction has not been set aside or a pardon issued, and (g) persons who are subject to liability for the commission of any offense which by special provision of law does and shall disqualify them. Persons who are husband and wife shall not be summoned as jurors on the same panel. Persons who are incapable, by reason of physical or mental disability, of rendering satisfactory jury service shall not be qualified to serve on a jury, but a person claiming this disqualification may be required to submit a physician's certificate as to the disability and the certifying physician is subject to inquiry by the court at its discretion. A nursing mother who requests to be excused shall be excused from jury service until she is no longer nursing her child, but the mother may be required to submit a physician's certificate in support of her request.

(2) The district court or any judge thereof may exercise the power of excusing any grand or petit juror or any person summoned for grand or petit jury service upon a showing of undue hardship, extreme inconvenience, or public necessity for such period as the court deems necessary. At the conclusion of such period the person shall reappear for jury service in accordance with the court's direction. All excuses and the grounds for such excuses shall be entered upon the record of the court and shall be considered as a public record. In districts having more than one judge of the district court, the court may by rule or order assign or delegate to the presiding judge or any one or more judges the sole authority to grant such excuses.

(3) No qualified prospective juror is exempt from jury service, except that any person sixty-five years of age or older who shall make such request to the court at the time the juror qualification form is filed with the jury commissioner shall be exempt from serving on grand and petit juries.

(4) A nursing mother shall be excused from jury service until she is no longer nursing her child by making such request to the court at the time the juror qualification form is filed with the jury commissioner and including with the request a physician's certificate in support of her request. The jury commissioner shall mail the mother a notification form to be completed and returned to the jury commissioner by the mother when she is no longer nursing the child.

Source: R.S.1867, Code § 657, p. 509; Laws 1911, c. 171, § 1, p. 548; R.S.1913, § 8135; Laws 1917, c. 139, § 1, p. 325; C.S.1922, § 9071; C.S.1929, § 20-1601; Laws 1939, c. 18, § 1, p. 98; C.S.Supp.,1941, § 20-1601; Laws 1943, c. 45, § 1, p. 191; R.S. 1943, § 25-1601; Laws 1953, c. 72, § 1, p. 224; Laws 1955, c. 90, § 1, p. 264; Laws 1959, c. 106, § 1, p. 433; Laws 1959, c. 143, § 1, p. 551; Laws 1969, c. 189, § 1, p. 780; Laws 1979, LB 234, § 2; Laws 1980, LB 733, § 1; Laws 1985, LB 113, § 1; Laws 1993, LB 31, § 2; Laws 2003, LB 19, § 3.

Cross References

For exemption of National Guard, see section 55-173.

1. Competency
2. Selection

1. Competency

Pursuant to subsection (1) of this section, not every person who works in a jail is necessarily a ''jailer''. State v. Jacob, 253 Neb. 950, 574 N.W.2d 117 (1998).

Holders of assessable policies issued by a mutual insurance company named as a party in an action may serve as jurors if the policyholder can decide the case fairly solely upon the evidence presented at trial. Howard v. State Farm Mut. Auto. Ins. Co., 242 Neb. 624, 496 N.W.2d 862 (1993).

Although several husbands and wives were on the same jury panel, there was no evidence that any statutorily disqualified person actually served as a juror at the trial. Schroll v. Fulton, 213 Neb. 310, 328 N.W.2d 780 (1983).

Defendant not denied fair trial by statute limiting eligibility for jury duty according to age. State v. Schwartz, 199 Neb. 17, 255 N.W.2d 859 (1977).

Excluding nineteen and twenty year olds from petit and grand jury service does not violate constitutional due process guarantees. State v. Foster, 196 Neb. 332, 242 N.W.2d 876 (1976).

District court may excuse for cause any grand juror who has been summoned. State v. Abboud, 181 Neb. 84, 147 N.W.2d 152 (1966).

Nothing in this section disqualified a negro from jury service. Bell v. State, 159 Neb. 474, 67 N.W.2d 762 (1954).

Failure of counsel to again inquire of juror, incompetent and ineligible because of his age, was not waived, where trial court has asked the qualifying questions and juror failed to disclose his ineligibility, when fact is unknown to counsel and parties. Berg v. Griffiths, 126 Neb. 235, 252 N.W. 918 (1934).

Juror is presumed to be qualified at time of serving in absence of showing to contrary. Seaton v. State, 109 Neb. 828, 192 N.W. 501 (1923).

Mere impairment of eyesight does not render juror incompetent. Reed v. State, 75 Neb. 509, 106 N.W. 649 (1906).

Juror must be qualified voter. Russell v. State, 62 Neb. 512, 87 N.W. 344 (1901).

Juror must be elector of the county wherein he is called to serve. Hart v. State, 14 Neb. 572, 16 N.W. 905 (1883).

Negroes are not incompetent. Brittle v. People, 2 Neb. 198 (1873).

2. Selection

Statute exempting certain occupations from jury duty upheld against motion to quash jury panel. State v. Wounded Arrow, 207 Neb. 544, 300 N.W.2d 19 (1980).

It is not error to overrule challenge to the array that does not plead facts showing in what way statute was violated. Uerling v. State, 125 Neb. 374, 250 N.W. 243 (1933).

Failure to interrogate juror on voir dire as to his competency and to challenge for that cause constitutes waiver of juror's incompetency. Flannigan v. State, 124 Neb. 748, 248 N.W. 92 (1933).

Evidence was insufficient to support challenge to the array on ground jury panel was improperly selected. Nelson v. State, 118 Neb. 812, 226 N.W. 438 (1929).

25-1601.01 Repealed. Laws 1977, LB 283, § 4.

25-1601.02 Repealed. Laws 1967, c. 149, § 1, p. 446.

25-1601.03 Legislative intent; jury system.

The Legislature hereby declares that it is the intent and purpose of this section and sections 25-1601, 25-1603, 25-1609, 25-1611, 25-1625, 25-1627, 25-1627.01, 25-1629, 25-1629.01 to 25-1629.04, 25-1631.03, 25-1637, 25-1639, and 25-1640 to create a jury system which will insure that:

(1) All persons selected for jury service are selected at random from a fair cross section of the population of the area served by the court;

(2) All qualified citizens have the opportunity to be considered for jury service;

(3) All qualified citizens fulfill their obligation to serve as jurors when summoned for that purpose; and

(4) No citizen is excluded from jury service in this state as a result of discrimination based upon race, color, religion, sex, national origin, or economic status.

Source: Laws 1979, LB 234, § 1.

25-1602 Jurors; actions to which municipal corporation a party; inhabitants and taxpayers; competency.

On the trial of any suit in which a county or any other municipal corporation is a party, the inhabitants and taxpayers of such municipal corporation shall be competent jurors if otherwise competent and qualified according to law.

Source: Laws 1877, § 1, p. 16; R.S.1913, § 8136; C.S.1922, § 9072; C.S.1929, § 20-1602.

Interest as taxpayer may disqualify where he testifies such interest would influence verdict. Omaha v. Cane, 15 Neb. 657, 20 N.W. 101 (1884).

Ordinarily interest as taxpayer does not disqualify. Omaha v. Olmstead, 5 Neb. 446 (1877).

25-1603 Jurors; selection.

In each of the counties of this state, wherein a district court is appointed or directed to be held, the lists of grand and petit jurors shall be made up and jurors selected for jury duty in the manner prescribed in sections 25-1625 to 25-1642.

Source: R.S.1867, Code § 658, p. 510; R.S.1913, § 8137; C.S.1922, § 9073; C.S.1929, § 20-1603; Laws 1931, c. 36, § 1, p. 129; Laws 1939, c. 18, § 23, p. 113; C.S.Supp.,1941, § 20-1603; R.S.1943, § 25-1603; Laws 1953, c. 72, § 2, p. 225; Laws 1979, LB 234, § 3; Laws 1980, LB 733, § 2.

1. Scope
2. Challenge

1. Scope

Number of votes cast at election does not furnish basis for definite inference as to number of persons possessing qualifications of jurors. Nelson v. State, 118 Neb. 812, 226 N.W. 438 (1929).

Failure of county board to select jurors fifteen days before opening of term did not require quashing of panel without resulting prejudice. Fetty v. State, 118 Neb. 169, 223 N.W. 955 (1929).

Section is not applicable to calling of juries after commencement of term. Pinn v. State, 107 Neb. 417, 186 N.W. 544 (1922).

One who has served within two years should not be selected, but it is not sufficient to quash panel. Kerr v. State, 63 Neb. 115, 88 N.W. 240 (1901).

In calling special term, failure of judge to direct summons of jurors under this section does not invalidate. Welsh v. State, 60 Neb. 101, 82 N.W. 368 (1900).

Section is mandatory, and must be strictly followed. Davis v. State, 31 Neb. 247, 47 N.W. 854 (1891).

When right of suffrage was restricted to male voters, apportionment might be based on vote at last general election. Bohanan v. State, 15 Neb. 209, 18 N.W. 129 (1883).

Jury for called term must be selected in this manner. Brown alias McElvoy v. State, 9 Neb. 157, 2 N.W. 378 (1879).

2. Challenge

Failure to challenge a juror for cause and to examine him or other witnesses as to his competency is a waiver, even though fact of incompetency is not known until after verdict. Young v. State, 133 Neb. 644, 276 N.W. 387 (1937).

It was error to refuse to quash panel where officers who selected jurors are members of secret society seeking to convict defendant. Nelson v. State, 115 Neb. 26, 211 N.W. 175 (1926).

It was error to overrule challenge to the array in criminal case, where jurors were drawn by precinct, separately, instead of by lot from sixty names from county at large. Kronberg v. State, 114 Neb. 393, 207 N.W. 668 (1926).

Commissioner having case pending should not assist in selection of list, but panel will not be quashed. Northeastern Neb. R. R. Co. v. Frazier, 25 Neb. 42, 40 N.W. 604 (1888).

It is ground for plea in abatement, where grand jury is not proportionately selected. Barton v. State, 12 Neb. 260, 11 N.W. 323 (1882).

Plea in abatement that jurors were not properly selected must specifically point out objections. Baldwin v. State, 12 Neb. 61, 10 N.W. 463 (1881).

If not selected proportionately, it is ground for challenge to array. Clark v. Saline County, 9 Neb. 516, 4 N.W. 246 (1880).

25-1604 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1605 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1606 Jurors; how summoned; notice.

The summons of grand and petit jurors for the courts of this state shall be served by the jury commissioner of such court by mailing a copy of such summons, containing the time, place, and the name of the court which such jurors are to attend, by either registered, certified, or first-class mail to the person whose name has been drawn, not less than ten days before the day such juror is to appear as a juror in such court, except that this shall not prevent service of special summons on a talesman by the sheriff of the county or by such other person as may be designated by the judge or judges.

Source: R.S.1867, Code §§ 661, 662, p. 510; Laws 1885, c. 97, § 1, p. 381; R.S.1913, § 8141; Laws 1915, c. 148, § 1, p. 318; C.S. 1922, § 9076; C.S.1929, § 20-1606; R.S.1943, § 25-1606; Laws 1953, c. 72, § 3, p. 225; Laws 1957, c. 242, § 18, p. 831; Laws 1982, LB 677, § 1.

This section was cited as illustrative of service of process by registered mail. Blauvelt v. Beck, 162 Neb. 576, 76 N.W.2d 738 (1956).

25-1607 Jurors; appearance.

Each grand juror and petit juror summoned shall appear before the court on the day and at the hour specified in the summons, and shall not depart without leave of court.

Source: R.S.1867, Code § 663, p. 511; R.S.1913, § 8142; C.S.1922, § 9077; C.S.1929, § 20-1607.

25-1608 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1609 Jurors; grounds for challenge; sufficiency of challenge.

It shall be sufficient cause of challenge of the petit juror that he or she lacks any one of the qualifications mentioned in section 25-1601, or that he or she has requested or solicited any officer of the court or officer charged in any manner with the duty of selecting the jury to place him or her upon the panel.

Source: R.S.1867, Code § 665, p. 511; Laws 1881, c. 29, § 1, p. 207; Laws 1901, c. 83, § 1, p. 476; R.S.1913, § 8144; C.S.1922, § 9079; C.S.1929, § 20-1609; Laws 1939, c. 18, § 4, p. 99; C.S.Supp.,1941, § 20-1609; R.S.1943, § 25-1609; Laws 1953, c. 72, § 4, p. 226; Laws 1979, LB 234, § 4.

Right of counsel to put pertinent questions on voir dire examination of jurors exists to enable party to ascertain if there is ground for challenge for cause. Oden v. State, 166 Neb. 729, 90 N.W.2d 356 (1958).

When juror is party to suit not pending for trial at term of court during which he serves, it does not constitute statutory ground sufficient by itself to sustain challenge for cause. Killion v. Dinklage, 121 Neb. 322, 236 N.W. 757 (1931).

Juror on special venire is not incompetent because summoned on regular panel and served in case before same was quashed. Randolph v. State, 65 Neb. 520, 91 N.W. 356 (1902).

Right to challenge juror because he has served as such in the same court within two years extends to talesman. Coil v. State, 62 Neb. 15, 86 N.W. 925 (1901); Wiseman v. Bruns, 36 Neb. 467, 54 N.W. 858 (1893).

Juror may claim exemption; verdict would be legal. Marion v. State, 20 Neb. 233, 29 N.W. 911 (1886).

Service at any term in two years disqualifies; applies to talesmen. Figg v. Donahoo, 4 Neb. Unof. 661, 95 N.W. 1020 (1903).

Service as talesmen at same term does not disqualify. Carlson & Hanson v. Holm, 2 Neb. Unof. 38, 95 N.W. 1125 (1901).

25-1610 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1611 Jurors; failure to appear; neglect of officers; penalties.

Any person summoned for jury service who fails to appear or to complete jury service as directed shall be ordered by the court to appear forthwith and show cause for such failure to comply with the summons. If such person fails to show good cause for noncompliance with the summons he or she shall be guilty of contempt of court.

If any jury commissioner or deputy jury commissioner, sheriff or deputy sheriff, or person having charge of election records, neglects or fails to perform the duties imposed by sections 25-1601 to 25-1639, the person so offending shall be considered guilty of contempt of court.

Source: R.S.1867, Code § 667, p. 511; R.S.1913, § 8146; C.S.1922, § 9081; C.S.1929, § 20-1611; R.S.1943, § 25-1611; Laws 1953, c. 72, § 5, p. 226; Laws 1979, LB 234, § 5.

25-1612 Packing juries; solicitation of jury service; penalties.

If a sheriff or other officer corruptly or through favor or ill will, summons a juror with the intent that such juror shall find a verdict for or against either party, or shall summon a grand juror from like motives with the intent that such grand juror shall or shall not find an indictment or presentment against any particular individual, he shall be fined not exceeding five hundred dollars, and forfeit his office and be forever disqualified from holding any office in this state. Any person who shall seek the position of juror, or who shall ask any attorney or other officer of the court or any other person or officer in any manner charged with the duty of selecting the jury, to secure or procure his selection as a juryman shall be deemed guilty of a contempt of court and be fined not exceeding twenty dollars and shall thereby be disqualified from serving as a juror for that term. Any attorney or party to a suit pending for trial at that term who shall request, or solicit the placing of any person upon a jury, or upon the jury list, shall be deemed guilty of a contempt of court and be fined not exceeding one hundred dollars, and the person so sought to be put upon the jury or jury list, shall be disqualified to serve as a juror at that term of the court.

Source: R.S.1867, Code § 668, p. 512; Laws 1901, c. 83, § 2, p. 477; R.S.1913, § 8147; C.S.1922, § 9082; C.S.1929, § 20-1612.

25-1613 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1614 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1615 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1616 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1617 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1618 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1619 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1620 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1621 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1622 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1623 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1624 Repealed. Laws 1953, c. 72, § 16, p. 237.

25-1625 Jury commissioner; designation; salary; expenses; duties.

(1) In each county of the State of Nebraska there shall be a jury commissioner.

(2) In counties having a population of not more than fifty thousand inhabitants, the clerk of the district court shall be jury commissioner ex officio.

(3) In counties having a population of more than fifty thousand, and not more than one hundred fifty thousand inhabitants, the jury commissioner shall be a separate office in the county government or the duties may be performed, when authorized by the judges of the district court within such counties, by the election commissioner. The jury commissioner shall receive an annual salary of not less than twelve hundred dollars.

(4) In counties having a population of more than one hundred fifty thousand inhabitants and not more than two hundred thousand inhabitants, the clerk of the district court shall perform the duties of jury commissioner without additional compensation.

(5) In counties having a population in excess of two hundred thousand inhabitants, the judges of the district court within such counties shall determine whether the clerk of the district court will perform the duties of jury commissioner without additional compensation or the election commissioner will be jury commissioner ex officio.

(6) In all counties the necessary expenses incurred in the performance of the duties of jury commissioner shall be paid by the county board of the county out of the general fund, upon proper claims approved by one of the district judges in the judicial district and duly filed with the county board.

(7) In all counties the jury commissioner shall prepare and file the annual inventory statement with the county board of the county of all county personal property in his or her custody or possession, as provided in sections 23-346 to 23-350.

Source: Laws 1915, c. 248, § 1, p. 568; C.S.1922, § 9095; C.S.1929, § 20-1625; Laws 1931, c. 65, § 5, p. 178; Laws 1939, c. 28, § 20, p. 159; C.S.Supp.,1941, § 20-1625; R.S.1943, § 25-1625; Laws 1947, c. 62, § 9, p. 202; Laws 1953, c. 72, § 6, p. 227; Laws 1961, c. 113, § 1, p. 352; Laws 1971, LB 547, § 1; Laws 1975, LB 527, § 1; Laws 1979, LB 234, § 6; Laws 2003, LB 19, § 4.

Cross References

For designation of election commissioner in counties having a population in excess of one hundred thousand inhabitants, see section 32-207.

For designation of election commissioner in counties having a population of twenty thousand to one hundred thousand inhabitants, see section 32-211.

Statutory procedure for selection and impaneling of juries in a county the size of Douglas is provided. Maher v. State, 144 Neb. 463, 13 N.W.2d 641 (1944).

Jury commissioner act indicates modern trend against advance disclosure of names of jurors. Fetty v. State, 118 Neb. 169, 223 N.W. 955 (1929).

25-1626 Jury commissioner; compensation in counties over 200,000 inhabitants; assistance; deputy; appointment; powers.

(1) In counties of over two hundred thousand inhabitants, the salary of the jury commissioner shall be fixed by the district judges, but in no event shall exceed three thousand dollars per annum. Said salary shall be payable by warrants drawn on the general fund of the county. A majority of the judges of the district court may by order direct the clerk of the court to furnish such assistance to the jury commissioner as they may find necessary.

(2) The jury commissioner shall appoint a deputy jury commissioner from the regular employees of his office who shall serve ex officio and who shall hold office during the pleasure of the jury commissioner. The deputy jury commissioner shall be approved by the judge or judges of the district court before taking office. The deputy jury commissioner, during the absence of the jury commissioner from the county or during the sickness or disability of the jury commissioner, with the consent of such judge or judges, may perform any or all of the duties of the jury commissioner.

(3) If there are no regular employees of the office of jury commissioner, he may appoint some other county officer or employee thereof as deputy jury commissioner.

Source: Laws 1915, c. 248, § 1, p. 568; C.S.1922, § 9096; C.S.1929, § 20-1626; R.S.1943, § 25-1626; Laws 1951, c. 69, § 1, p. 224; Laws 1953, c. 72, § 7, p. 227; Laws 1955, c. 90, § 2, p. 265; Laws 1955, c. 91, § 1, p. 268; Laws 1965, c. 123, § 1, p. 460.

25-1626.01 Repealed. Laws 1959, c. 266, § 1, p. 953.

25-1626.02 Jury commissioner in counties over 200,000 population; salary increase, when effective.

Section 25-1626 shall be so interpreted as to effectuate its general purpose, to provide, in the public interest, adequate compensation as therein provided for the jury commissioner, and to permit a change in such salary as soon as same may become operative under the Constitution of the State of Nebraska.

Source: Laws 1965, c. 123, § 2, p. 460.

25-1627 Jury list; key number; determination; record.

The jury commissioner shall in the presence of one of the judges of the district court of the county, at such times as may be necessary, or as he may be ordered to do so by the district judge, select a number to be known as a key number. The selecting of a key number shall be done in a manner which will insure that the number selected is the result of chance. The key number shall be selected from among the numbers one to ten. The jury commissioner shall make a record of the manner in which the key number was selected, the name of the judge present, and the date and the hour of the selection, the same to be

certified by the jury commissioner, and such records shall become a part of the public records of the county. The jury commissioner may use an electrical or mechanical system or device in carrying out his or her duties pursuant to this section.

Source: Laws 1915, c. 248, § 3, p. 569; C.S.1922, § 9097; C.S.1929, § 20-1627; R.S.1943, § 25-1627; Laws 1953, c. 72, § 8(1), p. 228; Laws 1977, LB 283, § 1; Laws 1979, LB 234, § 7.

A defendant in a criminal case is not entitled to a proportionate number of his race on the jury. State v. Gutierrez, 187 Neb. 383, 191 N.W.2d 164 (1971).

Written order of court directing key number to be drawn is not necessary. Maher v. State, 144 Neb. 463, 13 N.W.2d 641 (1944).

25-1627.01 Jury list; counties having less than 3,000 inhabitants; two key numbers; additional key numbers; when.

In counties having a population of less than three thousand inhabitants, the jury commissioner shall select two key numbers or such larger number of key numbers as the district judge or judges may order instead of only one, and all the provisions of sections 25-1627 and 25-1628 shall apply to the selecting, recording, and use of such numbers in making up the key number list. In other counties having a population of three thousand inhabitants or more, where experience demonstrates that the use of only one key number does not produce a list of names of sufficient number to make the system of practical use, the district judge or judges of such counties may, in their discretion, order the selecting of two key numbers as herein provided for.

Source: Laws 1953, c. 72, § 8(2), p. 229; Laws 1955, c. 90, § 3, p. 266; Laws 1979, LB 234, § 8.

25-1628 Jury list; how made up.

(1) At least once each calendar year, the officer having charge of the election records shall furnish to the jury commissioner a complete list of the names, dates of birth, and addresses of all registered electors nineteen years of age or older in the county. The Department of Motor Vehicles shall make available to each jury commissioner each December a list in magnetic, optical, digital, or other electronic format mutually agreed to by the jury commissioner and the department containing the names, dates of birth, and addresses of all licensed motor vehicle operators nineteen years of age or older in the county. The jury commissioner may request such a list of licensed motor vehicle operators from the county treasurer if the county treasurer has an automated procedure for developing such lists. If a jury commissioner requests similar lists at other times from the department, the cost of processing such lists shall be paid by the county which the requesting jury commissioner serves.

(2) Upon receipt of both lists described in subsection (1) of this section, the jury commissioner shall combine the separate lists and attempt to reduce duplication to the best of his or her ability to produce a master list. In counties having a population of three thousand inhabitants or more, the jury commissioner shall produce a master list at least once each calendar year. In counties having a population of less than three thousand inhabitants, the jury commissioner shall produce a master list at least once every two calendar years.

(3) The proposed juror list shall be derived by selecting from the master list the name of the person whose numerical order on such list corresponds with the key number and each successive tenth name thereafter. The jury commis-

sioner shall certify that the proposed juror list has been made in accordance with sections 25-1625 to 25-1637.

(4) Any duplication of names on a master list shall not be grounds for quashing any panel pursuant to section 25-1637 or for the disqualification of any juror.

Source: Laws 1915, c. 248, § 4, p. 569; C.S.1922, § 9098; C.S.1929, § 20-1628; R.S.1943, § 25-1628; Laws 1957, c. 88, § 1, p. 337; Laws 1971, LB 11, § 1; Laws 1985, LB 113, § 2; Laws 1988, LB 111, § 1; Laws 1989, LB 82, § 1; Laws 2003, LB 19, § 5; Laws 2005, LB 402, § 1.

A defendant in a criminal case is not entitled to a proportionate number of his race on the jury. State v. Gutierrez, 187 Neb. 383, 191 N.W.2d 164 (1971).

25-1629 Proposed jury list; qualification form; investigation; revision; complaints; grand jury list; when drawn.

The jury commissioner shall immediately upon deriving the proposed juror list mail a juror qualification form to each proposed juror pursuant to section 25-1629.01 and investigate the persons whose names are found on the list. If he or she finds that any one of them is not possessed of the qualifications of petit jurors as set forth in section 25-1601 or is excluded by the terms of section 25-1601, he or she shall strike such name from the list and make a record of each name stricken, which record shall be kept in his or her office subject to inspection by the court and attorneys of record in cases triable to a jury pending before the court, under such rules as the court may prescribe. The list as thus revised shall constitute the list from which petit jurors shall be selected, until such list shall have been exhausted in the manner hereinafter set forth or until otherwise ordered by the judge or judges. Unless otherwise ordered by the judge or judges, the jury commissioner shall immediately upon completing the revision of the list, in the presence of a judge for such district, select at random the names of eighty persons possessing the qualifications for grand jurors as set out in section 25-1601. When no grand jury list is selected, the judge or judges may at any time order the selecting of a grand jury list. This list shall constitute the list from which grand jurors shall be chosen. Any judge of the district court shall upon the request of any person entitled to access to the list of names stricken, if satisfied that such request is made in good faith, direct the jury commissioner to appear before the judge at chambers and in the presence of the complaining person state his or her reasons for striking the name specified in the request.

Source: Laws 1915, c. 248, § 5, p. 570; C.S.1922, § 9099; C.S.1929, § 20-1629; Laws 1939, c. 18, § 14, p. 106; C.S.Supp.,1941, § 20-1629; R.S.1943, § 25-1629; Laws 1953, c. 7, § 1, p. 221; Laws 1953, c. 72, § 9, p. 229; Laws 1955, c. 9, § 4, p. 266; Laws 1977, LB 283, § 2; Laws 1979, LB 234, § 9; Laws 1985, LB 113, § 3.

The key-number system for the selection of jurors from voter registration lists is constitutionally valid. State v. Addison, 198 Neb. 442, 253 N.W.2d 165 (1977).

In selection of grand jury, names can be drawn from more than one panel. State v. Abboud, 181 Neb. 84, 147 N.W.2d 152 (1966).

Until jury list created by drawing of key number is exhausted, no new jury list can be made. Maher v. State, 144 Neb. 463, 13 N.W.2d 641 (1944).

25-1629.01 Juror qualification form; prospective juror; complete; return; when.

The jury commissioner shall mail to every prospective juror whose name appears on the proposed juror list a juror qualification form accompanied by instructions to fill out and return the form by mail to the jury commissioner within ten days after its receipt. The juror qualification form shall be in the form prescribed by the Supreme Court. Notarization of the juror qualification form shall not be required. If the prospective juror is unable to fill out the form, another person may do it for him or her and shall indicate that he or she has done so and the reason therefor. If it appears that there is an omission, ambiguity, or error in a returned form, the jury commissioner shall again send the form with instructions to the prospective juror to make the necessary addition, clarification, or correction and to return the form to the jury commissioner within ten days after its second receipt.

Source: Laws 1979, LB 234, § 12; Laws 2005, LB 105, § 1.

25-1629.02 Juror qualification form; failure to return; effect; contempt of court.

Any prospective juror who fails to return a completed juror qualification form as instructed shall be directed by the jury commissioner to appear before him or her to fill out the juror qualification form. At the time of the prospective juror's appearance for jury service or at the time of any interview before the court or jury commissioner, any prospective juror may be required to fill out another juror qualification form, at which time the prospective juror may be questioned with regard to his or her responses to questions contained on the form and grounds for his or her excuse or disqualification. Any information thus acquired by the court or jury commissioner shall be noted on the juror qualification form.

Any person who knowingly fails to complete and return or who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror shall be guilty of contempt of court.

Source: Laws 1979, LB 234, § 13.

25-1629.03 One-step qualifying and summoning system.

In lieu of the procedure set forth in sections 25-1629.01 and 25-1629.02, a jury commissioner may institute a one-step qualifying and summoning system as prescribed in section 25-1629.04.

Source: Laws 1979, LB 234, § 14.

25-1629.04 One-step qualifying and summoning system; procedure.

After a proposed jury list has been selected, the jury commissioner may require that each person listed on the proposed jury list be served with a summons, issued by the jury commissioner, to appear before the court at a time and place certain for jury duty. The jury qualification questionnaire may be sent together with the summons in a single mailing to a prospective juror. The summons may be served upon each juror by first-class, certified, or registered mail, or by personal service by a jury commissioner, the clerk, or other person authorized by the court. After the initial appearance of the juror, he or she shall appear for jury service in any court of the county as directed by the judge of any court during the term of jury service of the juror.

No person shall be guilty of contempt of court pursuant to section 25-1611 for failing to respond to a summons sent by first-class mail.

Source: Laws 1979, LB 234, § 15; Laws 2007, LB67, § 1.

25-1630 Jury list; how kept; tampering; solicitation; penalty.

The jury commissioner shall, immediately after making such revised list of petit jurors, write the name of each person remaining upon the list upon a separate ticket, and place all the tickets thus remaining in the box or wheel to be kept for that purpose. The jury commissioner shall, immediately after making such list of grand jurors, write the name and address of each person upon the list upon a separate ticket, and place all the tickets in a separate box or wheel to be kept for that purpose until the next list of petit jurors is selected when those names remaining in the grand jury box shall have been destroyed and a new list of eighty names selected. If any person shall place or cause to be placed or ask to have placed in such box or wheel, any name of any person, except as provided in sections 25-1625 to 25-1637, he shall be guilty of a Class IV felony.

Source: Laws 1915, c. 248, § 6, p. 570; C.S.1922, § 1900; C.S.1929, § 20-1630; Laws 1939, c. 18, § 15, p. 107; C.S.Supp.,1941, § 20-1630; R.S.1943, § 25-1630; Laws 1977, LB 40, § 101.

Note: The Revisor of Statutes, as authorized by section 49-705(2)(g), has corrected an internal reference to correspond with the repeal of section 25-1638 by Laws 1979, LB 234, § 18.

25-1631 County court; advance jury selection; when authorized.

All parties to an action which is filed with a county court of this state may agree that the jury may be selected up to thirty-one days prior to the date of trial. The stipulation must be unanimous among all parties and evidenced by a joint stipulation to the court.

Source: Laws 1996, LB 1249, § 1.

25-1631.01 Repealed. Laws 1979, LB 234, § 18.

25-1631.02 Repealed. Laws 1979, LB 234, § 18.

25-1631.03 Petit jury; examination by judge; excess jurors.

The judge shall examine all jurors so selected who appear and if, after all excuses have been allowed more than twenty-four petit jurors for each judge sitting with a jury, who are qualified and not excluded by the terms of section 25-1601, shall remain, the court may excuse by lot such number in excess of twenty-four as the court may see fit. Those jurors who have been discharged in excess of twenty-four for each judge, but are qualified, shall not be discharged permanently, but shall remain subject to be resummoned for jury service upon the same panel and before a new key number is selected.

Source: Laws 1915, c. 248, § 7, p. 570; C.S.1922, § 9101; C.S.1929, § 20-1631; Laws 1939, c. 18, § 16, p. 107; C.S.Supp.,1941, § 20-1631; R.S.1943, § 25-1631; Laws 1953, c. 72, § 10(4), p. 231; Laws 1979, LB 234, § 10.

Objection to jury panel on ground there were not 24 jurors for each judge was not sustained. Bell v. State, 159 Neb. 474, 67 N.W.2d 762 (1954).

25-1632 Petit jury for subsequent periods; how drawn; how notified.

Subsequent panels of petit jurors for two weeks each shall be called as the judge or judges may determine during the term, and at least ten days before such subsequent panel, the judge or judges, as the case may be, shall proceed as aforesaid to the office of the jury commissioner, and the jury commissioner shall, in the presence of such judge or judges, draw in the same manner such number of names as such judge or judges shall direct as petit jurors for such subsequent two weeks period of that term for jury service. The persons so drawn shall be notified and summoned the same as those drawn for the first two weeks. The judge or judges may, by order, defer the drawing and reporting of jury panels for service after the first two weeks of the term for such period of time as they may determine and in such order or orders may fix the number of panels to be drawn and the number of jurors to be drawn for each panel. During the term the jury commissioner shall draw, notify, and summon other petit jurors in the manner hereinbefore provided as often as the length of the term may require and the judge or judges direct. The provisions of this section shall not be mandatory in counties having a population of less than sixty thousand inhabitants.

Source: Laws 1915, c. 248, § 8, p. 571; C.S.1922, § 9102; C.S.1929, § 20-1632; R.S.1943, § 25-1632; Laws 1953, c. 71, § 1, p. 222; Laws 1953, c. 72, § 11(1), p. 231.

Trial courts are ordered to discontinue the practice of conducting jury selection on one day for all of the trials scheduled during a monthly term. State v. Cisneros, 248 Neb. 372, 535 N.W.2d 703 (1995).

25-1632.01 Petit jury; special panel in criminal cases.

Whenever there shall be pending in the criminal court any case, wherein the defendant shall be charged with a felony, and the judge holding the court is convinced from the circumstances of the case that a jury cannot be obtained from the regular panel to try the case, the judge may, in his discretion, prior to the day fixed for the trial of the case, direct the jury commissioner to draw, in the same manner as described in section 25-1632, such number of names as the judge or judges may direct as a special panel from which a jury may be selected to try such case, which panel shall be notified and summoned for said day the same as the regular panel.

Source: Laws 1915, c. 248, § 8, p. 571; C.S.1922, § 9102; C.S.1929, § 20-1632; R.S.1943, § 25-1632; Laws 1953, c. 72, § 11(2), p. 232.

25-1633 Grand jury; how drawn; alternate jurors.

If a grand jury shall be required by law, or by order of the judge or judges, for any term of court, it shall be the duty of the jury commissioner to draw out of the box or wheel, containing the names of the grand jury list, in the presence of the judge or judges, forty names of persons. The jury commissioner shall then prepare a list of such names, which list shall contain the given names and surnames of persons named therein, their respective places of residence, and their several occupations. Such list shall then be turned over by the jury commissioner to a board to consist of the jury commissioner, the presiding judge of the district court, and one other person whom the presiding judge shall designate. The presiding judge shall be the chairperson. Such board shall select from the list of forty names, the names of sixteen persons, qualified as grand

jurors under this section, and the persons whose names are so selected shall be the grand jurors. Such board shall also select from the list of forty names, the names of three additional persons to serve as alternate jurors. The alternate jurors shall sit with the grand jury and participate in all investigative proceedings to the same extent as the regular grand jurors. Alternate grand jurors shall be permitted to question witnesses, review evidence, and participate in all discussions of the grand jury which occur prior to the conclusion of presentation of evidence. When the grand jury has determined that no additional evidence is necessary for its investigation, the alternate grand jurors shall be separated from the regular grand jurors and shall not participate in any further discussions, deliberations, or voting of the grand jury unless one or more of the regular grand jurors is or are excused because of illness or other sufficient reason. Such alternate jurors shall fill vacancies in the order of their selection.

Source: Laws 1915, c. 248, § 9, p. 572; Laws 1921, c. 113, § 1, p. 393; C.S.1922, § 9103; C.S.1929, § 20-1633; Laws 1939, c. 18, § 17, p. 108; C.S.Supp.,1941, § 20-1633; R.S.1943, § 25-1633; Laws 1953, c. 72, § 12(1), p. 232; Laws 1999, LB 72, § 1.

In selection of grand jury, names can be drawn from more than one panel. State v. Abboud, 181 Neb. 84, 147 N.W.2d 152 (1966).

25-1633.01 Grand jury; summons.

The jury commissioner shall immediately summon the persons selected under the provisions of section 25-1633, in the manner provided by law, for the summoning of petit jurors, to appear before said court at or before the hour of 11 a.m. on the day such judge or judges may direct, to serve as grand jurors for said term.

Source: Laws 1915, c. 248, § 9, p. 572; Laws 1921, c. 113, § 1, p. 393; C.S.1922, § 9103; C.S.1929, § 20-1633; Laws 1939, c. 18, § 17, p. 108; C.S.Supp.,1941, § 20-1633; R.S.1943, § 25-1633; Laws 1953, c. 72, § 12(2), p. 233.

25-1633.02 Repealed. Laws 1979, LB 234, § 18.

25-1633.03 Repealed. Laws 1979, LB 234, § 18.

25-1634 Petit jury; extra jurors to complete panel; talesmen.

If for any reason it appears to the judge that the panel of petit jurors will not be adequate at the opening of the court, or at any time during the term, the jury commissioner shall, when ordered by the judge or judges of the court draw, in the same manner and presence as the first drawing, such number of jurors as the judge or judges shall direct to fill such panel or as extra jurors, and those drawn shall be notified and summoned in the same manner as the others or as the court may direct. This shall also apply to the selection of talesmen for particular causes after the regular panel is exhausted.

Source: Laws 1915, c. 248, § 10, p. 572; C.S.1922, § 9104; C.S.1929, § 20-1634; R.S.1943, § 25-1634; Laws 1953, c. 72, § 13(1), p. 234.

25-1634.01 Petit jury; appearance; excused; postponement of service.

(1) Each person summoned, under the provisions of section 25-1634, shall forthwith appear before the court and if competent shall serve on the petit jury unless such person shall be excused from service or lawfully challenged. If necessary, jurors shall continue to be so drawn from time to time until the panel shall be filled.

(2) The court may postpone service of a qualified juror from one jury panel to a specific future panel. A written form shall be completed for each such juror, giving the juror's name and address and the reason for the postponement and bearing the signature of the district judge. Such form shall become a part of the official records of the jury commissioner. The names of jurors transferred from one panel to another shall be added to the names drawn for a particular panel as drawn under section 25-1632.

Source: Laws 1915, c. 248, § 10, p. 572; C.S.1922, § 9104; C.S.1929, § 20-1634; R.S.1943, § 25-1634; Laws 1953, c. 72, § 13(2), p. 235; Laws 1965, c. 124, § 1, p. 461.

25-1634.02 Petit jury; additional jurors; how chosen.

When it is deemed necessary the judge shall direct the jury commissioner or the sheriff of the county or such other person as may be designated by the judge to summon from the bystanders or the body of the county a sufficient number of persons having the qualifications of jurors, as provided in section 25-1601, to fill the panel, in order that a jury may be obtained.

Source: Laws 1915, c. 248, § 10, p. 572; C.S.1922, § 9104; C.S.1929, § 20-1634; R.S.1943, § 25-1634; Laws 1953, c. 72, § 13(3), p. 235.

Right to summon talesmen is made to depend upon necessity, which is determinable by trial judge. Pribyl v. State, 165 Neb. 691, 87 N.W.2d 201 (1957).

In great emergency, jury can be selected from bystanders. Losieau v. State, 157 Neb. 115, 58 N.W.2d 824 (1953).

25-1634.03 Petit jury; additional jurors; discharged; qualified as regular jurors.

When such a jury is obtained, the persons selected from the bystanders or from the body of the county to fill the panel and not chosen on the jury shall be discharged from the panel as soon as the judge or judges determine; *Provided*, that such persons selected from the bystanders or from the body of the county as provided in this section shall not thereafter be disqualified from service as jurors when regularly drawn in the manner provided in sections 25-1627 to 25-1630 unless excused by the judge.

Source: Laws 1915, c. 248, § 10, p. 572; C.S.1922, § 9104; C.S.1929, § 20-1634; R.S.1943, § 25-1634; Laws 1953, c. 72, § 13(4), p. 235.

25-1635 Jurors; disclosing names; when permissible; penalty; access to juror qualification forms.

(1) It shall be unlawful for a jury commissioner or the officer in charge of the election records, or any clerk or deputy thereof, or any person who may obtain access to any record showing the names of persons drawn to serve as grand or petit jurors to disclose to any person, except to other officers in carrying out official duties or as herein provided, the name of any person so drawn or to permit any person to examine such record or to make a list of such names,

except under order of the court. The application for such an order shall be filed in the form of a motion in the office of the clerk of the district court, containing the signature and residence of the applicant or his or her attorney and stating all the grounds on which the request for such order is based. Such order shall not be made except for good cause shown in open court and it shall be spread upon the journal of the court. Any person violating any of the provisions of this section shall be guilty of a Class IV felony. Notwithstanding the foregoing provisions of this section, the judge or judges in any district may, in his, her, or their discretion, provide by express order for the disclosure of the names of persons drawn from the revised key number list for actual service as grand or petit jurors.

(2) Notwithstanding subsection (1) of this section, the Supreme Court or an agent of the Supreme Court acting under the direction and supervision of the Chief Justice shall have access to juror qualification forms for research purposes. The Supreme Court and its agent shall treat such information as confidential, and nothing identifying any individual shall be released.

Source: Laws 1915, c. 248, § 11, p. 573; C.S.1922, § 9105; C.S.1929, § 20-1635; R.S.1943, § 25-1635; Laws 1949, c. 56, § 1, p. 167; Laws 1953, c. 72, § 14, p. 235; Laws 1977, LB 40, § 102; Laws 2005, LB 105, § 2.

25-1636 Jurors; competency; challenge.

It shall be ground for challenge for cause that any proposed juror lacks any of the qualifications provided by law. It shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement; *Provided*, that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion based upon rumor or newspaper statements and as to the truth of which said juror has formed no opinion, shall not disqualify said person to serve as a juror on such cause, if said juror shall upon oath state that it is the belief of said person that he or she can fully and impartially render a verdict in accordance with the law and the evidence, and the court shall be satisfied as to the truth of such statement.

Source: Laws 1915, c. 248, § 12, p. 573; Laws 1921, c. 113, § 2, p. 394; C.S.1922, § 9106; C.S.1929, § 20-1636; Laws 1939, c. 18, § 18, p. 110; C.S.Supp.,1941, § 20-1636; Laws 1943, c. 45, § 3, p. 193; R.S.1943, § 25-1636; Laws 1953, c. 72, § 15, p. 236.

Cross References

For exemption of National Guard, see section 55-173.
For qualifications of jurors, see sections 25-1601 and 25-1609.

The fact that many, most, or even all the jurors knew something about the case in advance does not entitle a defendant to a change of venue, for a criminal defendant is not guaranteed a jury totally ignorant of the facts and circumstances of his or her case. State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992).

It is not a cause challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged if such juror shall state on oath that it is the belief of that person that he or she can render an impartial verdict according to the law and the evidence, and the court shall be satisfied as to the truth of that statement. State v. Jacobs, 226 Neb. 184, 410 N.W.2d 468 (1987).

To safeguard constitutional right of trial by jury in criminal case, legislature has provided for challenges for cause. Oden v. State, 166 Neb. 729, 90 N.W.2d 356 (1958).

Failure to interrogate jurors as to his residence waives disqualification of juror who is nonresident of county. Marino v. State, 111 Neb. 623, 197 N.W. 396 (1924).

An employee of a party, including a corporate party, is ineligible to serve on a jury involving its employer, and the challenge

to such potential jurors may be made by either party to the litigation. When a challenge to a potential juror or venire is made on the basis of employment of a potential juror by a party to the litigation, it is not necessary that the challenging party show that the potential juror is biased or cannot be impartial. Kusek v. Burlington Northern RR. Co., 4 Neb. App. 924, 552 N.W.2d 778 (1996).

25-1637 Juries; proceedings stayed; panel quashed; grounds; procedures; new list, order for.

(1) A party may move to stay the proceedings, to quash the entire panel, or for other appropriate relief on the ground of substantial failure to comply with Chapter 25, article 16, in selecting the grand or petit jury. Such motion shall be made within seven days after the moving party discovered or by the exercise of diligence could have discovered the grounds for such motion, and in any event before the petit jury is sworn to try the case.

(2) Upon a motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with Chapter 25, article 16, the moving party is entitled to present, in support of the motion, the testimony of the jury commissioner or the clerk, any relevant records and papers not public or otherwise available which were used by the jury commissioner or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand jury or a petit jury there has been a substantial failure to comply with Chapter 25, article 16, the court shall stay the proceedings pending the selection of the jury in conformity with Chapter 25, article 16, quash an entire panel, or grant other appropriate relief.

(3) The procedures prescribed by this section are the exclusive means by which the state, a person accused of a crime, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with Chapter 25, article 16.

(4) The contents of any records or papers used by the jury commissioner or the clerk in connection with the selection process and not made public under Chapter 25, article 16, shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (1) of this section, until after all persons on the revised proposed juror list have been discharged. The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (1) of this section.

(5) Whenever the entire panel is quashed the court shall make an order directing the jury commissioner to select a new key number in the manner provided in section 25-1627 and prepare a new proposed juror list in the manner provided in section 25-1628. The jury commissioner shall revise such list and qualify and summon jurors as provided in sections 25-1629 to 25-1630.

Source: Laws 1915, c. 248, § 13, p. 577; C.S.1922, § 9108; C.S.1929, § 20-1637; R.S.1943, § 25-1637; Laws 1959, c. 102, § 3, p. 425; Laws 1979, LB 234, § 11; Laws 1985, LB 113, § 4.

Under subsection (1) of this section, an objection pertaining to a failure to comply with Batson requirements must be made before the jury is sworn to try the case. An objection challenging prosecution's strike of juror because of race must be made prior to swearing of jury. State v. Covarrubias, 244 Neb. 366, 507 N.W.2d 248 (1993).

25-1638 Repealed. Laws 1979, LB 234, § 18.

25-1639 Juror; serve; limitations.

In any five-year period no person shall be required to:

(1) Serve as a petit juror for more than four calendar weeks, except if necessary to complete service in a particular case;

(2) Serve on more than one grand jury; or

(3) Serve as both a grand and petit juror.

Source: Laws 1979, LB 234, § 16; Laws 1980, LB 733, § 3.

25-1640 Employee; penalized due to jury service; prohibited; penalty.

Any person who is summoned to serve on jury duty shall not be subject to discharge from employment, loss of pay, loss of sick leave, loss of vacation time, or any other form of penalty, as a result of his or her absence from employment due to such jury duty, upon giving reasonable notice to his or her employer of such summons. Any person who is summoned to serve on jury duty shall be excused upon request from any shift work for those days required to serve as a juror without loss of pay. No employer shall subject an employee to discharge, loss of pay, loss of sick leave, loss of vacation time, or any other form of penalty on account of his or her absence from employment by reason of jury duty, except that an employer may reduce the pay of an employee by an amount equal to any compensation, other than expenses, paid by the court for jury duty. Any person violating the provisions of this section shall be guilty of a Class IV misdemeanor.

Source: Laws 1979, LB 234, § 17; Laws 1980, LB 733, § 4.

25-1641 Petit jurors; how selected.

Unless the judge or judges shall order that no jury be drawn, the jury commissioner shall select a list of petit jurors in the manner directed by the judge or judges pursuant to this section. At least ten days before the first day of any jury term of the district court or ten days before the day the jury is otherwise directed to report, three of the judges of the court if there be three, or one of the judges if there be less than three, or a judge of the county court or the sheriff or such other elective officer of the county as the judge or judges may designate shall appear at the office of the jury commissioner who, in the presence of such judge or judges or the sheriff or other officer of the county so designated by the judge or judges, shall select by chance the names of thirty persons or such number as the judge or judges may otherwise direct, for each judge sitting with a jury in such court, as petit jurors for such term. The person selecting the names may use an electrical or mechanical system or device in carrying out his or her duties pursuant to this section.

If an electronic or mechanical system or device is used to select the petit jurors, the judge or judges or the sheriff or other elective officer so designated need not be personally present at the office of the jury commissioner during such selection. In lieu thereof, the presiding judge or his or her designated representative may direct the jury commissioner to select at random from the proposed jury list a specified number of petit jurors for such term of court or, if more than one jury panel is summoned during such term, for each such panel.

Source: Laws 1980, LB 733, § 5; Laws 1983, LB 329, § 1; Laws 1984, LB 13, § 39.

25-1642 Petit jury; special; how drawn.

Notwithstanding that an order has been entered that no jury be called for a term, a judge of the district court may thereafter by special order direct that a

jury be drawn as provided in section 25-1641 and called to report at a specified time set out in the order.

Source: Laws 1980, LB 733, § 6.

25-1643 Petit jury; how notified.

The jury commissioner shall immediately after the selection, referred to in sections 25-1641 and 25-1642, mail a juror qualification form to each proposed juror pursuant to section 25-1629.01.

Source: Laws 1980, LB 733, § 7.

ARTICLE 17

COSTS

Cross References

Judgments for costs against state officers and agencies, see section 25-21,217.
State officers, departments, receivers, etc., not required to give attachment bond, see section 25-21,216.

Section
25-1701. Repealed. Laws 2003, LB 19, § 7.
25-1702. Repealed. Laws 2003, LB 19, § 7.
25-1703. Repealed. Laws 2001, LB 489, § 15.
25-1704. Repealed. Laws 2001, LB 489, § 15.
25-1705. Security for costs; judgment against surety upon motion; satisfaction.
25-1706. Costs upon disclaimer.
25-1707. Costs on motions, continuances, and amendments.
25-1708. Plaintiff's costs; when allowed.
25-1709. New or additional security.
25-1710. Defendant's costs; when allowed.
25-1711. Award and taxation of costs; power of court to exercise discretion; frivolous appeals in jury cases; actual fees and expenses.
25-1712. Successive actions against joinable parties; limit to recovery by plaintiff.
25-1713. Sheriff's fees; summons issued out of county; return.
25-1714. Application for postponement of trial; condition.
25-1715. Costs on motion; limit; how taxed.
25-1716. Unpaid costs; lien; terminates.
25-1717. Bond for cost, appeal, supersedeas, injunction, or attachment; county and employees; exemption.

25-1701 Repealed. Laws 2003, LB 19, § 7.

25-1702 Repealed. Laws 2003, LB 19, § 7.

25-1703 Repealed. Laws 2001, LB 489, § 15.

25-1704 Repealed. Laws 2001, LB 489, § 15.

25-1705 Security for costs; judgment against surety upon motion; satisfaction.

After final judgment has been rendered in an action in which security for costs has been given, as required by this chapter, the court, on motion of any person having a right to such costs, or any part thereof, after ten days' notice of such motion, may enter judgment against the surety for the amount of the costs or so much thereof as may be unpaid. Executions may be issued on such judgment, as in other cases, for the use and benefit of the persons entitled to such costs. In the event that a cash bond has been given, the court shall, on motion of any person having a right to such costs, or any part thereof, after ten

days' notice of such motion, enter judgment for the amount of costs or so much thereof as may be unpaid, and shall proceed to pay the same from the cash bond; and any surplus remaining after such costs have been paid and satisfied shall be returned to the party who posted the cash bond.

Source: R.S.1867, Code § 616, p. 503; R.S.1913, § 8164; C.S.1922, c. 150, § 1, p. 321; C.S.1922, § 9115; C.S.1929, § 20-1705; R.S. 1943, § 25-1705; Laws 2001, LB 489, § 8.

Section is not applicable to cost bond of appellant required by rule of Supreme Court. Dunn v. Bozarth, 64 Neb. 862, 90 N.W. 954 (1902).

25-1706 Costs upon disclaimer.

Where defendants disclaim having any title or interest in land or other property, the subject matter of the action, they shall recover their costs unless for special reasons the court decides otherwise.

Source: R.S.1867, Code § 618, p. 504; R.S.1913, § 8165; C.S.1922, § 9116; C.S.1929, § 20-1706.

This section is declaratory of equity rule; court has discretion. Fowler v. Brown, 51 Neb. 414, 71 N.W. 54 (1897).

In action on official bond of state officers, state law governs in federal court; surety is liable where sheriff made arrest in conformity with duty under state law but used excessive force. Bassinger v. United States Fidelity & Guaranty Co., 58 F.2d 573 (8th Cir. 1932).

25-1707 Costs on motions, continuances, and amendments.

Unless otherwise provided by statute, the costs of motions, continuances, amendments, and the like, shall be taxed and paid as the court in its discretion may direct.

Source: R.S.1867, Code § 619, p. 504; R.S.1913, § 8166; C.S.1922, § 9117; C.S.1929, § 20-1707.

25-1708 Plaintiff's costs; when allowed.

Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property.

Source: R.S.1867, Code § 620, p. 504; R.S.1913, § 8167; C.S.1922, § 9118; C.S.1929, § 20-1708.

1. Allowance
2. Disallowance
3. Miscellaneous

1. Allowance

Plaintiff, in action for recovery of money only, is ordinarily entitled to costs where he recovers judgment. Rehn v. Bingaman, 152 Neb. 171, 40 N.W.2d 673 (1950).

In a suit to quiet title in persons claiming adverse possession of specific real property, costs follow the judgment. Hallowell v. Borchers, 150 Neb. 322, 34 N.W.2d 404 (1948).

Ordinary rule is that the successful party is entitled to judgment for costs. Tobas v. Mutual Building & Loan Assn., 147 Neb. 676, 24 N.W.2d 870 (1946).

Where a judgment is obtained for the recovery of specific real property the costs follow the judgment. Tuttle v. Wyman, 146 Neb. 146, 18 N.W.2d 744 (1945).

Where plaintiff's action is for a recovery of money only, costs shall be allowed of course to the plaintiff upon a judgment in his favor. Shellenbarger v. Shellenbarger, 137 Neb. 762, 291 N.W. 95 (1940).

Where judgment is properly rendered against surety company on official bond a reasonable attorney's fee may be taxed as part of costs. Ericsson v. Streitz, 132 Neb. 692, 273 N.W. 17 (1937).

On appeal from justice court by defendant, where no setoff is pleaded, plaintiff is entitled to costs regardless of amount of judgment. Miller v. Henderson, 76 Neb. 383, 107 N.W. 586 (1906).

2. Disallowance

Award of costs to plaintiff was not required in equity action to determine lien. Ehlers v. Campbell, 159 Neb. 328, 66 N.W.2d 585 (1954).

Judgment on counterclaim for nominal damages would not carry costs when plaintiff was entitled to judgment in substan-

tial amount. Stewart v. Spade Township, 157 Neb. 93, 58 N.W.2d 841 (1953).

3. Miscellaneous

This section does not apply strictly where defendant prevails on a counterclaim; the fact that a defendant may procedurally bring a cause as a counterclaim does not preclude him from recovery of costs when he prevails on such. Langel Chevrolet-Cadillac v. Midwest Bridge, 213 Neb. 283, 329 N.W.2d 97 (1983).

In a suit for both money damages and equitable relief, the trial court was correct in denoting the action one in equity and finding that this section does not apply. Hein v. M&N Feed Yards, Inc., 205 Neb. 691, 289 N.W.2d 756 (1980).

Section recognizes common law precept. Keller v. State, 184 Neb. 853, 172 N.W.2d 782 (1969).

Costs which have accrued in district court prior to judgment of reversal abide the final determination of the cause. National Masonic Accident Assn. v. Burr, 57 Neb. 437, 77 N.W. 1098 (1899).

25-1709 New or additional security.

The court may order new or additional security at any time upon notice and on reasonable and proper terms.

Source: Laws 2001, LB 489, § 7.

25-1710 Defendant's costs; when allowed.

Costs shall be allowed of course to any defendant upon a judgment in his favor in the actions mentioned in section 25-1708.

Source: R.S.1867, Code § 622, p. 504; R.S.1913, § 8169; C.S.1922, § 9120; C.S.1929, § 20-1710.

Note: The Revisor of Statutes, as authorized by section 49-705, has changed internal reference ''sections 25-1708 and 25-1709'' to ''section 25-1708''. Section 25-1709 was repealed in 1972, by LB 1032, § 287.

Section recognizes common law precept. Keller v. State, 184 Neb. 853, 172 N.W.2d 782 (1969).

Defendant is ordinarily entitled to recover costs upon a judgment in his favor. Rehn v. Bingaman, 152 Neb. 171, 40 N.W.2d 673 (1950).

Successful party should be allowed costs as of course, where no reason appears why general rule should not be followed. Tobas v. Mutual Building & Loan Assn., 147 Neb. 676, 24 N.W.2d 870 (1946).

Defendant is not entitled to costs paid by him in order to obtain a change of venue. Moss v. Lindsey, 62 Neb. 829, 88 N.W. 119 (1901).

25-1711 Award and taxation of costs; power of court to exercise discretion; frivolous appeals in jury cases; actual fees and expenses.

In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable. In all cases of appeals from an inferior court or when an original filing made in the district court is within the jurisdictional limits of an inferior court, and a jury is demanded, the court may in its discretion tax as costs the actual fees and expenses necessitated by such jury if the court finds that the appeal was taken or the original filing was made for a frivolous or capricious reason, and such costs may be apportioned between the parties on the same or adverse sides.

Source: R.S.1867, Code § 623, p. 504; R.S.1913, § 8170; C.S.1922, § 9121; C.S.1929, § 20-1711; R.S.1943, § 25-1711; Laws 1965, c. 125, § 1, p. 462.

1. Discretion of court
2. Miscellaneous

1. Discretion of court

It is within the discretion of a trial court to tax costs in certain proceedings as it may think right and equitable. States v. Anderson, 219 Neb. 545, 364 N.W.2d 38 (1985).

In a suit for both money damages and equitable relief, the trial court was correct in denoting the action one in equity and finding that this section applied. Hein v. M&N Feed Yards, Inc., 205 Neb. 691, 289 N.W.2d 756 (1980).

Upon reversal of a judgment, Supreme Court may apportion costs on appeal between the parties. Richardson v. Waterite Co., 169 Neb. 263, 99 N.W.2d 265 (1959).

In equity action, taxation of costs rests in discretion of trial court. Ehlers v. Campbell, 159 Neb. 328, 66 N.W.2d 585 (1954).

Where each party prevails in part, trial court has discretion in taxation of costs. Ricenbaw v. Kraus, 157 Neb. 723, 61 N.W.2d 350 (1953).

Discretion conferred on court in taxing costs is not arbitrary but a legal one. Stocker v. Wells, 155 Neb. 472, 52 N.W.2d 284 (1952).

Action of trial court in taxing costs is not reviewable unless abuse of discretion is shown. In re Estate of Nielsen, 135 Neb. 110, 280 N.W. 246 (1938).

In equity cases, the court has a sound discretion in taxing costs, but attorney's fees cannot be taxed as costs against the successful litigant. Hering v. Simon, 77 Neb. 60, 108 N.W. 154 (1906).

Discretion conferred is not arbitrary. Fee of guardian ad litem in will contest was properly chargeable to proponents. In re Clapham's Estate, 73 Neb. 492, 103 N.W. 61 (1905).

Costs in Supreme Court are entirely under the control and in the discretion of the court. German Nat. Bank of Beatrice v. Beatrice Rapid Transit & Power Co., 69 Neb. 115, 95 N.W. 49 (1903).

Where there are no provisions as to taxing costs, it is discretionary with court, and ruling will not be disturbed unless abused. Woodard v. Baird, 43 Neb. 310, 61 N.W. 612 (1895).

Court may apportion costs in child support case. Jones v. State ex rel. Gibson, 14 Neb. 210, 14 N.W. 901 (1883).

Discretion conferred is legal, within limits of legal and equitable principles. Albers v. Dillavou, 4 Neb. Unof. 340, 93 N.W. 937 (1903).

Taxation of costs will not be interfered with unless abuse is shown. Porter v. Trompen, 2 Neb. Unof. 76, 96 N.W. 226 (1901).

2. Miscellaneous

Costs may not be taxed against persons who are not parties to the litigation. State v. Canizales, 240 Neb. 811, 484 N.W.2d 446 (1992); Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N.W.2d 838 (1960).

This section does not apply to actions for the recovery of money only, but rather only to "other" actions. Langel Chevrolet-Cadillac v. Midwest Bridge, 213 Neb. 283, 329 N.W.2d 97 (1983).

In contest over construction of a trust created by will, costs were chargeable to trustee and paid as an expense of administration. Hauschild v. Hauschild, 176 Neb. 319, 126 N.W.2d 192 (1964).

Costs can only be taxed against parties to the litigation. Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N.W.2d 838 (1960).

This section does not apply to actions for recovery of money only. Shellenbarger v. Shellenbarger, 137 Neb. 762, 291 N.W. 95 (1940).

Taxation of costs is ministerial, and clerk may tax costs after term, within reasonable time. Barkley v. Pool, 105 Neb. 203, 180 N.W. 77 (1920).

Costs in will contest may be paid out of trust estate. Smullin v. Wharton, 83 Neb. 328, 119 N.W. 773 (1909), opinion modified and rehearing denied 83 Neb. 346, 121 N.W. 441 (1909).

Court cannot allow costs to unsuccessful contestant of will. Wallace v. Sheldon, 56 Neb. 55, 76 N.W. 418 (1898).

25-1712 Successive actions against joinable parties; limit to recovery by plaintiff.

Where several actions are brought on one bill of exchange, promissory note, or other obligation or instrument in writing, against several parties, who might have been joined as defendants in the same action, no costs shall be recovered by the plaintiff in more than one of such actions, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within the state.

Source: R.S.1867, Code § 624, p. 504; R.S.1913, § 8171; C.S.1922, § 9122; C.S.1929, § 20-1712.

25-1713 Sheriff's fees; summons issued out of county; return.

When a summons is issued to another county than that in which the action or proceeding is pending, it may be returned by mail, and the sheriff shall be entitled to the same fees as if the summons had issued in the county of which he is sheriff.

Source: R.S.1867, Code § 625, p. 505; R.S.1913, § 8172; C.S.1922, § 9123; C.S.1929, § 20-1713.

25-1714 Application for postponement of trial; condition.

When an application shall be made to a court of record to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the costs of the term, may in the discretion of the judges be imposed as a condition of granting the postponement.

Source: Laws 1875, § 1, p. 63; R.S.1913, § 8173; C.S.1922, § 9124; C.S.1929, § 20-1714.

Awarding costs is discretionary with court. Coombs v. Brenklander, 29 Neb. 586, 45 N.W. 929 (1890).

25-1715 Costs on motion; limit; how taxed.

Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, which shall be absolute against the losing party on such motion, except that this provision shall not apply to verbal motions during the course of the trial.

Source: Laws 1875, § 2, p. 63; R.S.1913, § 8174; C.S.1922, § 9125; C.S.1929, § 20-1715; R.S.1943, § 25-1715; Laws 2002, LB 876, § 27.

25-1716 Unpaid costs; lien; terminates.

The judgment for unpaid court costs in any court of this state shall cease to be a lien on real estate unless action has been brought thereon within (1) five years after the latest partial payment has been made thereon, or (2) five years after such case becomes inactive or is closed by final judgment. The lien of any unpaid costs as of February 20, 1974, which would otherwise be terminated by this section shall continue for one year from such date at which time it shall terminate unless an action has been brought thereon within such year.

Source: Laws 1974, LB 666, § 1.

25-1717 Bond for cost, appeal, supersedeas, injunction, or attachment; county and employees; exemption.

No bond for cost, appeal, supersedeas, injunction, or attachment shall be required of any county or of any officer, board, head of any board, department, head of any department, commission, head of any commission, agent, or employee of any county in any proceeding or court action in which the county or any officer, board, head of any board, department, head of any department, commission, head of any commission, agent, or employee of the county is a party litigant in its, his, or her official capacity.

Source: Laws 1989, LB 556, § 1.

ARTICLE 18

EXPENSES AND ATTORNEY'S FEES

Section
25-1801. Claims of two thousand dollars or less; recovery; costs; interest; attorney's fees.
25-1802. Award of fees and expenses against state; terms; defined.
25-1803. Award of fees and expenses against state; when authorized.
25-1804. Award of fees and expenses against state; conditions; application.
25-1805. Award of fees and expenses against state; additional to compensation.
25-1806. Award of fees and expenses against state; how paid.
25-1807. Award of fees and expenses against state; proceedings to which applicable.
25-1808. Actions between state agencies, boards, commissions, constitutional officers, and members of the Legislature; costs awarded; when.
25-1809. Legal Services Fund; created; use; transfers.

25-1801 Claims of two thousand dollars or less; recovery; costs; interest; attorney's fees.

Any person, partnership, limited liability company, association, or corporation in this state having a claim which amounts to two thousand dollars or less against any person, partnership, limited liability company, association, or

corporation doing business in this state for (1) services rendered, (2) labor done, (3) material furnished, (4) overcharges made and collected, (5) lost or damaged personal property, (6) damage resulting from delay in transmission or transportation, (7) livestock killed or injured in transit, or (8) charges covering articles and service affecting the life and well-being of the debtor which are adjudged by the court to be necessaries of life may present the same to such person, partnership, limited liability company, association, or corporation, or to any agent thereof, for payment in any county where suit may be instituted for the collection of the same. If, at the expiration of ninety days after the presentation of such claim, the same has not been paid or satisfied, he, she, or it may institute suit thereon in the proper court. If he, she, or it establishes the claim and secures judgment thereon, he, she, or it shall be entitled to recover the full amount of such judgment and all costs of suit thereon, and, in addition thereto, interest on the amount of the claim at the rate of six percent per annum from the date of presentation thereof, and, if he, she, or it has an attorney employed in the case, an amount for attorney's fees as provided in this section. If the cause is taken to an appellate court and plaintiff shall recover judgment thereon, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court as provided in this section, except that if the party in interest fails to recover a judgment in excess of the amount that may have been tendered by any person, partnership, limited liability company, association, or corporation liable under this section, then such party in interest shall not recover the attorney's fees provided by this section. Attorney's fees shall be assessed by the court in a reasonable amount but shall in no event be less than ten dollars when the judgment is fifty dollars or less and when the judgment is over fifty dollars up to two thousand dollars the attorney's fee shall be ten dollars plus ten percent of the judgment in excess of fifty dollars.

Source: Laws 1919, c. 191, § 1, p. 865; C.S.1922, § 9126; C.S.1929, § 20-1801; R.S.1943, § 25-1801; Laws 1951, c. 70, § 1, p. 225; Laws 1955, c. 92, § 1, p. 269; Laws 1967, c. 150, § 1, p. 446; Laws 1993, LB 121, § 171.

Cross References

For interest on unsettled accounts, see section 45-104.

1. Allowance
2. Denial
3. Procedure
4. Miscellaneous

1. Allowance

Plaintiff allowed fee hereunder for services of his counsel. Bauer v. Board of Regents of University of Nebraska, 192 Neb. 87, 219 N.W.2d 236 (1974).

Under this section when the judgment is over fifty dollars, the attorney's fee allowable is fixed at the sum of ten dollars plus ten percent of the judgment in excess of fifty dollars. Potts v. Mahood, 187 Neb. 142, 187 N.W.2d 655 (1971).

Attorney's fee correctly computed under facts of case. Sinnett v. Hie Food Products, Inc., 185 Neb. 221, 174 N.W.2d 720 (1970).

Allowance of attorney's fee for services in Supreme Court was proper in suit on open running account. Lewis v. Hiskey, 166 Neb. 402, 89 N.W.2d 132 (1958).

Allowance of attorneys' fees for services in Supreme Court sustained. Benson v. General Implement Corporation, 151 Neb. 234, 37 N.W.2d 223 (1949).

Party must plead and prove conditions precedent to be entitled to allowance of an attorney's fee. Haley v. Fleming, 148 Neb. 407, 27 N.W.2d 626 (1947).

It is the practice to allow attorney's fees and expenses only where provided by statute or where uniform course of procedure has been to allow such recovery. Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N.W. 836 (1937).

Reasonable attorney's fee may be taxed against employer on claim for wages. Dobney v. Chicago & N. W. Ry. Co., 120 Neb. 824, 235 N.W. 585 (1931).

Section is not unconstitutional as providing penalty in favor of individual. Daily v. Chicago, St. P., M. & O. Ry. Co., 110 Neb. 481, 194 N.W. 676 (1923).

2. Denial

Attorney's fee for collecting an attorney's fee not allowed where first fee was expense claimed against trust fund. Krause

v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 169 N.W.2d 601 (1969).

Voluntary reduction in amount of claim to one thousand dollars did not authorize allowance of attorney's fee. Hancock v. Parks, 172 Neb. 442, 110 N.W.2d 69 (1961).

Denial of attorney's fee based upon claim against a fund paid into court was proper. United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961).

Prayer for a total amount in excess of one thousand dollars due on one cause of action did not authorize allowance of attorney's fees. Schaffer v. Strauss Brothers, 164 Neb. 773, 83 N.W.2d 543 (1957).

Attorney's fees were not recoverable in action to enforce judgment. Ehlers v. Campbell, 159 Neb. 328, 66 N.W.2d 585 (1954).

3. Procedure

In order to receive an attorney fee under this section, it is necessary to plead and prove all the conditions precedent enumerated in the statute. Guaranteed Foods v. Rison, 207 Neb. 400, 299 N.W.2d 507 (1980).

Where request for attorney's fees failed to show compliance with this section or Rule 8 b 3 of Rules of the Supreme Court, 1974, it was disallowed. Edward Frank Rozman Co. v. Keillor, 195 Neb. 587, 239 N.W.2d 779 (1976).

Prejudgment interest and an attorney's fee cannot be recovered hereunder unless it is proved the claim was presented ninety days before suit commenced. Andrews Electric Co. v. Farm Automation, Inc., 188 Neb. 669, 198 N.W.2d 463 (1972).

To collect attorney's fee hereunder, plaintiff must plead and prove conditions precedent. Nichol v. Clema, 188 Neb. 74, 195 N.W.2d 233 (1972); Andrews v. Wilkie, 181 Neb. 398, 148 N.W.2d 924 (1967).

4. Miscellaneous

Cited and held not in point on facts in action involving fidelity policy or bond. Beshaler v. Helberg, 187 Neb. 584, 193 N.W.2d 261 (1971).

Allowance of attorney's fee within the limitations provided are within the sound discretion of the trial court. Anoka-Butte Lumber Co. v. Malerbi, 180 Neb. 256, 142 N.W.2d 314 (1966).

25-1802 Award of fees and expenses against state; terms; defined.

For purposes of sections 25-1802 to 25-1807, unless the context otherwise requires:

(1) Fees and other expenses shall mean reasonable attorney's fees and the reasonable expense of expert witnesses plus court costs, but shall not include any portion of an attorney's fee or salary paid by a unit of local, state, or federal government in the case;

(2) State shall mean the State of Nebraska, a state agency, or any official of the state acting in his or her official capacity; and

(3) State agency shall mean any state constitutional office, any state administrative department, or any state board or commission established by an act of the Legislature.

Source: Laws 1982, LB 192, § 1; Laws 1994, LB 855, § 1.

25-1803 Award of fees and expenses against state; when authorized.

(1) Unless otherwise provided by law, the court having jurisdiction over a civil action brought by the state or an action for judicial review brought against the state pursuant to the Administrative Procedure Act shall award fees and other expenses to the prevailing party unless the prevailing party is the state, except that the court shall not award fees and expenses if it finds that the position of the state was substantially justified.

(2) The court, in its discretion, may reduce the amount to be awarded pursuant to this section, or deny an award, to the extent that the prevailing party, during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy or when an overriding public interest exists which would make an award unjust.

Source: Laws 1982, LB 192, § 2.

Cross References

Administrative Procedure Act, see section 84-920.

Subsection (1) of this section acts as a limited waiver of the state's sovereign immunity in civil actions brought by the state to the extent that fees and expenses shall be awarded except when the court finds that the position of the State was substantially justified. Action for contempt brought by intervening prospective adoptive parents when Department of Social Services did not comply with unsupervised visitation order issued in an action brought by the department was a suit brought by the

State for the purposes of this section. In re Interest of Krystal P. et al., 251 Neb. 320, 557 N.W.2d 26 (1996).

The establishment of ''substantial justification'' for a position under the provisions of this section is dependent upon the circumstances of each case. For the purposes of this section, a position has substantial justification if it has a reasonable basis both in law and in fact. The unsuccessful pursuit of a position by the State does not, in and of itself, establish that the position was not ''substantially justified'' so as to entitle the prevailing party to the award of fees and other expenses under the provisions of this section. Meier v. State, 227 Neb. 376, 417 N.W.2d 771 (1988).

Attorney fees may be awarded under this section only in legal and administrative proceedings initiated after July 17, 1982. Drinkwine v. Flebbe, 219 Neb. 291, 363 N.W.2d 152 (1985).

25-1804 Award of fees and expenses against state; conditions; application.

(1) A party seeking an award for fees and other expenses pursuant to sections 25-1802 to 25-1807 shall, not later than thirty days after the entry of the final judgment in the action, submit to the court an application which provides evidence of eligibility for an award pursuant to such sections and which specifies the amount sought. If the amount sought includes an attorney's fee or the fee for an expert witness, the application shall include an itemized statement for each such fee indicating the actual time expended in service to the applicant and the rate at which the fees were computed.

(2) Notwithstanding any other provision of such sections, fees and other expenses shall be awarded as provided in such sections only to those prevailing parties who are:

(a) Natural persons; or

(b) A sole proprietorship, partnership, limited liability company, corporation, association, or public or private organization:

(i) That had an average daily employment of fifty persons or less for the twelve months preceding the filing of such action; and

(ii) Whose gross receipts for the twelve-month period preceding the filing of the action was two million dollars or less or whose average gross receipts for the three twelve-month periods preceding the filing of such appeal pursuant to the Administrative Procedure Act was two million dollars or less, whichever amount is greater.

Source: Laws 1982, LB 192, § 3; Laws 1993, LB 121, § 172; Laws 2000, LB 921, § 14.

Cross References

Administrative Procedure Act, see section 84-920.

Attorney fees may be awarded under this section only in legal and administrative proceedings initiated after July 17, 1982. Drinkwine v. Flebbe, 219 Neb. 291, 363 N.W.2d 152 (1985).

25-1805 Award of fees and expenses against state; additional to compensation.

Fees and expenses awarded pursuant to sections 25-1802 to 25-1807 may be ordered in addition to any compensation awarded in a judgment.

Source: Laws 1982, LB 192, § 4.

25-1806 Award of fees and expenses against state; how paid.

Fees and expenses awarded by a federal court or pursuant to sections 25-1802 to 25-1805 shall be paid in the manner provided in the State Miscellaneous Claims Act. Claims for such fees and expenses shall be filed with the State Claims Board in the manner provided in such act.

Source: Laws 1982, LB 192, § 5; Laws 1988, LB 864, § 6.

Cross References

State Miscellaneous Claims Act, see section 81-8,294.

25-1807 Award of fees and expenses against state; proceedings to which applicable.

Sections 25-1802 to 25-1807 shall apply only to legal and administrative proceedings initiated after July 17, 1982.

Source: Laws 1982, LB 192, § 6.

25-1808 Actions between state agencies, boards, commissions, constitutional officers, and members of the Legislature; costs awarded; when.

Notwithstanding sections 25-1803, 25-21,210, 81-8,228, and 84-216, whenever a state agency, board, commission, or constitutional officer, any person acting in behalf of the agency, board, commission, or constitutional officer, or the Legislature brings a legal action or proceeding against another agency, board, commission, or constitutional officer or the Legislature, and fails to substantially prevail in the action or proceeding, as determined by the court, the party against whom the action is brought shall be awarded fees and other expenses incident to the action or proceeding by the court. Fees and expenses that shall be awarded include reasonable attorney's fees, reasonable expert witness fees, and court costs. If the Attorney General represented the agency, board, commission, constitutional officer, or Legislature, he or she shall prepare a billing of the services provided by his or her office, and the amount billed less any reduction made by the court shall be paid to the Legal Services Fund. The agency, board, commission, constitutional officer, or Legislature responsible for the payment of fees and expenses pursuant to this section shall make payment from funds appropriated to the agency, board, commission, constitutional officer, or Legislature unless a special fund or appropriation has been made for such purpose by the Legislature.

Source: Laws 1993, LB 781, § 1.

25-1809 Legal Services Fund; created; use; transfers.

There is hereby created the Legal Services Fund to be administered by the Director of Administrative Services. All money received by the Attorney General or directed to be deposited in the fund by any state agency, board, commission, or constitutional officer or the Legislature pursuant to section 25-1808 shall be deposited into the fund. At the end of each fiscal year, the director shall transfer from the fund into the budget of the appropriate state agency, board, commission, or constitutional office or the Legislature those fees and expenses that have been awarded by the court. In those instances when the Attorney General has billed a state agency, board, commission, or constitutional officer or the Legislature, the money awarded shall be appropriated to the budget of the Attorney General. The director shall report a summary of such transfers to the Legislature at the end of each fiscal year.

Source: Laws 1993, LB 781, § 2.

ARTICLE 19

REVERSAL OR MODIFICATION OF JUDGMENTS AND ORDERS BY APPELLATE COURTS

Cross References

Court of Appeals, see sections 24-1105 to 24-1107.

Right of appeal, see Article I, section 23, Constitution of Nebraska.
State officers and agencies, not required to give appeal or supersedeas bonds, see section 25-21,216.

(a) REVIEW ON PETITION IN ERROR

(b) REVIEW ON APPEAL

(c) GENERAL PROVISIONS

(a) REVIEW ON PETITION IN ERROR

25-1901 District court; appellate jurisdiction; scope.

A judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court

may be reversed, vacated, or modified by the district court, except that the district court shall not have jurisdiction over (1) appeals from a juvenile court as defined in section 43-245, (2) appeals from a county court in matters arising under the Nebraska Probate Code or the Nebraska Uniform Trust Code, in matters involving adoption or inheritance tax, or in domestic relations matters, or (3) appeals within the jurisdiction of the Tax Equalization and Review Commission.

Source: R.S.1867, Code § 580, p. 496; R.S.1913, § 8175; C.S.1922, § 9127; C.S.1929, § 20-1901; R.S.1943, § 25-1901; Laws 1972, LB 1032, § 136; Laws 1974, LB 733, § 2; Laws 1986, LB 529, § 22; Laws 1994, LB 1106, § 1; Laws 1995, LB 538, § 1; Laws 1996, LB 1296, § 4; Laws 2003, LB 130, § 115; Laws 2007, LB167, § 1.

Cross References

Nebraska Probate Code, see section 30-2201.
Nebraska Uniform Trust Code, see section 30-3801.

1. Scope

Pursuant to this section, a district court has jurisdiction over a petition-in-error proceeding only when it is reviewing a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court. Clayton v. Lacey, 256 Neb. 282, 589 N.W.2d 529 (1999).

This section does not apply to judgments of the county court, and the exclusive method of obtaining district court review of a county court decision is by appeal. Miller v. Brunswick, 253 Neb. 141, 571 N.W.2d 245 (1997).

In reviewing the decision of a tribunal in a petition in error proceeding, a court is to determine whether the tribunal acted within its jurisdiction and whether the decision rendered is supported by sufficient relevant evidence and is restricted to the record created before the lower tribunal. Crown Products Co. v. City of Ralston, 253 Neb. 1, 567 N.W.2d 294 (1997).

A city council is a tribunal whose decision can be reversed, vacated, or modified by a court of proper jurisdiction. Abboud v. Lakeview, Inc., 237 Neb. 326, 466 N.W.2d 442 (1991).

Where no other method of appeal is provided, one may obtain judicial review by proceedings in error under this statute. Moore v. Black, 220 Neb. 122, 368 N.W.2d 488 (1985).

A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion. Andrews v. City of Fremont, 213 Neb. 148, 328 N.W.2d 194 (1982).

The State Board of Education hearing appeals under section 79-1103.05 acts in a quasi-judicial capacity and therefor either party may appeal its decision under this section or under section 84-917. Richardson v. Board of Education, 206 Neb. 18, 290 N.W.2d 803 (1980).

Orders of the Department of Public Welfare made pursuant to section 68-1016, may be reviewed by petition in error as well as by appeal. Downer v. Ihms, 192 Neb. 594, 223 N.W.2d 148 (1974).

An appeal in a post conviction proceeding from a court inferior to the district court may be taken to the district court only. State v. Williams, 188 Neb. 802, 199 N.W.2d 611 (1972).

Granting of disability pension under city ordinance in question was quasi-judicial function; upon refusal to grant pension, proper remedy is by way of petition in error or appeal. Watts v. City of Omaha, 184 Neb. 41, 165 N.W.2d 104 (1969).

It is mandatory and jurisdictional under this section that a petition in error be filed in the appellate court and a properly authenticated transcript be filed within one calendar month after the rendition of the judgment or final order. Friedman v. State, 183 Neb. 9, 157 N.W.2d 855 (1968).

In a proceeding under this section, it is mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter. Lemburg v. Nielsen, 182 Neb. 747, 157 N.W.2d 381 (1968).

Denial of petition for incorporation of a village may be reviewed by petition in error. Little v. Board of County Commissioners, 179 Neb. 655, 140 N.W.2d 1 (1966).

In a proceeding under this section it is mandatory that a petition in error and transcript be timely filed to vest appellate court with jurisdiction. Frankforter v. Turner, 175 Neb. 252, 121 N.W.2d 377 (1963); Harms v. County Board of Supervisors, 173 Neb. 687, 114 N.W.2d 713 (1962).

This and succeeding nine sections provide an effective procedure to secure a review by the district court of a final order made by the county court. Consolidated Credit Corporation v. Berger, 141 Neb. 598, 4 N.W.2d 571 (1942).

This section is in pari materia with section providing for appeal in probate cases. In re Estate of Mathews, 125 Neb. 737, 252 N.W. 210 (1933).

Order approving executor's account, requiring further report, and continuing proceedings, was not ''final order.'' In re Hansen's Estate, 117 Neb. 551, 221 N.W. 694 (1928).

Error proceedings lie to review proceedings in justice court to try right of property. McCormick Harvesting Machine Co. v. Scott, 66 Neb. 479, 92 N.W. 599 (1902).

Section is broad enough to include decree of adoption of probate court. Ferguson v. Herr, 64 Neb. 649, 90 N.W. 625 (1902), reversed on rehearing 64 Neb. 659, 94 N.W. 542 (1903).

To take error proceedings, there must be a final order or judgment. Reynolds v. City of Tecumseh, 48 Neb. 785, 67 N.W. 792 (1896).

2. When review allowed

A petition in error is the proper proceeding to obtain review of an action of a city council, which is a tribunal inferior to the district court. In reviewing a decision based on a petition in

error, an appellate court determines whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence. Luet, Inc. v. City of Omaha, 247 Neb. 831, 530 N.W.2d 633 (1995).

A decision by the Nebraska Department of Correctional Services Appeals Board will not be reviewed by the district court unless a petition for review is filed within the 30-day limit prescribed by section 25-1931. Lewis v. Camp, 236 Neb. 94, 459 N.W.2d 211 (1990).

A petitioner in error must, within one calendar month after judgment is announced under the law and facts by an inferior tribunal, file his petition with a transcript containing the final judgment sought to be reversed. Marcotte v. City of Omaha, 196 Neb. 217, 241 N.W.2d 838 (1976).

Orders made in the exercise of judicial functions by a board inferior to the district court are reviewable by error proceedings. Emry v. Lake, 181 Neb. 568, 149 N.W.2d 520 (1967).

Changes made by county superintendent of schools in proceedings to change school district boundaries may be reviewed in district court either by appeal or by error proceedings. Moser v. Turner, 180 Neb. 635, 144 N.W.2d 192 (1966).

It is only where a tribunal acts judicially that a review by error proceedings is allowed. Longe v. County of Wayne, 175 Neb. 245, 121 N.W.2d 196 (1963).

Review may be had by petition in error of proceedings by city council in the levy of special assessments for paving. Elliott v. City of Auburn, 172 Neb. 1, 108 N.W.2d 328 (1961).

Final order of city council could be reviewed by error proceedings. Simpson v. City of Grand Island, 166 Neb. 393, 89 N.W.2d 117 (1958).

Order of county superintendent of schools may be reviewed by error proceedings. School Dist. No. 49 of Merrick County v. Kreidler, 165 Neb. 761, 87 N.W.2d 429 (1958).

Order of Superintendent of Public Instruction was reviewable by petition in error. Schutte v. Schmitt, 162 Neb. 162, 75 N.W.2d 656 (1956).

Action taken in reorganization of school district could be reviewed in district court. School District No. 49 of Lincoln County v. School District No. 65-R of Lincoln County, 159 Neb. 262, 66 N.W.2d 561 (1954).

Review in district court of appraisement of improvements on school lands was authorized. Jessen v. Blackard, 159 Neb. 103, 65 N.W.2d 345 (1954).

Error proceedings to district court were available to review action of county committee under Reorganization of School Districts Act. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

Error proceedings were available to review action appraising improvements on school land leases. From v. Sutton, 156 Neb. 411, 56 N.W.2d 441 (1953).

District court may review county court's exercise of probate jurisdiction by proceedings in error. In re Berg's Estate, 139 Neb. 99, 296 N.W. 460 (1941).

Error may be prosecuted from denial by Department of Trade and Commerce of permit to installment investment company to do business in state. Investor's Syndicate v. Bryan, 113 Neb. 816, 205 N.W. 294 (1925).

Order of State Banking Board on application for charger is reviewable by district court in error proceedings. Shumway v. Warrick, 108 Neb. 652, 189 N.W. 301 (1922).

Order by board of equalization of metropolitan water district is reviewable by district court on error. McCague Inv. Co. v. Metropolitan Water Dist., 101 Neb. 820, 165 N.W. 158 (1917).

The action of the State Banking Board in granting or refusing a bank charter is reviewable by petition in error in the district court. State ex rel. White v. Morehead, 101 Neb. 37, 161 N.W. 1040 (1917).

Conviction of civil contempt before justice of peace can be reviewed only by error proceedings. Hanika v. State, 87 Neb. 845, 128 N.W. 526 (1910).

Review on error of judgments of justices of the peace still exists. Engles v. Morgenstern, 85 Neb. 51, 122 N.W. 688 (1909).

Order of State Board of Health revoking physician's license is reviewable. Mathews v. Hedlund, 82 Neb. 825, 119 N.W. 17 (1908).

Action of State Board of Equalization may be reviewed in district court by petition in error. State ex rel. U.P.R.R. Co. v. State Board of Equalization & Assessment, 81 Neb. 139, 115 N.W. 789 (1908).

District court has jurisdiction to review by proceedings in error an order revoking physician's license. Munk v. Frink, 75 Neb. 172, 106 N.W. 425 (1905).

Order of county court allowing claim against estate may be reviewed in district court on error. Herman v. Beck, 68 Neb. 566, 94 N.W. 512 (1903).

Order of county superintendent changing boundaries or creating new districts is reviewable by error proceedings. Pollack v. School Dist. No. 42 of Antelope County, 54 Neb. 171, 74 N.W. 393 (1898).

Judgment of county or city board of equalization may be reviewed by an error proceeding. Webster v. City of Lincoln, 50 Neb. 1, 69 N.W. 394 (1896).

Proceedings in hearing on habeas corpus may be reviewed on error. In re Van Sciever, 42 Neb. 772, 60 N.W. 1037 (1894).

Review of order of county board of equalization can be had by error proceedings. Waltham v. Town of Mullally, 27 Neb. 483, 43 N.W. 252 (1889).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

Judgments or final orders of county court may be reviewed in error proceedings. Rudolf v. Winters, 7 Neb. 125 (1878).

District court may review by error proceedings action of State Board of Equalization and Assessment in taxing air-flight equipment. Mid-Continent Airlines v. Nebraska State Board of Equalization and Assessment, 105 F.Supp. 188 (D. Neb. 1952).

3. When review denied

The specific statutory procedure for appealing local administrative decisions to a board of adjustment foreclosed a landowner's ability to appeal by a petition in error the county board of supervisors' denial of a conditional use permit. Mogensen v. Board of Supervisors, 268 Neb. 26, 679 N.W.2d 413 (2004).

A decision by the Nebraska Department of Correctional Services Appeals Board will not be reviewed by the district court unless a petition for review is filed within the 30-day limit prescribed by section 25-1931. Lewis v. Camp, 236 Neb. 94, 459 N.W.2d 211 (1990).

Probate judgments of the county court may not be brought to the district court for review by the error proceedings contemplated in this section. In re Guardianship of Potter, 235 Neb. 149, 453 N.W.2d 755 (1990).

A 1974 amendment to this statute was intended to eliminate proceedings in error as a method of obtaining district court review of a county court decision; thus, the action was properly dismissed. SapaNajin v. Wolford, 222 Neb. 387, 383 N.W.2d 796 (1986).

Where errors assigned require review of evidence they cannot be considered on either appeal or error proceedings in absence of a bill of exceptions. Lanc v. Douglas County Welfare Administration, 189 Neb. 651, 204 N.W.2d 387 (1973).

Cited in holding that order of county superintendent was not reviewable by error proceedings. Kosmicki v. Kowalski, 184 Neb. 639, 171 N.W.2d 172 (1969).

Appeal or error proceedings do not lie from purely legislative acts by public bodies having legislative power; passage of a zoning ordinance is a legislative act. Scottsbluff Improvement Assn. v. City of Scottsbluff, 183 Neb. 722, 164 N.W.2d 215 (1969).

An order of an administrative officer is not reviewable by error proceedings under this section unless the officer exercised judicial functions. School Dist. No. 23 of Dakota County v. School Dist. No. 11 of Dakota County, 181 Neb. 305, 148 N.W.2d 301 (1967).

Findings of administrative board acting in a judicial capacity cannot be collaterally attacked. Cacek v. Munson, 160 Neb. 187, 69 N.W.2d 692 (1955).

Review in district court of action of county board, making assessments for benefit of drainage district, is by error proceedings and not by appeal. Loup River Public Power Dist. v. Platte County, 135 Neb. 21, 280 N.W. 430 (1938).

Legislature has provided no appeal to district court from act of city council of city of second class sitting as board of equalization to levy special assessments for paving, and jurisdiction cannot be conferred on district court by consent of parties. Roberts v. City of Mitchell, 131 Neb. 672, 269 N.W. 515 (1936).

4. Miscellaneous

A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. Because teacher's pay scale grievance did not present a dispute of adjudicative fact and school board was not required by statute to act in a judicial manner when administering pay scale grievances, district court lacked jurisdiction to hear teacher's petition in error. Kropp v. Grand Island Pub. Sch. Dist. No. 2, 246 Neb. 138, 517 N.W.2d 113 (1994).

All parties interested must be made parties to review by error proceedings. Clausen v. School Dist. No. 33 of Lincoln County, 164 Neb. 78, 81 N.W.2d 822 (1957).

Proceedings in error afford remedy to correct errors of quasi-judicial tribunal. Jungman v. Coolidge, 157 Neb. 122, 58 N.W.2d 828 (1953).

An agreement between parties to an appeal from county court pending in district court, made without knowledge or consent of surety on appeal bond, to effect that defendant dismiss his appeal with costs taxed to defendant and that plaintiff withhold issuing execution for three months and four days after dismissal of appeal, operated as release of surety on appeal bond. New Idea Spreader Co. v. Brown, 129 Neb. 551, 262 N.W. 51 (1935).

Council's determination of sufficiency of abutting owner's objections to paving is judicial function; becomes final in absence of proceedings to review. Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N.W. 619 (1927).

On review by error proceedings of order of probate court, petition in error must be filed. Baacke v. Dredla, 57 Neb. 92, 77 N.W. 341 (1898).

25-1902 Final order, defined.

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

Source: R.S.1867, Code § 581, p. 496; R.S.1913, § 8176; C.S.1922, § 9128; C.S.1929, § 20-1902.

1. Final order
2. Not final order
3. Miscellaneous

1. Final order

A judgment is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. An order entered by a court may affect a substantial right and be subject to review as a final order although it could not or need not be properly denominated a judgment. State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

In a case involving two appellees, a lower court order sustaining one appellee's motion for summary judgment and entering judgment against the appellant was a final order because it determined the action as related to those two parties, and no further action was necessary as between those two parties. Blue Cross and Blue Shield v. Dailey, 268 Neb. 733, 687 N.W.2d 689 (2004).

A denial of a motion to compel based on the Federal Arbitration Act is a final, appealable order because it affects a substantial right and is made in a special proceeding. Webb v. American Employers Group, 268 Neb. 473, 684 N.W.2d 33 (2004).

A trial court's order which ordered the clerk of the court to issue an amended commitment for a defendant who had previously been convicted and sentenced is a final, appealable order. State v. Perry, 268 Neb. 179, 681 N.W.2d 729 (2004).

The denial of a motion to vacate and set aside the judgment under subsection (2) of section 29-4123 affects a substantial right in a special proceeding and is therefore an appealable order under this section. State v. Bronson, 267 Neb. 103, 672 N.W.2d 244 (2003).

An order denying a request for reimbursement pursuant to the in forma pauperis statutes entered after the judgment is an order affecting a substantial right made upon a summary application in an action after judgment and is therefore a final, appealable order under this section. Heathman v. Kenney, 263 Neb. 966, 644 N.W.2d 558 (2002).

A proceeding to determine the competency of an accused to stand trial is a special proceeding within the meaning of this section, and an order finding the accused incompetent to stand trial and ordering the accused confined until such time as he or she is competent is a final order from which an appeal may be taken under section 25-1911. State v. Jones, 258 Neb. 695, 605 N.W.2d 434 (2000).

The three types of final orders which may be reviewed on appeal under the provisions of this section are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. State v. Bjorklund, 258 Neb. 432, 604 N.W.2d 169 (2000); State v. Silvers, 255 Neb. 702, 587 N.W.2d 325 (1998); In re Interest of Anthony G., 255 Neb. 442, 586 N.W.2d 427 (1998); State v. Kula, 254 Neb. 962, 579 N.W.2d 541 (1998); O'Connor v. Kaufman, 6 Neb. App. 382, 574 N.W.2d 513 (1998).

A ruling on a plea in bar is a final order as defined in this section. State v. Marshall, 253 Neb. 676, 573 N.W.2d 406 (1998).

A ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her statutory speedy trial rights were violated is final and appealable. State v. Gibbs, 253 Neb. 241, 570 N.W.2d 326 (1997).

The denial of a plea in bar is a final order as defined by this section. State v. Sinsel, 249 Neb. 369, 543 N.W.2d 457 (1996).

In order for a decree to qualify as ''final'', it must dispose of the whole merits of the case and leave nothing for further consideration of the court. In re Adoption of Krystal P. & Kile P., 248 Neb. 907, 540 N.W.2d 312 (1995).

The denial of a plea in bar is a final order as defined in this section. State v. Lynch, 248 Neb. 234, 533 N.W.2d 905 (1995).

The three types of order which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. Hull v. Aetna Ins. Co., 247 Neb. 713, 529 N.W.2d 783 (1995).

Three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. Rohde v. Farmers Alliance Mut. Ins. Co., 244 Neb. 863, 509 N.W.2d 618 (1994); Jarrett v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993); In re Interest of R.G., 238 Neb. 405, 470 N.W.2d 780 (1991).

An order to vacate a dismissal constitutes a special proceeding within the meaning of this section. Jarrett v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993).

An order vacating a dismissal after the limitations period has run constitutes an order affecting a substantial right made during a special proceeding, and is therefore a final appealable order. Jarrett v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993).

A proceeding under section 30-2454 to remove a personal representative for cause is a special proceeding within the meaning of this section and therefore is a final order and is appealable even though it may not terminate the action or constitute a final disposition of the case. In re Estate of Seidler, 241 Neb. 402, 490 N.W.2d 453 (1992).

Proceedings before the Department of Water Resources brought pursuant to section 46-209 also are special proceedings for the purposes of this section. In re Applications A-14137, A-14138A, A-14138B, and A-14139, 240 Neb. 117, 480 N.W.2d 709 (1992).

The denial of a plea in bar raising a double jeopardy claim is a final order as defined in this section. State v. Woodfork, 239 Neb. 720, 478 N.W.2d 248 (1991).

An order which directs the Department of Social Services to pay for the costs of treatment is a final order for purposes of this section. In re Interest of J.M.N., 237 Neb. 116, 464 N.W.2d 811 (1991).

A denial of a plea in bar is a final order as defined by this section. State v. Milenkovich, 236 Neb. 42, 458 N.W.2d 747 (1990).

Order by separate juvenile court requiring parent to participate in psychological therapy and requiring Department of Social Services to pay for that therapy was a final order. In re Interest of B.M.H., 233 Neb. 524, 446 N.W.2d 222 (1989).

Order of county court dismissing motion to remove personal representative was appealable. In re Estate of Snover, 233 Neb. 198, 443 N.W.2d 894 (1989).

An order is final and appealable when the substantial rights of the parties to the action are determined even though the cause is retained for the determination of matters incidental thereto. In re 1983-84 County Tax Levy, 220 Neb. 897, 374 N.W.2d 235 (1985); Dorshorst v. Dorshorst, 174 Neb. 886, 120 N.W.2d 32 (1963).

On appeal from the county court sitting as a juvenile court, an order of the district court remanding the case to the county court for a further dispositional hearing is a final order appealable to this court. In re Interest of Roman, 212 Neb. 919, 327 N.W.2d 36 (1982).

Only final orders may be properly appealed to the Supreme Court. An order in a case is final if no further action by a court is necessary to dispose of the cause pending. Lake v. Piper, Jaffray & Hopwood, Inc., 212 Neb. 570, 324 N.W.2d 660 (1982).

Proceeding to determine the competency of the accused to stand trial is a ''special proceeding'' and an order finding the defendant incompetent to stand trial and ordering him confined until such time as he is competent is a ''final order'' from which an appeal may be taken. State v. Guatney, 207 Neb. 501, 299 N.W.2d 538 (1980).

An order fixing fees in a partition action is a final, appealable order. Evans v. Evans, 199 Neb. 480, 259 N.W.2d 925 (1977).

An order of the Court of Industrial Relations establishing bargaining units is a final order under this section, and becomes immediately appealable. American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N.W.2d 1 (1977).

An order affecting a substantial right made in a special proceeding is a final order which may be appealed. State v. Loomis, 195 Neb. 552, 239 N.W.2d 266 (1976).

Order of county superintendent denying petition for school district reorganization was a final order. Frankforter v. Turner, 175 Neb. 252, 121 N.W.2d 377 (1963).

Order vacating a default judgment is an appealable order. Jones v. Nebraska Blue Cross Hospital Service Assn., 175 Neb. 101, 120 N.W.2d 557 (1963).

A denial of a motion to file a petition on appeal from municipal court out of time is a final order. Pep Sinton, Inc. v. Thomas, 174 Neb. 508, 118 N.W.2d 621 (1962).

Public officer has an appealable interest where proper administration of the duties of a public office is involved. State ex rel. Coulter v. McFarland, 166 Neb. 242, 88 N.W.2d 892 (1958).

Order of dismissal without prejudice was a final order. Akins v. Chamberlain, 164 Neb. 428, 82 N.W.2d 632 (1957).

Order of Superintendent of Public Instruction dissolving school district was final order. Schutte v. Schmitt, 162 Neb. 162, 75 N.W.2d 656 (1956).

Order affecting substantial right in condemnation proceeding is appealable. Higgins v. Loup River P. P. & I. Dist., 159 Neb. 549, 68 N.W.2d 170 (1955).

Order entered under Juvenile Court Act was made in special proceeding. Ripley v. Godden, 158 Neb. 246, 63 N.W.2d 151 (1954).

Order granting interpleader is final order as between stakeholder and claimants. Strasser v. Commercial Nat. Bank, 157 Neb. 570, 60 N.W.2d 672 (1953).

Granting of continuance under federal Civil Relief Act was final order. Sullivan v. Storz, 156 Neb. 177, 55 N.W.2d 499 (1952).

Condemnation is a special statutory proceeding under this section. Webber v. City of Scottsbluff, 155 Neb. 48, 50 N.W.2d 533 (1951).

Denial by district court of request to issue special execution by successful plaintiff in a replevin action is a final order from which an appeal can be taken. Barstow v. Wolff, 148 Neb. 14, 26 N.W.2d 390 (1947).

An order affecting a substantial right in an action upon a summary application after judgment is a final order from which an appeal may be taken. De Lair v. De Lair, 146 Neb. 771, 21 N.W.2d 498 (1946).

An order of the court confirming or refusing to confirm a sale constitutes a final and appealable order. Federal Farm Mortgage Corporation v. Ganser, 145 Neb. 589, 17 N.W.2d 613 (1945).

The denial of an application for a writ of habeas corpus by the district court is a final order. Williams v. Olson, 145 Neb. 282, 16 N.W.2d 178 (1944).

Final orders in habeas corpus proceedings may be reviewed on appeal. The test of finality of order for purpose of appeal is whether particular proceeding or action is terminated by judgment. Tail v. Olson, 144 Neb. 820, 14 N.W.2d 840 (1944).

Suit under workmen's compensation law is a special proceeding hereunder and order of trial court is final and appealable within meaning of this section. G. A. Steinheimer Co. v. Podkovich, 122 Neb. 710, 241 N.W. 287 (1932).

Judgment by district court awarding weekly sum ''until further order'' in compensation case was final order. Schlesselman v. Travelers Ins. Co., 111 Neb. 65, 195 N.W. 466 (1923).

Alimony decree was final order. Wharton v. Jackson, 107 Neb. 288, 185 N.W. 428 (1921).

Absolute order of revivor of action against defendant's executor was final order. Levin v. Muser, 107 Neb. 230, 185 N.W. 431 (1921).

Order vacating judgment on petition filed after the term was final order. Wunrath v. Peoples Furniture & Carpet Co., 98 Neb. 342, 152 N.W. 736 (1915).

An order granting or refusing license to sell realty to pay debts of deceased person was final order. In re Estate of Broehl, 93 Neb. 166, 139 N.W. 1020 (1913).

To appeal from order, it must be formally entered upon journal. Fauber v. Keim, 84 Neb. 167, 120 N.W. 1019 (1909).

Action of State Board of Equalization on railroad assessment was final order. State ex rel. U.P.R.R. Co. v. State Board of Equalization & Assessment, 81 Neb. 139, 115 N.W. 789 (1908).

Quashing summons and dismissing action without prejudice was final order. Davis v. Jennings, 78 Neb. 462, 111 N.W. 128 (1907).

If no further action is necessary to dispose of case, order is final. Huffman v. Rhodes, 72 Neb. 57, 100 N.W. 159 (1904).

Order of county court denying right to file claim against estate was final order. Ribble v. Furmin, 71 Neb. 108, 98 N.W. 420 (1904).

Judgment of district court reversing judgment or order of inferior court, though case retained for trial, was final order. Ribble v. Furmin, 69 Neb. 38, 94 N.W. 967 (1903).

Order vacating judgment rendered at former term was final order. Bannard v. Duncan, 65 Neb. 179, 90 N.W. 947 (1902).

Appointment of receiver was final order. Seeds Dry-Plate Co. v. Heyn Photo-Supply Co., 57 Neb. 214, 77 N.W. 660 (1898).

Quashing writ of replevin and dismissing action was final order. Swain v. Savage, 55 Neb. 687, 77 N.W. 362 (1898).

Decree in foreclosure annulling mortgage though proceedings on note continued, was final order. France v. Bell, 52 Neb. 57, 71 N.W. 984 (1897).

Order setting aside sale was final order. Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co., 51 Neb. 659, 71 N.W. 279 (1897).

Ex parte order, in aid of execution against defendant, was final order. Clarke v. Nebraska Nat. Bank, 49 Neb. 800, 69 N.W. 104 (1896).

Decision refusing to order clerk to approve supersedeas was final order. State ex rel. Lions Ins. Co. v. Baker, 45 Neb. 39, 63 N.W. 139 (1895).

Order recalling order of sale in foreclosure was final order. State ex rel. Harris v. Laflin, 40 Neb. 441, 58 N.W. 936 (1894).

Discharge of attachment was final order. Moline, Milburn & Stoddard Co. v. Curtis, 38 Neb. 520, 57 N.W. 161 (1893); Adams County Bank v. Morgan, 26 Neb. 148, 41 N.W. 993 (1889).

Denying petition to intervene was final order. Herman v. Barhydt, 20 Neb. 625, 31 N.W. 488 (1886).

Overruling application to set aside default and permit answer was final order. Steele v. Haynes, 20 Neb. 316, 30 N.W. 63 (1886).

Order on application to modify decree affecting substantial right though it does not determine action was final order. O'Brien v. O'Brien, 19 Neb. 584, 27 N.W. 640 (1886).

Order requiring attorney to pay money into court was final order. Baldwin v. Foss, 14 Neb. 455, 16 N.W. 480 (1883).

Decree enjoining sale of real estate was final order. Rickards v. Coon, 13 Neb. 419, 14 N.W. 162 (1882).

Judgment of dismissal and costs to defendant was final order. Rogers v. Russell, 11 Neb. 361, 9 N.W. 547 (1881).

Order confirming sale, made at chambers, was final order. State Bank of Nebraska v. Green, 8 Neb. 297, 1 N.W. 210 (1879).

Decision of county board of equalization in assessing and levying taxes was final order. Sioux City & P. R. R. v. Washington County, 3 Neb. 30 (1873).

Where multiple causes of action or multiple parties are involved, the trial court must both enter a final order pursuant to this section and make an express determination that there is no just reason for delay and expressly direct the entry of judgment to make appealable an order adjudicating fewer than all claims or the rights and liabilities of fewer than all parties. Pioneer Chem. Co. v. City of North Platte, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

The three types of final orders which may be reviewed on appeal under this section are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. Michael B. v. Donna M., 11 Neb. App. 346, 652 N.W.2d 618 (2002).

The three types of final orders which may be reviewed on appeal under this section are (1) an order which affects a substantial right in an action and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. Jacobson v. Jacobson, 10 Neb. App. 622, 635 N.W.2d 272 (2001).

An order adjudicating an individual as a mentally ill dangerous person pursuant to section 71-908 and ordering that person retained for an indeterminate amount of time is an order affecting a substantial right in a special proceeding from which an appeal may be taken. In re Interest of Saville, 10 Neb. App. 194, 626 N.W.2d 644 (2001).

A denial of a plea in bar is a final, appealable order. State v. Noll, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

A ruling on a motion to set aside the forfeiture of an appeal bond is an appealable order. State v. Hernandez, 1 Neb. App. 830, 511 N.W.2d 535 (1993).

2. Not final order

An order denying or dissolving a temporary injunction or restraining order is not a final order as defined in this section. Dissolution of a temporary restraining order is not a final order within the meaning of this section. Waite v. City of Omaha, 263 Neb. 589, 641 N.W.2d 351 (2002).

An order denying an application for appointment of a receiver is not made in a special proceeding and therefore cannot be a final order. Nebraska Nutrients, Inc. v. Shepherd, 261 Neb. 723, 626 N.W.2d 472 (2001).

An order sustaining a motion for partial summary judgment, which grants a permanent injunction but reserves the issue of monetary damages for later disposition, is not a final, appealable order. O'Connor v. Kaufman, 255 Neb. 120, 582 N.W.2d 350 (1998).

A motion to disqualify a criminal defendant's court-appointed attorney is not a final, appealable order. State v. Schlund, 249 Neb. 173, 542 N.W.2d 421 (1996).

A trial court order is not a final decision for the purposes of appeal or res judicata if a motion for new trial of the matter is pending before the court. Smith v. Smith, 246 Neb. 193, 517 N.W.2d 394 (1994).

Where the Nebraska Motor Vehicle Industry Licensing Board's order is clearly conditional, operating only in the event that the franchisor finds another franchisee and notifies the board of the fact that it has done so, it is not a final order and is therefore not appealable. Garber v. State, 241 Neb. 523, 489 N.W.2d 550 (1992).

An ex parte temporary detention order keeping a juvenile's custody from his or her parent for a short period of time pending a hearing as to whether the detention should be continued is not final; however, a detention order entered after a hearing continuing to keep a juvenile's custody from his or her parent pending an adjudication hearing to determine whether the juvenile is neglected, and thus within the purview of section 43-247(3)(a), is final and thus appealable. In re Interest of R.G., 238 Neb. 405, 470 N.W.2d 780 (1991).

Where all of plaintiff's theories are based on the same operative facts and involve the same parties, summary judgment with regard to only some of the theories does not constitute a final, appealable order which this court may consider. Lewis v. Craig, 236 Neb. 602, 463 N.W.2d 318 (1990).

An order dismissing one cause of action while a second cause of action arising out of the same factual circumstances and involving the same parties but asserting a different legal theory of recovery remains pending for trial does not constitute a final appealable order. P. R. Halligan Post 163 v. Schultz, 212 Neb. 329, 322 N.W.2d 657 (1982).

Decision of trial court temporarily suspending father's right of visitation and temporarily suspending his obligation to pay child support pending an appeal in a related guardianship case was not a final order, and was not appealable. Sain v. Sain, 211 Neb. 519, 319 N.W.2d 107 (1982).

Dissolution of a restraining order is not a final order within the meaning of this section. Abramson v. Bemis, 201 Neb. 97, 266 N.W.2d 226 (1978).

District court order remanding a cause to county court for new trial not an appealable, final order. Martin v. Zweygardt, 199 Neb. 770, 261 N.W.2d 379 (1978).

Order sustaining objections to personal jurisdiction not final within meaning of this section. Ranch & Farm Lines, Inc. v. Dressman, 185 Neb. 328, 175 N.W.2d 299 (1970).

An order sustaining a general demurrer to a petition, not followed by a judgment of dismissal or other final disposition of the case, is not a final order or judgment, and is not reviewable in the Supreme Court. Root v. School Dist. No. 25 of Custer County, 183 Neb. 22, 157 N.W.2d 877 (1968).

Summary judgment on issue of liability alone was not a final order. Hart v. Ronspies, 181 Neb. 38, 146 N.W.2d 795 (1966).

An order sustaining an objection to personal jurisdiction is not a final order. Busboom v. Gregory, 179 Neb. 254, 137 N.W.2d 825 (1965).

An order sustaining special appearance is not a final order. Erdman v. National Indemnity Co., 178 Neb. 312, 133 N.W.2d 472 (1965).

Order overruling a motion for summary judgment is not a final order. Pressey v. State, 173 Neb. 652, 114 N.W.2d 518 (1962); Rehn v. Bingaman, 157 Neb. 467, 59 N.W.2d 614 (1953).

Order of city council holding action on claim in abeyance is interlocutory and not final. Belitz v. City of Omaha, 172 Neb. 36, 108 N.W.2d 421 (1961).

Order denying motion for summary judgment is not an appealable order. Otteman v. Interstate Fire & Cas. Ins. Co., 171 Neb. 148, 105 N.W.2d 583 (1960).

Order to bring in an additional party is not final or appealable. Lund v. Holbrook, 157 Neb. 854, 62 N.W.2d 112 (1954).

Sustaining motion to strike withdrawal from petition for probate of will was not a final order. Hill v. Humlicek, 156 Neb. 61, 54 N.W.2d 366 (1952).

Overruling of motion to dismiss appeal from county court to district court is not a final order. Egan v. Bunner, 155 Neb. 611, 52 N.W.2d 820 (1952).

An order sustaining a demurrer is not a final order. Shipley v. Shipley, 154 Neb. 872, 50 N.W.2d 103 (1951).

Pendency of motion for new trial prevents judgment from being final. Harkness v. Central Nebraska P. P. & I. Dist., 154 Neb. 463, 48 N.W.2d 385 (1951).

Order sustaining a demurrer, in absence of further proceedings, is not a final order reviewable on appeal. Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N.W.2d 808 (1949).

An order is not final when the substantial rights of the parties remained undetermined and when the cause is retained for further action. Barry v. Wolf, 148 Neb. 27, 26 N.W.2d 303 (1947).

Order overruling a demurrer to a petition is not a final order reviewable on appeal. Anson v. Kruse, 147 Neb. 989, 25 N.W.2d 896 (1947).

An appeal from Department of Roads and Irrigation to Supreme Court will be dismissed where record does not disclose rendition of final order or judgment from which such appeal is prosecuted. Cozad Ditch Co. v. Central Nebraska Public Power & Irr. Dist., 132 Neb. 547, 272 N.W. 560 (1937).

Sustaining motion to strike certain parts of answer without further judicial action does not constitute a final, appealable order. State ex rel. Sorensen v. State Bank of Omaha, 131 Neb. 223, 267 N.W. 532 (1936).

Order approving executor's account, requiring further report, and continuing proceedings was not a final order. In re Hansen's Estate, 117 Neb. 551, 221 N.W. 694 (1928).

Ruling on interlocutory matter was not a final order. Gainsforth v. Peterson, 113 Neb. 1, 201 N.W. 645 (1924).

County court's order appointing guardian ad litem was not a final order. In re Estate of Isaac, 108 Neb. 662, 189 N.W. 297 (1922).

Temporary injunction against Secretary of State from submitting referendum was not a final order. Barkley v. Pool, 102 Neb. 799, 169 N.W. 730 (1918).

Order to bring in additional defendant, another wrong-doer alleged to be indemnitor, in personal injury action, was not a final order. Kaplan v. City of Omaha, 100 Neb. 567, 160 N.W. 960 (1916).

In partition suit, where partition ordered, order is not appealable until effected and confirmed. Peterson v. Damoude, 95 Neb. 469, 145 N.W. 847 (1914).

Order dissolving temporary injunction, not disposing of case, was not final order. Young v. City of Albion, 77 Neb. 678, 110 N.W. 706 (1906).

Sustaining demurrer to petition without dismissal was not final order. Larson v. Sloan, 77 Neb. 438, 109 N.W. 752 (1906).

Refusal of peremptory writ of mandamus, in case not dismissed, was not a final order. State ex rel. Yeiser v. Higby, 60 Neb. 765, 84 N.W. 261 (1900).

Order fixing amount of supersedeas bond, delaying writ of assistance, was not a final order. Green v. Morse, 57 Neb. 798, 78 N.W. 395 (1899).

Overruling plea in abatement was not a final order. Bartels v. Sonnenschein, 54 Neb. 68, 74 N.W. 417 (1898).

Order opening judgment and permitting answer was not a final order. Merle & Heaney Mfg. Co. v. Wallace, 48 Neb. 886, 67 N.W. 883 (1896).

Judgment for costs is not reviewable before final adjudication disposing of case. Reynolds v. City of Tecumseh, 48 Neb. 785, 67 N.W. 792 (1896).

Judgment for costs in favor of defendant on verdict in his favor was not a final order. Little v. Gamble, 47 Neb. 827, 66 N.W. 849 (1896).

Dissolution of restraining order and denial of temporary injunction was not a final order. Manning v. Connell, 47 Neb. 83, 66 N.W. 17 (1896).

Order dissolving or modifying temporary injunction incident to cause was not a final order. Bartram v. Sherman, 46 Neb. 713, 65 N.W. 789 (1896).

Quashing summons without order of dismissal was not a final order. Lewis v. Barker, 46 Neb. 662, 65 N.W. 778 (1896).

Order setting aside verdict at term and granting new trial, before judgment, was not a final order. Johnson v. Parrotte, 46 Neb. 51, 64 N.W. 363 (1895).

Order determining that appeal to district court was taken in time was not a final order. Edgar v. Keller, 43 Neb. 263, 61 N.W. 587 (1895).

Overruling plaintiff's application for special master to conduct foreclosure sale was not final order. American Inv. Co. v. Nye, 40 Neb. 720, 59 N.W. 355 (1894).

Sustaining demurrer to counterclaim was not final order. Yager v. Lemp, 39 Neb. 93, 58 N.W. 285 (1894).

Sustaining of motion to quash service of summons is not a final order. Persinger v. Tinkle, 34 Neb. 5, 51 N.W. 299 (1892).

Overruling motion to discharge attachment was not a final order. Root v. State Bank of Nebraska, 30 Neb. 772, 47 N.W. 82 (1890).

Refusing to dismiss on motion of defendant was not a final order. Grimes v. Chamberlain, 27 Neb. 605, 43 N.W. 395 (1889).

Setting aside decree to permit defendant to answer cross-petition of which he had no notice was not a final order. Cockle Separator Mfg. Co. v. Clark, 23 Neb. 702, 37 N.W. 628 (1888).

Sustaining motion to strike amended pleading was not final order. Welch v. Calhoun, 22 Neb. 166, 34 N.W. 348 (1887).

Overruling motion for default judgment was not a final order. Shedenhelm v. Shedenhelm, 21 Neb. 387, 32 N.W. 170 (1887).

Order for temporary alimony was not a final order. Aspinwall v. Aspinwall, 18 Neb. 463, 25 N.W. 623 (1885).

Finding that petition was confessed where defendant was in default was not a final order. Daniels v. Tibbets, 16 Neb. 666, 21 N.W. 454 (1884).

Allowance or refusal of attachment on claim not due was not final order. Seidentopf v. Annabil, 6 Neb. 524 (1877).

Judgment that partition is impracticable, and directing sale, was not a final order. Mills v. Miller, 2 Neb. 299 (1873).

Quashing service by publication or summons was not final order. Goldie v. Stewart, 5 Neb. Unof. 523, 99 N.W. 255 (1904).

Dissolution of temporary injunction was not a final order. Stansbury v. Storer, 3 Neb. Unof. 100, 91 N.W. 197 (1902).

Judgment for costs on special findings was not a final order. Welch v. Tippery, 1 Neb. Unof. 163, 95 N.W. 491 (1901).

3. Miscellaneous

The overruling of a pretrial motion raising a statute of limitations defense neither affects a substantial right nor occurs in the context of a special proceeding. State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

A proceeding initiated under sections 30-3814 and 30-3862 to remove a trustee is a special proceeding within the meaning of this section. In re Trust of Rosenberg, 269 Neb. 310, 693 N.W.2d 500 (2005).

With the enactment of subsection (1) of section 25-1315, one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of this section as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal. Bailey v. Lund-Ross Constructors Co., 265 Neb. 539, 657 N.W.2d 916 (2003).

An order on ''summary application in an action after judgment'' under this section is an order ruling on a postjudgment motion in an action. Heathman v. Kenney, 263 Neb. 966, 644 N.W.2d 558 (2002).

Approval of class certification neither affects a substantial right nor is a special proceeding. A special proceeding within the meaning of this section must be one that is not an action and is not and cannot be legally a step in an action as part of it. None of the many steps or proceedings necessary or permitted to be taken in an action to commence it, to join issues in it, and conduct it to a final hearing and judgment can be a special proceeding within the terms of this section. Keef v. State, 262 Neb. 622, 634 N.W.2d 751 (2001).

When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right. Also, if an order significantly impinges on a constitutional right, for example, parents' liberty interest in raising their children or a criminal defendant's right not to be subjected to double jeopardy, this affects a substantial right. Hernandez v. Blankenship, 257 Neb. 235, 596 N.W.2d 292 (1999).

Postconviction proceedings are special proceedings under this section. State v. Silvers, 255 Neb. 702, 587 N.W.2d 325 (1998).

Per this section, a motion to discharge for lack of speedy trial, pursuant to section 29-1208, is an order affecting a substantial right made during a special proceeding. State v. Jacques, 253 Neb. 247, 570 N.W.2d 331 (1997).

Unless the context is shown to intend otherwise, action includes any proceeding in a court and only final orders therein are bases for appeals. Grantham v. General Telephone Co., 187 Neb. 647, 193 N.W.2d 449 (1972).

A substantial right is an essential legal right as distinguished from a mere technical one. Western Smelting & Refining Co. v. First Nat. Bank of Omaha, 150 Neb. 477, 35 N.W.2d 116 (1948).

Orders which fall into the second category of this section must meet two requirements: a substantial right must be affected, and the court's order must be made in a special proceeding. Michael B. v. Donna M., 11 Neb. App. 346, 652 N.W.2d 618 (2002).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

Because a motion to modify a dissolution decree is brought pursuant to Chapter 42 of the Nebraska Revised Statutes, it is not encompassed in Chapter 25 and is therefore a special proceeding as that term is used in this section. Templeton v. Templeton, 9 Neb. App. 937, 622 N.W.2d 424 (2001).

An appellate court has jurisdiction over the appeal of an order by the workers' compensation court affecting a substantial right after a special proceeding, even where part of the order complained of involves a remand for clarification. Underwood v. Eilers Machine & Welding, Inc., 6 Neb. App. 631, 575 N.W.2d 878 (1998).

25-1903 Petition in error; filing; summons; contents; service, when returnable; cause, when triable.

The proceedings to obtain such reversal, vacation or modification shall be by petition entitled petition in error, filed in a court having power to make such

reversal, vacation or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record in the original case shall be sufficient. The summons shall notify the adverse party that a petition in error has been filed in a certain case, naming it, and shall be returnable on or before the first day of the next term of court, if issued in vacation, and twenty days before the commencement of the term; if issued in term time, or within twenty days before the commencement of the term, it shall be returnable on a day named in said summons. In all cases in the Supreme Court, if a case be docketed twenty days or more before the next succeeding term, it shall stand for hearing at said term. If less than twenty days intervene, the cause shall not stand for trial, except by consent of all the parties thereto, until the second term after the docketing of said cause, except causes brought before the court in the exercise of its original jurisdiction.

Source: R.S.1867, Code § 584, p. 496; Laws 1885, c. 95, § 1, p. 375; R.S.1913, § 8177; C.S.1922, § 9129; C.S.1929, § 20-1903.

1. Scope

Cited in holding that order of county superintendent was not reviewable by error proceedings. Kosmicki v. Kowalski, 184 Neb. 639, 171 N.W.2d 172 (1969).

Orders made in the exercise of judicial functions by a board inferior to the district court are reviewable by error proceedings. Emry v. Lake, 181 Neb. 568, 149 N.W.2d 520 (1967).

Error proceedings can still be brought to review changes in boundaries of school district made by county superintendent. Languis v. DeBoer, 181 Neb. 32, 146 N.W.2d 750 (1966).

Where two county superintendents hold a hearing on school district reorganization, error proceedings will lie from order of one superintendent denying petition. Frankforter v. Turner, 175 Neb. 252, 121 N.W.2d 377 (1963).

Determination by city council as to sufficiency of paving petition may be reviewed by petition in error. Elliott v. City of Auburn, 172 Neb. 1, 108 N.W.2d 328 (1961).

Where appeal is not provided, error proceedings from order of city council are available. Simpson v. City of Grand Island, 166 Neb. 393, 89 N.W.2d 117 (1958).

Award of appraisers in condemnation proceeding may be reviewed by district court on petition in error. Hoesly v. Department of Roads and Irrigation, 142 Neb. 383, 6 N.W.2d 365 (1942).

Review by district court of an assessment of benefits by a county board in creation of a drainage district is by petition in error. Loup River Public Power Dist. v. Platte County, 141 Neb. 29, 2 N.W.2d 609 (1942), 135 Neb. 21, 280 N.W. 430 (1938).

Appeal from assessment of benefits by county board in establishment of drainage district was not authorized under the statutes. Loup River Public Power District v. Platte County, 135 Neb. 21, 280 N.W. 430 (1938).

The Legislature has provided no appeal to district court from act of city council of city of second class, sitting as board of equalization to levy special assessments for paving, and only way district court gets jurisdiction is by proceedings in error. Roberts v. City of Mitchell, 131 Neb. 672, 269 N.W. 515 (1936).

Order granting or refusing bank charter is reviewable by district court on petition in error. State ex rel. White v. Morehead, 101 Neb. 37, 161 N.W. 1040 (1917).

A request for specific performance is outside the scope of a petition in error. Griess v. Clay Cty. Bd. of Supervisors, 11 Neb. App. 910, 662 N.W.2d 638 (2003).

2. Procedure

A petitioner in error must, within one calendar month after judgment is announced under the law and facts by an inferior tribunal, file his petition with a transcript containing the final judgment sought to be reversed. Marcotte v. City of Omaha, 196 Neb. 217, 241 N.W.2d 838 (1976).

Petition is required to contain an assignment of errors. McDonald v. Rentfrow, 171 Neb. 479, 106 N.W.2d 682 (1960).

An error proceeding is in the nature of a new action. Dovel v. School Dist. No. 23 of Otoe County, 166 Neb. 548, 90 N.W.2d 58 (1958).

Upon review of order of school district boards, error proceedings should be taken to district court of county where hearing was held. School Dist. No. 49 of Merrick County v. Kreidler, 165 Neb. 761, 87 N.W.2d 429 (1959).

Summons is required to be issued. From v. Sutton, 156 Neb. 411, 56 N.W.2d 441 (1953).

Service of summons on attorney of record is sufficient. Parker v. Parker, 73 Neb. 4, 102 N.W. 85 (1905).

Summons cannot issue until petition in error and transcript are filed. Ritchey v. Seeley, 68 Neb. 120, 93 N.W. 977 (1903), motion to dismiss granted 68 Neb. 127, 94 N.W. 972 (1903), former decision affirmed on rehearing, 68 Neb. 129, 97 N.W. 818 (1903).

Serving of summons in error on attorney of record is properly made although defendant in error is dead. Link v. Reeves, 63 Neb. 424, 88 N.W. 670 (1902).

Each alleged error must be specially set forth in the petition in error. Ainsworth v. Taylor, 53 Neb. 484, 73 N.W. 927 (1898); Lean v. Andrews, 38 Neb. 656, 57 N.W. 401 (1894).

Notice of appeal given before filing of petition in error cannot be treated as summons in error. Benson v. Michael, 29 Neb. 131, 45 N.W. 276 (1890).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

The proceedings to obtain reversal, vacation, or modification of orders issued by tribunals inferior to the district court shall

be by petition entitled ''Petition in Error'', setting forth the errors complained of. Cox v. Douglas Cty. Civ. Serv. Comm., 6 Neb. App. 748, 577 N.W.2d 758 (1998).

3. Miscellaneous

Jurisdiction of a proceeding in error was not defeated by omission of phrase ''in error'' from the reference in summons to the petition. Campbell v. City of Ogallala, 178 Neb. 663, 134 N.W.2d 597 (1965).

This section has been in force since 1913 revision, and provides effective procedure for review by the district court through proceedings in error of a final order made by the county court in the exercise of probate jurisdiction. In re Berg's Estate, 139 Neb. 99, 296 N.W. 460 (1941).

Right to review final orders of justices of the peace by error proceedings still exists. Engles v. Morgenstern, 85 Neb. 51, 122 N.W. 688 (1909).

Unless petition in error is filed, district court has no jurisdiction. Baacke v. Dredla, 57 Neb. 92, 77 N.W. 341 (1898).

25-1904 Summons in error; praecipe; service; return; fees.

The summons mentioned in section 25-1903 shall, upon the written praecipe of the plaintiff in error, or his attorney, be issued by the clerk of the court in which the petition is filed, to the sheriff of any county in which the defendant in error or his attorney of record may be; and if the writ issue to a foreign county, the sheriff thereof may return the same by mail to the clerk, and shall be entitled to the same fees as if the same had been returnable to the district court of the county in which said officer resides. The defendant in error, or his attorney, may waive in writing the issuing or service of the summons.

Source: R.S.1867, Code § 585, p. 497; R.S.1913, § 8178; C.S.1922, § 9130; C.S.1929, § 20-1904.

Omission of words ''in error'' from summons was a noncompliance with a directory provision. Campbell v. City of Ogallala, 178 Neb. 663, 134 N.W.2d 597 (1965).

Summons is required to be issued upon praecipe of petitioner. Dovel v. School Dist. No. 23 of Otoe County, 166 Neb. 548, 90 N.W.2d 58 (1958).

Summons may be served on attorney of record. Clausen v. School Dist. No. 33 of Lincoln County, 164 Neb. 78, 81 N.W.2d 822 (1957).

Waiver is of no effect until petition and transcript are filed, and void if proceedings are commenced after death of client. Ritchey v. Seeley, 68 Neb. 120, 93 N.W. 977 (1903), motion to dismiss granted, 60 Neb. 127, 94 N.W. 972 (1903), affirmed on rehearing 60 Neb. 129, 97 N.W. 818 (1903).

Attorney of record at time of trial may waive summons. Dakota County v. Bartlett, 67 Neb. 62, 93 N.W. 192 (1903).

If petition and transcript are filed before death, summons may be served upon attorney of record. Link v. Reeves, 63 Neb. 424, 88 N.W. 670 (1902).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

25-1905 Proceedings in error; transcript; abstracts of record not required in Supreme Court.

The plaintiff in error shall file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings. The transcript shall contain the final judgment or order sought to be reversed, vacated, or modified. No written or printed abstract or any copy of an abstract of the records shall be required in any case in the Supreme Court of this state.

Source: R.S.1867, Code § 586, p. 497; Laws 1885, c. 95, § 2, p. 376; Laws 1887, c. 96, § 1, p. 651; R.S.1913, § 8179; C.S.1922, § 9131; C.S.1929, § 20-1905; R.S.1943, § 25-1905; Laws 1991, LB 561, § 1.

1. Necessity
2. Authentication
3. Contents
4. Miscellaneous

1. Necessity

To confer jurisdiction on a district court for proceedings in error, a proper transcript must be filed with the district court within one calendar month after rendition of a final judgment or order to be reviewed. Clark v. Cornwell, 223 Neb. 282, 388 N.W.2d 848 (1986).

Where a proceeding in error pursuant to this section is utilized seek reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and transcript, containing the final judgment or order, are filed in the court requested to review such judgment or

order. Glup v. City of Omaha, 222 Neb. 355, 383 N.W.2d 773 (1986).

A transcript of the proceedings in the lower tribunal must be filed with the petition in error in order to confer jurisdiction upon the district court. School Dist. No. 39 of Sarpy County v. Farber, 215 Neb. 791, 341 N.W.2d 320 (1983).

A petitioner in error must, within one calendar month after judgment is announced under the law and facts by an inferior tribunal, file his petition with a transcript containing the final judgment sought to be reversed. Marcotte v. City of Omaha, 196 Neb. 217, 241 N.W.2d 838 (1976).

The provisions requiring plaintiff in error to file with his petition an authenticated transcript containing final order is jurisdictional and mandatory. Downer v. Ihms, 192 Neb. 594, 223 N.W.2d 148 (1974).

Responsibility for filing a proper transcript within time is placed directly on plaintiff in error. Lemburg v. Nielsen, 182 Neb. 747, 157 N.W.2d 381 (1968); Dovel v. School Dist. No. 23 of Otoe County, 166 Neb. 548, 90 N.W.2d 58 (1958).

Filing of transcript of proceedings of inferior tribunal is mandatory and jurisdictional. Anania v. City of Omaha, 170 Neb. 160, 102 N.W.2d 49 (1960).

Transcript is required. From v. Sutton, 156 Neb. 411, 56 N.W.2d 441 (1953).

Jurisdictional feature of transcript is the judgment, decree or final order sought to be vacated. Fike v. Ott, 76 Neb. 439, 107 N.W. 774 (1906).

Section applies to proceedings in error to Supreme Court; transcript is jurisdictional. Saussay v. Lemp Brewing Co., 64 Neb. 429, 89 N.W. 1048 (1902).

Requirement of filing of transcript of proceedings is jurisdictional. School District No. 49 of Adams County v. Cooper, 44 Neb. 714, 62 N.W. 1084 (1895).

Transcript of the record is necessary to review order discharging attachment. Goldsmith v. Wix, 43 Neb. 573, 61 N.W. 718 (1895).

Transcript must be filed with petition and cannot be waived. Record v. Butters, 42 Neb. 786, 60 N.W. 1019 (1894).

2. Authentication

The mere production of unauthenticated original papers does not constitute a transcript within the meaning of this section. Moell Mennonite Deaconess Home & Hosp., 221 Neb. 168, 375 N.W.2d 618 (1985).

Properly authenticated transcript must be filed within one calendar month after the rendition of the judgment or final order. Friedman v. State, 183 Neb. 9, 157 N.W.2d 855 (1968).

Filing of copy of final judgment, without reference to its source, does not constitute the filing of a transcript of proceedings. Adams v. City of Omaha, 179 Neb. 684, 139 N.W.2d 885 (1966).

Upon petition in error from administrative board of a city to the district court, authenticated copy of transcript is necessary. Ostler v. City of Omaha, 179 Neb. 515, 138 N.W.2d 826 (1965).

Original papers cannot be made a substitute for transcript. Smith v. Delane, 74 Neb. 594, 104 N.W. 1054 (1905); Brabham v. Custer County, 3 Neb. Unof. 801, 92 N.W. 989 (1902).

Duly authenticated transcript containing final judgment or order is jurisdictional. New Home Sewing Machine Co. v. Thornburg, 56 Neb. 636, 77 N.W. 86 (1898).

Transcript must be properly authenticated to confer jurisdiction on appellate court. Brockman Commission Co. v. Sang, 52 Neb. 506, 72 N.W. 856 (1897).

3. Contents

It is mandatory and jurisdictional that a plaintiff in error file a transcript of the proceedings containing the final judgment or order to be reviewed at the time a petition in error is filed. Cole v. Kilgore, 241 Neb. 620, 489 N.W.2d 843 (1992); Brown v. Board of Education, 231 Neb. 108, 435 N.W.2d 184 (1989).

Record of proceedings before tribunal constitutes the transcript that must be filed in district court with the petition in error. Dlouhy v. City of Fremont, 175 Neb. 115, 120 N.W.2d 590 (1963).

Transcript is required to contain the final judgment or order sought to be reversed. McDonald v. Rentfrow, 171 Neb. 479, 106 N.W.2d 682 (1960).

Transcript from justice to district court was sufficient though bill of particulars was not copied therein. National Supply Co. v. Chicago & N. W. Ry. Co., 108 Neb. 326, 187 N.W. 917 (1922).

In error proceedings, it is jurisdictional that transcript contain final order or judgment. Casler v. Nordgren, 55 Neb. 669, 76 N.W. 524 (1898).

Transcript of proceedings contemplates duly certified copies of original pleadings and papers. Royal Trust Co. of Chicago v. Exchange Bank of Cortland, 55 Neb. 663, 76 N.W. 425 (1898).

4. Miscellaneous

The plain language of this section requires that for jurisdiction to attach, the transcript of the proceedings or praecipe must be filed specifically with the petition in error in the court requested to review such judgment. River City Life Ctr. v. Douglas Cty. Bd. of Equal., 265 Neb. 723, 658 N.W.2d 717 (2003).

The action of the city council on claims for pension and disability is reviewable in the district court by way of petition in error or appeal. Schmitt v. City of Omaha, 191 Neb. 608, 217 N.W.2d 86 (1974).

This section is cited as illustration of the meaning of the term ''final judgment.'' Kometscher v. Wade, 177 Neb. 299, 128 N.W.2d 781 (1964).

Only one transcript is required although proceeding affects school districts in more than one county. School Dist. No. 49 of Merrick County v. Kreidler, 165 Neb. 761, 87 N.W.2d 429 (1958).

Transcript must be filed with petition and before issuance of summons to confer jurisdiction. Slobodisky v. Curtis, 58 Neb. 211, 78 N.W. 522 (1899).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

25-1906 Proceedings in error; transcript; how obtained.

Judges of judicial tribunals having no clerk, and clerks of every court of record, shall upon request and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final order of such courts, to either of the parties to the same, or to any person interested in procuring such transcript.

Source: R.S.1867, Code § 587, p. 497; R.S.1913, § 8180; C.S.1922, § 9132; C.S.1929, § 20-1906; R.S.1943, § 25-1906; Laws 1972, LB 1032, § 137.

The provision requiring plaintiff in error to file with his petition an authenticated transcript containing final order is jurisdictional and mandatory. Downer v. Ihms, 192 Neb. 594, 223 N.W.2d 148 (1974).

The filing by plaintiff in error of authenticated copy of proceedings containing final order to be reviewed is jurisdictional and mandatory. Lanc v. Douglas County Welfare Administration, 189 Neb. 651, 204 N.W.2d 387 (1973).

County superintendent not required to file a transcript anywhere; must only furnish upon request when paid lawful fees. Lemburg v. Nielsen, 182 Neb. 747, 157 N.W.2d 381 (1968).

Authenticated transcript was furnished. Ostler v. City of Omaha, 179 Neb. 515, 138 N.W.2d 826 (1965).

Authenticated transcript is required and filing of original papers is not sufficient. Anania v. City of Omaha, 170 Neb. 160, 102 N.W.2d 49 (1960).

County superintendent of schools who presides at hearing may authenticate transcript. School Dist. No. 49 of Merrick County v. Kreidler, 165 Neb. 761, 87 N.W.2d 429 (1958).

Attorney in fact for defeated party may demand transcript of justice judgment. State ex rel. Newby v. Ellsworth, 61 Neb. 444, 85 N.W. 439 (1901).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

25-1907 Proceedings in error; effect; supersedeas bond.

No proceedings to reverse, vacate, or modify any judgment rendered, or final order made, by any court inferior to the district court shall operate as a stay of execution unless the judge or clerk of the court in which the judgment was rendered or order made shall take and approve a written undertaking to the defendant in error, executed on the part of the plaintiff in error, by one or more sufficient sureties. The undertaking shall be conditioned that the plaintiff will pay all the costs which have accrued or may accrue on such proceedings in error, together with the amount of any judgment that may be rendered against such plaintiff in error, either on the further trial of the case, after the judgment of the court below shall have been set aside or reversed, or upon and after the affirmation thereof in the district court. No proceedings shall operate as a stay of execution on judgments of restitution rendered in actions for the forcible entry and detention, or the forcible detention only, of lands and tenements, unless the undertaking shall be further conditioned for the payment to the defendant in error of all money or sums of money that has or have accrued or may accrue to the defendant from the plaintiff in error for the use, occupation or rent of the lands and tenements in controversy, in case the judgment sought to be reversed shall be affirmed.

Source: R.S.1867, Code § 593, p. 499; Laws 1871, § 1, p. 110; R.S.1913, § 8181; C.S.1922, § 9133; C.S.1929, § 20-1907; R.S.1943, § 25-1907; Laws 1951, c. 71, § 1, p. 227; Laws 1972, LB 1032, § 138.

Supersedeas bond may be filed in district court in proceedings in error from county court to district court. In re Berg's Estate, 139 Neb. 99, 296 N.W. 460 (1941).

Bond is necessary to stay execution but not to obtain review. Welton v. Beltezore, 17 Neb. 399, 23 N.W. 1 (1885).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

25-1908 Proceedings in error; stay of execution; supersedeas bond; approval; endorsement.

Before the written undertaking mentioned in section 25-1907 shall operate to stay execution of the judgment or order, a petition in error must be filed in the district court, and the execution of the undertaking, and the sufficiency of the sureties must be approved by the judge or clerk of the court in which the judgment was rendered or order made. The judge or clerk of the court shall

endorse approval upon the undertaking. The undertaking shall be filed in the court in which the judgment was rendered or order made.

Source: R.S.1867, Code § 590, p. 498; G.S.1873, c. 57, § 590, p. 630; R.S.1913, § 8182; C.S.1922, § 9134; C.S.1929, § 20-1908; R.S. 1943, § 25-1908; Laws 1951, c. 71, § 2, p. 227; Laws 1972, LB 1032, § 139.

Supersedeas bond may be filed in district court in proceedings in error from county court to district court. In re Berg's Estate, 139 Neb. 99, 296 N.W. 460 (1941).

Trial court has jurisdiction to vacate or set aside supersedeas bond where surety is insufficient. Bates & Co. v. Stanley, 51 Neb. 252, 70 N.W. 972 (1897).

Bond does not stay judgment until petition in error is filed. Von Dorn v. Mengedoht, 41 Neb. 525, 59 N.W. 800 (1894).

Filing of petition in error is a condition of supersedeas. McDonald v. Bowman, 40 Neb. 269, 58 N.W. 704 (1894).

An appeal from a special assessment by a metropolitan-class city taken as specified in section 14-813 means that proceedings from a district court shall be the same as an appeal from a county board, and under this section, that means appeal is taken by petition in error and the review is solely of the record made before the tribunal whose action is being reviewed. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

25-1909 Repealed. Laws 1974, LB 733, § 5.

25-1910 Repealed. Laws 1974, LB 733, § 5.

(b) REVIEW ON APPEAL

25-1911 Appellate jurisdiction; scope.

A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.

Source: R.S.1867, Code § 582, p. 496; R.S.1913, § 8185; C.S.1922, § 9137; C.S.1929, § 20-1911; R.S.1943, § 25-1911; Laws 1991, LB 732, § 51.

1. Scope
2. Appeal proper
3. Appeal not proper
4. Court review
5. Miscellaneous

1. Scope

The Supreme Court reviews determinations made in the district courts only where there is a judgment rendered or final order made by the district court. Lewis v. Craig, 236 Neb. 602, 463 N.W.2d 318 (1990).

Matters involving appointments of personal representatives, on appeal to the district court and the Supreme Court, are reviewed for error appearing on the record. In re Estate of Casselman, 219 Neb. 653, 365 N.W.2d 805 (1985).

Only final orders regarding sufficiency of pleadings are appealable. State ex rel. Douglas v. Ledwith, 204 Neb. 6, 281 N.W.2d 729 (1979).

An order affecting a substantial right made in a special proceeding is a final order which may be appealed. State v. Loomis, 195 Neb. 552, 239 N.W.2d 266 (1976).

Section 25-1315.03 provides that certain orders are appealable, but it is not exclusive. Edquist v. Commercial Sav. & Loan Assn., 191 Neb. 618, 217 N.W.2d 82 (1974).

Unless the context is shown to intend otherwise, action includes any proceeding in a court and only final orders therein are bases for appeals. Grantham v. General Telephone Co., 187 Neb. 647, 193 N.W.2d 449 (1972).

There can be no appeal to the Supreme Court until there has been a judgment of final order in the district court. Essay v. Essay, 180 Neb. 291, 142 N.W.2d 337 (1966).

Supreme Court is authorized to review final orders for errors exhibited by the record. Akins v. Chamberlain, 164 Neb. 428, 82 N.W.2d 632 (1957).

Judgment may be reversed only ''for errors appearing on record.'' Frey v. Drahos, 7 Neb. 194 (1878); Morrill v. Taylor, 6 Neb. 236 (1877).

2. Appeal proper

An appeal properly perfected under the provisions of this section and section 25-1912 prevents any final judgment or order from becoming final while the appeal is pending. State v. Beyer, 260 Neb. 670, 619 N.W.2d 213 (2000).

A proceeding before a juvenile court is a ''special proceeding'' for appellate purposes. A judicial determination made following an adjudication in a special proceeding which affects the substantial rights of parents to raise their children is a final, appealable order. In re Interest of Clifford M. et al., 258 Neb. 800, 606 N.W.2d 743 (2000).

The three types of final appealable orders are: (1) an order which affects a substantial right and which determines the action and prevents judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. Jarrett v. Eichler, 244 Neb. 310, 506 N.W.2d 682 (1993).

A finding that the accused is incompetent to stand trial may be appealed to the Supreme Court as a final order. State v. Guatney, 207 Neb. 501, 299 N.W.2d 538 (1980).

A notice of appeal filed after the court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on the Supreme Court if the notice of appeal shows on its face that it relates to a decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates. Dale Electronics, Inc. v. Federal Ins. Co., 203 Neb. 133, 277 N.W.2d 572 (1979).

Action taken by county committee upon reorganization of school district was appealable. School District No. 49 of Lincoln County v. School District No. 65-R of Lincoln County, 159 Neb. 262, 66 N.W.2d 561 (1954).

Appeal from district court to Supreme Court was available to review action under Reorganization of School Districts Act. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

Order granting continuance under federal Civil Relief Act was appealable. Sullivan v. Storz, 156 Neb. 177, 55 N.W.2d 499 (1952).

A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside. Enquist v. Enquist, 146 Neb. 708, 21 N.W.2d 404 (1946).

The refusal to allow a writ of habeas corpus is a final order. Williams v. Olson, 145 Neb. 282, 16 N.W.2d 178 (1944).

Final orders in habeas corpus proceedings may be reviewed on appeal. The test of finality of order for purpose of appeal is whether particular proceeding or action is terminated by judgment. Tail v. Olson, 144 Neb. 820, 14 N.W.2d 840 (1944).

Order vacating judgment on petition filed after the term is final and appealable. Wunrath v. Peoples Furniture & Carpet Co., 98 Neb. 342, 152 N.W. 736 (1915).

An order granting or refusing a license to sell real estate to pay debts of a deceased person is reviewable on appeal. In re Estate of Broehl, 93 Neb. 166, 139 N.W. 1020 (1913).

Judgment of district court reversing justice judgment on error is reviewable though case is retained for trial. Ribble v. Furmin, 69 Neb. 38, 94 N.W. 967 (1903).

Where court dismisses replevin action on ground that writ was unauthorized and the court without jurisdiction, there is a final judgment. Swain v. Savage, 55 Neb. 687, 77 N.W. 362 (1898).

3. Appeal not proper

An order dismissing one theory of recovery, while a second theory of recovery arising out of the same cause of action remains pending for trial, is not an appealable, final order. An action for damages arising from a contract of sale allegedly induced by several instances of fraud presents a single cause of action, and an order barring the action as it relates to one such instance only is not an appealable, final order. Henderson v. Forman, 240 Neb. 939, 486 N.W.2d 182 (1992).

A conditional judgment does not constitute a final and, therefore, appealable order. Schaad v. Simms, 240 Neb. 758, 484 N.W.2d 474 (1992).

Where all of plaintiff's theories are based on the same operative facts and involve the same parties, summary judgment with regard to only some of the theories does not constitute a final, appealable order which this court may consider. Lewis v. Craig, 236 Neb. 602, 463 N.W.2d 318 (1990).

If a contempt is criminal, the judgment is final and a proper subject for appeal. If the contempt is civil, the judgment is not final; the order is interlocutory and not subject to appeal. State ex rel Kandt v. North Platte Baptist Church, 219 Neb. 694, 365 N.W.2d 813 (1985).

An order overruling a motion for leave to amend is interlocutory and, in the absence of a final order, is not appealable. Knoell Constr. Co., Inc. v. Hanson, 208 Neb. 373, 303 N.W.2d 314 (1981).

A conditional order is not final and therefore not subject to appeal. Fritch v. Fritch, 191 Neb. 29, 213 N.W.2d 445 (1973).

An order denying a plea of the statute of limitations after separate hearing on that issue is not appealable. Wulf v. Farm Bureau Ins. Co., 188 Neb. 258, 196 N.W.2d 164 (1972).

Supreme Court had no jurisdiction to review interlocutory ruling in habeas corpus proceeding. Rhodes v. Houston, 172 Neb. 177, 108 N.W.2d 807 (1961).

Where motion for new trial is timely filed, ruling on demurrer does not become final until motion is disposed of. Harkness v. Central Nebraska P. P. & I. Dist., 154 Neb. 463, 48 N.W.2d 385 (1951).

An order sustaining a demurrer to a petition, without a dismissal or other final disposition of the case, is not reviewable on appeal. Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N.W.2d 808 (1949).

The sustaining of a motion to make more definite and certain or to strike certain parts of a pleading, without further judicial action, does not constitute a final, appealable order. Barry v. Wolf, 148 Neb. 27, 26 N.W.2d 303 (1947).

Order overruling demurrer is not a final order. Anson v. Kruse, 147 Neb. 989, 25 N.W.2d 896 (1947).

Order sustaining motion to strike certain parts of answer, without further judicial action, does not constitute a final, appealable order. State ex rel. Sorensen v. State Bank of Omaha, 131 Neb. 223, 267 N.W. 532 (1936).

Where partition has been ordered in suit for that purpose, appeal will not lie until partition is effected and confirmed. Peterson v. Damoude, 95 Neb. 469, 145 N.W. 847 (1914).

Where appeal is taken before court acts upon report of referee awarding partition, it should be dismissed. Vrana v. Vrana, 85 Neb. 128, 122 N.W. 678 (1909).

When record does not disclose final order or judgment, proceedings should be dismissed. Skallberg v. Skallberg, 84 Neb. 717, 121 N.W. 979 (1909).

Final order granting or refusing a license to sell intoxicating liquors is not reviewable on appeal. Halverstadt v. Berger, 72 Neb. 462, 100 N.W. 934 (1904).

When cause is retained for further action, order is not final. Merle & Heaney Mfg. Co. v. Wallace, 48 Neb. 886, 67 N.W. 883 (1896).

4. Court review

An appellate court's jurisdiction to grant relief pursuant to this section is limited to reversal, vacation, or modification of the final order from which the appeal is taken. An appellate court cannot address issues that do not bear on the correctness of the final order upon which its appellate jurisdiction is based. State v. Loyd, 269 Neb. 762, 696 N.W.2d 860 (2005).

The failure to clearly include an instruction to guide the jury concerning defendant's affirmative defenses was plain error, prejudicial to defendant, requiring reversal for a new trial. Omaha Mining Co. v. First Nat. Bank of Bellevue, 226 Neb. 743, 415 N.W.2d 111 (1987).

Supreme Court will take judicial notice of all rules of district, separate juvenile, county, municipal, and workmen's compensation courts on file with the Clerk of the Supreme Court. State v. Barrett, 200 Neb. 553, 264 N.W.2d 434 (1978).

In absence of bill of exceptions, judgment should be affirmed where sufficiency of pleadings is not questioned. Eisele v. Meeker, 105 Neb. 687, 181 N.W. 609 (1921).

Judgment should be reversed where clearly wrong on sole issue of fact involved. In re Estate of O'Connor, 105 Neb. 88, 179 N.W. 401 (1920).

Where both parties tried case on theory that a certain essential fact was proved, Supreme Court will not reverse for lack of evidence of such fact. Underwood v. Chicago & N. W. Ry. Co., 100 Neb. 275, 159 N.W. 408 (1916).

Court is bound by law of case on first appeal. Home Savings Bank of Fremont v. Shallenberger, 100 Neb. 113, 158 N.W. 455 (1916).

Verdict not inconsistent with entire charge should not be set aside because in conflict with isolated instruction. Prediger v. Lincoln Traction Co., 97 Neb. 315, 149 N.W. 775 (1914).

Supreme Court has power to modify judgment without vacating or modifying it as a whole. Porter v. Sherman County Banking Co., 40 Neb. 274, 58 N.W. 721 (1894).

Original evidence by affidavits cannot be received to contradict record. McDonald v. Bowman, 40 Neb. 269, 58 N.W. 704 (1894).

5. Miscellaneous

Affirmative relief, for purposes of an appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, necessitating a cross-appeal in order for that argument to be considered. McDonald v. DeCamp Legal Servs., P.C., 260 Neb. 729, 619 N.W.2d 583 (2000).

An appeal properly perfected prevents any final judgment or order from becoming final while the appeal is pending. Dewey v. Dewey, 192 Neb. 676, 223 N.W.2d 826 (1974).

Jurisdiction to reverse judgment on appeal must be timely invoked. Campbell v. Campbell, 168 Neb. 533, 96 N.W.2d 417 (1959).

Final order need not properly be denominated a judgment. Western Smelting & Refining Co. v. First Nat. Bank of Omaha, 150 Neb. 477, 35 N.W.2d 116 (1948).

''Court'' includes judge at chambers. Porter v. Flick, 60 Neb. 773, 84 N.W. 262 (1900).

Only parties to judgment, or their privies, may appeal or bring error. Burlington & M. R. R. R. Co. v. Martin, 47 Neb. 56, 66 N.W. 15 (1896).

Error proceedings in law and equity are identical. Swansen v. Swansen, 12 Neb. 210, 10 N.W. 713 (1881).

A statement of errors filed pursuant to Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1993) must be filed with the district court within 10 days of the filing of the bill of exceptions, rather than within 10 days of the filing of the notice of appeal. State v. Stuthman, 2 Neb. App. 317, 509 N.W.2d 410 (1993).

An appellant who has incorporated a properly drafted statement of errors directly into a notice of appeal from a judgment of the county court has satisfied the requirement in Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) concerning the timely filing of a statement of errors with the district court. State v. Nelson, 2 Neb. App. 289, 509 N.W.2d 232 (1993).

25-1912 Appeal; civil and criminal actions; procedure; notice of appeal; docketing fee; filing of transcript.

(1) The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and, except as otherwise provided in sections 25-2301 to 25-2310, 29-2306, and 48-641, by depositing with the clerk of the district court the docket fee required by section 33-103.

(2) A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

(3) The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01, (b) by a timely motion to alter or amend a judgment under section 25-1329, or (c) by a timely motion to set aside the verdict or judgment under section 25-1315.02, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection. When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. A new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion. No additional fees are required for such filing. A notice of appeal filed after the court announces its decision or order on the terminating motion but before the entry of the order is treated as filed on the date of and after the entry of the order.

(4) Except as otherwise provided in subsection (3) of this section and sections 25-2301 to 25-2310, 29-2306, and 48-641, an appeal shall be deemed perfected

and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court, and after being perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

(5) The clerk of the district court shall forward such docket fee and a certified copy of such notice of appeal to the Clerk of the Supreme Court, and the Clerk of the Supreme Court shall docket such appeal.

(6) Within thirty days after the date of filing of notice of appeal, the clerk of the district court shall prepare and file with the Clerk of the Supreme Court a transcript certified as a true copy of the proceedings contained therein. The Supreme Court shall, by rule, specify the method of ordering the transcript and the form and content of the transcript. Neither the form nor substance of such transcript shall affect the jurisdiction of the Court of Appeals or Supreme Court.

(7) Nothing in this section shall prevent any person from giving supersedeas bond in the district court in the time and manner provided in section 25-1916 nor affect the right of a defendant in a criminal case to be admitted to bail pending the review of such case in the Court of Appeals or Supreme Court.

Source: Laws 1907, c. 162, § 1, p. 495; R.S.1913, § 8186; Laws 1917, c. 140, § 1, p. 326; C.S.1922, § 9138; C.S.1929, § 20-1912; Laws 1941, c. 32, § 1, p. 141; C.S.Supp.,1941, § 20-1912; R.S.1943, § 25-1912; Laws 1947, c. 87, § 1, p. 265; Laws 1961, c. 35, § 1, p. 388; Laws 1981, LB 411, § 5; Laws 1982, LB 720, § 2; Laws 1982, LB 722, § 2; Laws 1986, LB 530, § 2; Laws 1986, LB 529, § 25; Laws 1991, LB 732, § 52; Laws 1995, LB 127, § 1; Laws 1997, LB 398, § 1; Laws 1999, LB 43, § 8; Laws 1999, LB 689, § 1; Laws 2000, LB 921, § 15.

Cross References

For amount of docket fee, see section 33-103.

1. Time for appeal
2. Jurisdiction
3. Motion for new trial
4. Petition in error
5. Miscellaneous

1. Time for appeal

An appellant must file his or her notice of appeal and deposit with the clerk of the district court the docket fee required by section 33-103 within 30 days of the entry of the order from which the appeal is taken. Martin v. McGinn, 267 Neb. 931, 678 N.W.2d 737 (2004).

A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment and must seek substantive alteration of the judgment. A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment, and the time for filing a notice of appeal runs from the date of the judgment. State v. Bellamy, 264 Neb. 784, 652 N.W.2d 86 (2002).

Under this section, a party has 30 days in which to appeal from a final order. State ex rel. Stenberg v. Moore, 258 Neb. 199, 602 N.W.2d 465 (1999).

The notice of appeal and docket fee are mandatory and jurisdictional and must be filed within 30 days of the entry of judgment of the trial court. Under subsection (2) of this section, the running of the time for filing a notice of appeal is terminated by only two events: the timely filing of a motion for new trial under section 25-1143 or a motion to set aside the verdict or judgment under section 25-1315.02. Under subsection (3) of this section, an appeal is deemed perfected and the appellate court has jurisdiction when the notice of appeal is filed and the docket fee is deposited; no other step shall be deemed jurisdictional. In re Interest of Noelle F. & Sarah F., 249 Neb. 628, 544 N.W.2d 509 (1996).

Under subsection (1) of this section, an appeal from the denial of a plea in bar must be filed within 30 days of the denial. State v. Sinsel, 249 Neb. 369, 543 N.W.2d 457 (1996).

Orders which are not announced in open court are not formalized until they have been entered on the journal. In such instances, pursuant to subsection (1) of this section, a notice of appeal must be filed within 30 days of the date the order was entered on the journal of the trial court. In re Interest of J.A., 244 Neb. 919, 510 N.W.2d 68 (1994).

The filing of a motion to reconsider a sentence made pursuant to the provisions of subdivision (1) of section 29-2308.01 does not affect the time within which a notice of appeal must be filed under the provisions of subsection (1) of this section. State v. Flying Hawk, 227 Neb. 878, 420 N.W.2d 323 (1988); State v. Spotted Elk, 227 Neb. 869, 420 N.W.2d 707 (1988).

The notice of appeal required by subsection (1) of this section is mandatory and jurisdictional and must be filed within the time required by statute; where such notice of appeal is not filed within thirty days from the entry of the judgment, decree, or final order appealed from, as required by subsection (1), the Supreme Court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Flying Hawk, 227 Neb. 878, 420 N.W.2d 323 (1988).

In order to vest the Supreme Court with jurisdiction, a notice of appeal must be filed within thirty days of the entry of the final order or the overruling of a motion for new trial. In re Interest of C.M.H. and M.S.H., 227 Neb. 446, 418 N.W.2d 226 (1988); State v. Stickney, 222 Neb. 465, 384 N.W.2d 301 (1986); State v. Howell, 188 Neb. 687, 199 N.W.2d 21 (1972).

Where a notice of appeal is not filed within 1 month from entry of the final order, the Supreme Court obtains no jurisdiction to hear the appeal, and the appeal must be dismissed. State v. Reed, 226 Neb. 575, 412 N.W.2d 848 (1987); Smith v. Smith, 225 Neb. 93, 402 N.W.2d 688 (1987).

The time within which an appeal must be taken is mandatory and must be met in order for an appellate tribunal to acquire jurisdiction of the subject matter. Federal Land Bank v. McElhose, 222 Neb. 448, 384 N.W.2d 295 (1986).

For this court to obtain jurisdiction, in the absence of a timely motion for new trial, a notice of appeal must be filed within one month after rendition of the judgment or decree or the making of the final order. Sederstrom v. Wrehe, 215 Neb. 429, 339 N.W.2d 74 (1983); Novak v. Nelsen, 209 Neb. 728, 311 N.W.2d 8 (1981).

Notice of intent to appeal filed more than thirty days after order denying relief sought in a petition for postconviction relief defeats the jurisdictional requirements of this section. State v. Harrington, 214 Neb. 696, 335 N.W.2d 316 (1983).

A notice of appeal is effective if it is filed within a month of the court's announcement of its judgment either in open court or by letter to the attorneys but before the judgment is entered. State v. Kolar, 206 Neb. 619, 294 N.W.2d 350 (1980).

There can be no appeal of a criminal conviction under this section until after sentence has been imposed. State v. Long, 205 Neb. 252, 286 N.W.2d 772 (1980).

Filing of notice of appeal and payment of docket fee are both mandatory within the one-month appeal period. American Legion Post No. 90 v. Nebraska Liquor Control Commission, 199 Neb. 429, 259 N.W.2d 36 (1977).

An order of the Court of Industrial Relations establishing bargaining units is a final order under this section, and becomes immediately appealable. American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N.W.2d 1 (1977).

Order determining defendant a sexual sociopath and sentencing him to penal complex is a final order and appeal therefrom is barred after thirty days. State v. Wells, 197 Neb. 584, 249 N.W.2d 904 (1977).

Notice of appeal in a criminal case must be filed with the clerk of the district court within one month after the overruling of a timely filed motion for new trial or sentencing, whichever is later. State v. Betts, 196 Neb. 572, 244 N.W.2d 195 (1976).

On appeal from a county or municipal court, notice of appeal and bond must be filed within ten days after rendition of judgment and this period cannot be prolonged by filing a motion for new trial. Edward Frank Rozman Co. v. Keillor, 195 Neb. 587, 239 N.W.2d 779 (1976).

An order placing a defendant on probation is a final order and appeal must be made within one month after it is entered. State v. Williams, 194 Neb. 483, 233 N.W.2d 772 (1975).

Appeal must be dismissed where notice of appeal is not filed within one month of judgment or final order. State v. Buss, 192 Neb. 407, 222 N.W.2d 113 (1974); Morimoto v. Nebraska Children's Home Society, 176 Neb. 403, 126 N.W.2d 184 (1964); Bebee v. Kriewald, 173 Neb. 179, 112 N.W.2d 764 (1962); Lockard v. Lockard, 169 Neb. 226, 99 N.W.2d 1 (1959); Campbell v. Campbell, 168 Neb. 533, 96 N.W.2d 417 (1959); Akins v. Chamberlain, 164 Neb. 428, 82 N.W.2d 632 (1957).

Unless notice of appeal is filed within one month from entry of judgment or final order, appeal therefrom must be dismissed. Diedrichs v. Empfield, 189 Neb. 120, 200 N.W.2d 254 (1972); Frenchman-Cambridge Irrigation Dist. v. Ferguson, 154 Neb. 20, 46 N.W.2d 692 (1951).

Appeal was lodged by timely writing judge setting out intent to appeal, indigency, and request for counsel. State v. Moore, 187 Neb. 507, 192 N.W.2d 157 (1971).

Appeal must be taken within one month from rendition of judgment. Pallas v. Dailey, 169 Neb. 277, 99 N.W.2d 6 (1959).

Appeal from judgment in habeas corpus case was properly taken within one month from rendition of judgment. Neudeck v. Buettow, 166 Neb. 649, 90 N.W.2d 254 (1958).

Right of appeal may be lost if appeal is not timely taken. Mueller v. Keeley, 163 Neb. 613, 80 N.W.2d 707 (1957).

Time for appeal commences to run from rendition and not entry of judgment. Sloan v. Gibson, 156 Neb. 625, 57 N.W.2d 167 (1953).

Proceedings to obtain a reversal of judgment or final order, when motion for new trial is not filed, must be instituted within one month from rendition thereof. Ash v. City of Omaha, 152 Neb. 699, 42 N.W.2d 648 (1950).

Appeal from district court should be dismissed for lack of jurisdiction where transcript in workmen's compensation case was not filed within thirty days of the entry of the judgment. Dobesh v. Associated Asphalt Contractors, 137 Neb. 1, 288 N.W. 32 (1939).

Supreme Court is without jurisdiction unless appeal is taken within statutory time; trial court cannot extend time for taking appeal by vacating decree after term and reentering same decree. Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98 (1933).

Time for perfecting appeal does not commence to run until district court's judgment is entered on journal. Union Central Life Ins. Co. v. Saathoff, 115 Neb. 385, 213 N.W. 342 (1927).

Amendment of this section shortening time for appeal was not applicable to judgments entered before statute took effect. Raddatz v. Christner, 103 Neb. 621, 173 N.W. 677 (1919).

Time for taking appeal begins to run when decree is entered of record. Anderson v. Griswold, 87 Neb. 578, 127 N.W. 883 (1910).

On appeal by party seeking to intervene after void judgment, time commences to run from dismissal of petition of intervention. Shold v. Van Treeck, 82 Neb. 99, 117 N.W. 113 (1908).

A notice of appeal filed before the trial court announces its ''decision or final order'' under subsection (2) of this section in final determination of an issue of costs cannot relate forward. J & H Swine v. Hartington Concrete, 12 Neb. App. 885, 687 N.W.2d 9 (2004).

Subsection (2) of this section was not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment. J & H Swine v. Hartington Concrete, 12 Neb. App. 885, 687 N.W.2d 9 (2004).

Since a poverty affidavit which is substituted for the docket fee must be filed within the time and in the manner required for filing the docket fee in subsection (2) of this section, a poverty affidavit filed or deposited after the announcement of a decision or final order but before entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry of the judgment, decree, or final order. State v. Billups, 10 Neb. App. 424, 632 N.W.2d 375 (2001).

Where there is no trial, a pleading entitled ''Motion for New Trial'' is not properly considered as a motion for new trial and

does not toll the running of the statutory time for filing an appeal from a trial court's order, but is only a motion to reconsider. Jackson v. Board of Equal. of City of Omaha, 10 Neb. App. 330, 630 N.W.2d 680 (2001).

The filing of a motion to reconsider sentence does not toll the time within which a notice of appeal must be filed under the provisions of subsection (1) of this section. The only two situations in which the running of time for filing a notice of appeal shall be terminated are (1) if a motion for new trial is filed pursuant to section 25-1143 within 10 days after the verdict or (2) the filing of a motion to set aside the verdict pursuant to section 25-1315.02 within 10 days after receipt of the verdict. State v. Camomilli, 1 Neb. App. 735, 511 N.W.2d 155 (1993).

2. Jurisdiction

Pursuant to subsection (3) of this section, a notice of appeal filed before the district court completely disposed of a party's motion for new trial was of ''no effect''. When a notice of appeal is initially filed before the district court has completely disposed of a motion for new trial, and thus is of no effect, and neither party filed a new notice of appeal after the district court completely disposed of the motion, the appellate court does not acquire jurisdiction over the appeal. Haber v. V & R Joint Venture, 263 Neb. 529, 641 N.W.2d 31 (2002).

An appellate court has no power to exercise appellate jurisdiction in proceedings to review the judgment of the district court unless the appellant shall have filed a notice of appeal and deposited a docket fee in the office of the clerk of the district court within the time fixed and as provided in this section. State v. Parmar, 255 Neb. 356, 586 N.W.2d 279 (1998).

Timeliness of an appeal is a jurisdictional necessity. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly; an appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. State v. Marshall, 253 Neb. 676, 573 N.W.2d 406 (1998).

Notice of appeal from juvenile court order, which was filed beyond 30-day limit for filing notice of appeal, did not satisfy requirements for appellate jurisdiction. In re Interest of B.M.H., 233 Neb. 524, 446 N.W.2d 222 (1989).

The filing of a notice of appeal under subsection (1) of this section, together with payment of fees unless fees are waived for cause, removes jurisdiction of the cause from the district court to the Supreme Court; once jurisdiction has been removed to the Supreme Court, the district court has no jurisdiction over the cause unless and until remand by the Supreme Court. State v. Spotted Elk, 227 Neb. 869, 420 N.W.2d 707 (1988).

The trial court is without jurisdiction to enter an order granting summary judgment after the defendant has perfected his appeal to the Supreme Court. Beavers v. Graham, 209 Neb. 556, 308 N.W.2d 826 (1981).

A notice of appeal filed after the court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on the Supreme Court if the notice of appeal shows on its face that it relates to a decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates. Dale Electronics, Inc. v. Federal Ins. Co., 203 Neb. 133, 277 N.W.2d 572 (1979).

Appeal dismissed in Supreme Court for lack of jurisdiction where notice of appeal was a nullity because filed prematurely. Spanheimer Roofing & Supply Co. v. Thompson, 198 Neb. 710, 255 N.W.2d 265 (1977).

An appeal shall be deemed perfected, giving the court jurisdiction, when notice of appeal has been timely filed and the docket fee timely deposited. State v. Price, 198 Neb. 229, 252 N.W.2d 165 (1977).

Order placing defendant on probation was a final and appealable order. State v. Osterman, 197 Neb. 727, 250 N.W.2d 654 (1977).

Any order made by the district court after jurisdiction is vested in the Supreme Court is void. State v. Allen, 195 Neb. 560, 239 N.W.2d 272 (1976).

Where a notice of appeal is not filed within one month from entry of the judgment or final order appealed from as required hereunder, the Supreme Court obtains no jurisdiction and the appeal must be dismissed. State v. Howell, 188 Neb. 687, 199 N.W.2d 21 (1972); State v. Williamsen, 183 Neb. 173, 159 N.W.2d 206 (1968).

Failure to appeal post conviction decision within one month prevented Supreme Court from obtaining jurisdiction. State v. Pauley, 185 Neb. 478, 176 N.W.2d 687 (1970).

Appeal must be dismissed where notice not filed within time prescribed by this section. Giangrasso v. Eagle Distributing Co., 185 Neb. 406, 176 N.W.2d 16 (1970).

In order to lodge jurisdiction in the Supreme Court where separate decrees are entered in an action brought on a single petition, it is necessary that a separate notice of appeal be filed and a separate docket fee paid on each decree which is appealed. County of Hall v. Engleman, 182 Neb. 676, 156 N.W.2d 801 (1968).

An appeal in a criminal case will not be dismissed because of the failure to state the nature of the offense and the sentence imposed. State v. Goff, 174 Neb. 217, 117 N.W.2d 319 (1962).

An intervener is a party to an action and may appeal or cross-appeal from an unfavorable judgment. Kirchner v. Gast, 169 Neb. 404, 100 N.W.2d 65 (1959).

Jurisdiction of appeal in workmen's compensation case is obtained by filing of transcript and depositing docket fee. Miller v. Peterson, 165 Neb. 344, 85 N.W.2d 700 (1957).

Where appeal was taken out of time, it was subject to dismissal. Vasa v. Vasa, 163 Neb. 642, 80 N.W.2d 696 (1957).

Filing of notice of appeal and payment of docket fee are jurisdictional requirements. Ruan Transport Corp. v. Peake, Inc., 163 Neb. 319, 79 N.W.2d 575 (1956).

Filing of notice of appeal and depositing docket fee gives Supreme Court jurisdiction of the cause and all the parties. Fick v. Herman, 161 Neb. 110, 72 N.W.2d 598 (1955); County of Madison v. Crippen, 143 Neb. 474, 10 N.W.2d 260 (1943); Keefe v. Grace, 142 Neb. 330, 6 N.W.2d 59 (1942).

Proceeding under Juvenile Court Act is reviewable by appeal. Krell v. Mantell, 157 Neb. 900, 62 N.W.2d 308 (1954).

Appeal within one month from date of rendition of decree in workmen's compensation case was required in order to confer jurisdiction on Supreme Court. Tucker v. Paxton & Gallagher Co., 152 Neb. 622, 41 N.W.2d 911 (1950).

Deposit of docket fee with clerk of district court is one of jurisdictional steps on appeal. Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N.W.2d 120 (1944).

Where, through mistake in preparation, original transcript does not show facts sufficient to give court jurisdiction on appeal, the appellate court will on timely application, permit a correction of the record by filing supplemental transcript. Dobesh v. Associated Asphalt Contractors, 137 Neb. 342, 289 N.W. 369 (1939).

Where notice of appeal is properly given in district court, Supreme Court acquires jurisdiction when transcript is filed, without further notice being required. Marvel v. Craft, 116 Neb. 802, 219 N.W. 242 (1928).

Necessary procedure to vest Supreme Court with jurisdiction is stated. Frazier v. Alexander, 111 Neb. 294, 196 N.W. 322 (1923).

No appeal can be taken from findings of fact or conclusions of law; there must be final judgment. First Nat. Bank of Omaha v. Cooper, 89 Neb. 632, 131 N.W. 958 (1911).

Stipulation was sufficient to give jurisdiction of cross-appeal. Lanham v. Bowlby, 86 Neb. 148, 125 N.W. 149 (1910).

The fact that a motion to reduce sentence was filed prior to filing a notice of appeal does not prevent the Court of Appeals from receiving jurisdiction of the case when the notice of appeal

is filed. State v. Camomilli, 1 Neb. App. 735, 511 N.W.2d 155 (1993).

3. Motion for new trial

The running of the time for filing an appeal is terminated when a motion for new trial is filed by any party within 10 days after a verdict, report, or decision is rendered. Breeden v. Nebraska Methodist Hosp., 257 Neb. 371, 598 N.W.2d 441 (1999).

In a criminal case, the judgment occurs when the verdict and sentence are rendered by the court, and a motion for new trial does not toll the running of the 30-day jurisdictional requirement of this section. State v. Nash, 246 Neb. 1030, 524 N.W.2d 351 (1994).

A motion for new trial is authorized after a judgment notwithstanding the verdict and, during pendency of such motion, suspends or tolls the time limit to comply with requirements for an appeal to the Nebraska Supreme Court. Dunn v. Hemberger, 230 Neb. 171, 430 N.W.2d 516 (1988).

Where the notice of appeal from an order denying a motion for a new trial was untimely filed, the time for appeal ran from the rendition of the judgment. Corell v. Corell, 201 Neb. 59, 266 N.W.2d 84 (1978).

An order in a criminal case overruling a motion for new trial and placing defendant on probation is a final appealable order. State v. Longmore, 178 Neb. 509, 134 N.W.2d 66 (1965).

Time for appeal did not commence to run until motion for new trial was overruled. Skag-Way Department Stores, Inc. v. City of Grand Island, 176 Neb. 169, 125 N.W.2d 529 (1964); Harkness v. Central Nebraska P. P. & I. Dist., 154 Neb. 463, 48 N.W.2d 385 (1951); Cozad v. McKeone, 149 Neb. 833, 32 N.W.2d 760 (1948).

Time for appeal begins to run from date of ruling on motion for new trial even though dismissal of action was based upon a ruling upon demurrer. Weiner v. Morgan, 175 Neb. 656, 122 N.W.2d 871 (1963).

Time for filing motion for new trial commences to run from rendition of judgment. Ricketts v. Continental Nat. Bank of Lincoln, 169 Neb. 809, 101 N.W.2d 153 (1960); Sullivan v. Sullivan, 168 Neb. 850, 97 N.W.2d 348 (1959).

Time for appeal begins to run from overruling of motion for new trial even though petition was dismissed on demurrer. Brasier v. Cribbett, 166 Neb. 145, 88 N.W.2d 235 (1958).

Jurisdictional steps must be taken within one month after rendition of judgment or of overruling of motion for new trial timely filed. Powell v. Van Donselaar, 160 Neb. 21, 68 N.W.2d 894 (1955).

Notice of appeal must be filed and docket fee paid within one month after rendition of decree or overruling of motion for new trial timely filed. Molczyk v. Molczyk, 154 Neb. 163, 47 N.W.2d 405 (1951).

Where motion for new trial was not filed within the time prescribed by law, time for appeal commenced to run from rendition of judgment rather than from overruling of motion for new trial. Ehlers v. Neal, 148 Neb. 697, 28 N.W.2d 558 (1947).

If a motion for new trial is filed in a case in which a judgment of dismissal was entered before any evidence was taken, the time for taking of appeal begins to run from the date of entry of order overruling such motion for new trial. McGerr v. Marsh, 148 Neb. 50, 26 N.W.2d 374 (1947).

Distinction pointed out between when time commences to run for filing of motion for new trial and for filing of transcript on appeal. Power v. Federal Land Bank of Omaha, 141 Neb. 139, 2 N.W.2d 924 (1942).

In equity case the sufficiency of the evidence contained in a bill of exceptions is properly before the Supreme Court for consideration notwithstanding the failure to file motion for a new trial in district court. Union Central Life Ins. Co. v. Burgess, 131 Neb. 20, 266 N.W. 898 (1936).

To secure limited review of an equity case, motion for new trial is not required. Douglas County v. Barker Co., 125 Neb. 253, 249 N.W. 607 (1933).

Time for perfecting appeal in compensation proceeding begins to run from overruling of motion for new trial. Lincoln Packing Co. v. Coe, 120 Neb. 299, 232 N.W. 92 (1930).

Motion for new trial is necessary to review ruling of court on evidence in equity case. Brady v. McGinley, 94 Neb. 761, 144 N.W. 780 (1913).

Motion for new trial is still necessary in law actions. Carmack v. Erdenberger, 77 Neb. 592, 110 N.W. 315 (1906).

Although a motion for new trial generally tolls the running of the statutory time for filing an appeal from a final order of the district court, such is not the case if the proceedings leading up to the motion for new trial do not constitute a trial as contemplated by this section. State v. Plymate, 8 Neb. App. 513, 598 N.W.2d 65 (1999).

A motion for new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true whether that court is hearing appeals from the county court or from some other lower tribunal. State v. Deutsch, 2 Neb. App. 186, 507 N.W.2d 681 (1993).

A motion for new trial that is not timely filed will not extend the time within which a notice of appeal must be filed. Zoet v. Zoet, 2 Neb. App. 71, 507 N.W.2d 42 (1993).

When a district court is acting in an appellate capacity, a motion for new trial is not a proper pleading and it does not stop the running of time for perfecting an appeal. Woodward v. Yonker, 1 Neb. App. 1011, 510 N.W.2d 480 (1993).

When a motion for new trial terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the entry of the order ruling upon the motion shall have no effect. Horace Mann Cos. v. Pinaire, 1 Neb. App. 907, 511 N.W.2d 540 (1993).

4. Petition in error

Civil proceeding to recover a penalty for violation of city ordinance may not be reviewed by error proceedings. State v. Warren, 162 Neb. 623, 76 N.W.2d 728 (1956).

Only judgments and sentences of district court upon convictions for felonies and misdemeanors under criminal code may be brought to Supreme Court by petition in error. Hoover v. State, 126 Neb. 277, 253 N.W. 359 (1934).

Conviction in contempt proceedings is reviewable only by petition in error as in criminal cases. Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N.W. 574 (1931).

Conviction in contempt proceedings is reviewable only on error. Hanika v. State, 87 Neb. 845, 128 N.W. 526 (1910).

Only judgment upon convictions under criminal code are reviewable on error; other cases, including convictions under city ordinances, are reviewable on appeal. Brandt v. State, 80 Neb. 843, 115 N.W. 327 (1908).

5. Miscellaneous

An appeal properly perfected under the provisions of this section and section 25-1911 prevents any final judgment or order from becoming final while the appeal is pending. State v. Beyer, 260 Neb. 670, 619 N.W.2d 213 (2000).

According to the plain language of this section, a poverty affidavit must be filed after the entry of the final order, and thus, a poverty affidavit is insufficient to perfect an appeal unless it is filed during the 30-day period following the rendition of judgment. A poverty affidavit must be filed in the office of the clerk of the district court, and its receipt in any other location is insufficient to perfect an appeal. State v. Parmar, 255 Neb. 356, 586 N.W.2d 279 (1998).

Per subsection (1) of this section, a motion to discharge for lack of speedy trial, pursuant to section 29-1208, is a final,

appealable order. State v. Jacques, 253 Neb. 247, 570 N.W.2d 331 (1997).

Pursuant to subsection (2) of this section, a notice of appeal filed before a judgment on a motion for new trial is entered has no effect. Reutzel v. Reutzel, 252 Neb. 354, 562 N.W.2d 351 (1997).

In a criminal case, judgment occurs when the verdict and sentence are rendered by the court. In a criminal action, the filing of a motion for new trial shall have no effect on the jurisdictional requirement that the appealing party must file a motion of appeal within 30 days after the sentencing date. State v. McCormick and Hall, 246 Neb. 271, 518 N.W.2d 133 (1994).

Under subsection (1) of this section, the appointment of a receiver may be treated as a final order. Robertson v. Southwood, 233 Neb. 685, 447 N.W.2d 616 (1989).

Generally, a criminal appeal may only be brought by the person who is aggrieved by the judgment and who has been given the right to appeal; however, a person who has been released and discharged from further prosecution on a specific complaint is not legally aggrieved, even though the person is open to prosecution for future violations of a similar nature. State v. Sports Couriers, Inc., 210 Neb. 168, 313 N.W.2d 447 (1981).

This section of the Nebraska Constitution does not bar either the Legislature or the Supreme Court from making reasonable rules and regulations governing review on appeal. Nebraska State Bank v. Dudley, 203 Neb. 226, 278 N.W.2d 334 (1979).

This section, specifying what steps are necessary in perfecting an appeal, is deemed jurisdictional and is not unconstitutionally vague so as to violate the due process clause of the Fourteenth Amendment of the U.S. Constitution. Nebraska State Bank v. Dudley, 203 Neb. 226, 278 N.W.2d 334 (1979).

No third party has right to intervene in a criminal case and appeal of news media from restrictive order is dismissed. State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975).

The right to appeal in criminal cases can be exercised only by the party to whom it is given; and generally only a person aggrieved or injured by a judgment may appeal. State v. Berry, 192 Neb. 826, 224 N.W.2d 767 (1975).

An appeal properly perfected prevents any final judgment or order from becoming final while the appeal is pending. Dewey v. Dewey, 192 Neb. 676, 223 N.W.2d 826 (1974).

Failure of public defender, on request of defendant, to file notice of appeal within prescribed time did not excuse defendant from requirements of this section. State v. Blunt, 182 Neb. 477, 155 N.W.2d 443 (1968).

Where a defendant invoked remedy by appeal, he could not at the same time carry on proceeding under the Post Conviction Act. State v. Carr, 181 Neb. 251, 147 N.W.2d 619 (1967).

A notice of appeal need not specifically describe the judgment appealed from. Morford v. Lipsey Meat Co., Inc., 179 Neb. 420, 138 N.W.2d 653 (1965).

The Legislature has made an interlocutory order appealable in civil cases. State v. Taylor, 179 Neb. 42, 136 N.W.2d 179 (1965).

Pendency of appeal from order of State Railway Commission did not operate to keep temporary rate in effect that expired by lapse of time. United Mineral Products Co. v. Nebraska Railroads, 177 Neb. 898, 131 N.W.2d 604 (1964).

Transcript on appeal to Supreme Court contains filings made in office of clerk of the district court. Everts v. School Dist. No. 16 of Fillmore County, 175 Neb. 310, 121 N.W.2d 487 (1963).

Appeal was proper from order adjudging defendant guilty of contempt. State ex rel. Beck v. Frontier Airlines, Inc., 174 Neb. 172, 116 N.W.2d 281 (1962).

Adequate cause must be shown for filing of supplemental transcript after submission of case. Robinson v. Meyer, 166 Neb. 178, 88 N.W.2d 219 (1958).

Party to appeal has right to have any omitted pleadings included in supplemental transcript. Gettel v. Hester, 165 Neb. 573, 86 N.W.2d 613 (1957).

Award of temporary alimony by district court during pendency of appeal is not authorized. Schlueter v. Schlueter, 158 Neb. 233, 62 N.W.2d 871 (1954).

Appeal, and not error, is the proper procedure to review conviction of violation of municipal ordinance. Wells v. State, 152 Neb. 668, 42 N.W.2d 363 (1950).

General appeal statute does not control appeals from entry of order for judgment notwithstanding verdict. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N.W.2d 533 (1949).

This section is made applicable to appeals from the State Railway Commission. In re Application of Moritz, 147 Neb. 400, 23 N.W.2d 545 (1946).

This section does not apply to filing fees in workmen's compensation cases. Lee v. Lincoln Cleaning & Dye Works, 144 Neb. 659, 14 N.W.2d 227 (1944).

A cross-appeal may be raised in the appellee's brief. In re Estate of Dalbey, 143 Neb. 32, 8 N.W.2d 512 (1943).

Where on second appeal to Supreme Court from Department of Roads and Irrigation substantially every issue presented was considered and determined adversely to appellant on first appeal, the appeal will be dismissed. Cozad Ditch Co. v. Central Nebraska Public Power & Irr. Dist., 132 Neb. 547, 272 N.W. 560 (1937).

Right to appeal is not forfeited by payment of judgment by defendant to avoid sale of his property on execution. Burke v. Dendinger, 120 Neb. 594, 234 N.W. 405 (1931).

Time of filing transcript is determined by time of arrival at clerk's office, and failure to deliver mail is no excuse. Larson v. Wegner, 120 Neb. 449, 233 N.W. 253 (1930).

Supreme Court may allow representative of deceased party to revive action after transcript is filed. Long v. Krause, 104 Neb. 599, 178 N.W. 188 (1920).

Rule in equity cases is unchanged. Ogden v. Garrison, 82 Neb. 302, 117 N.W. 714 (1908).

Requisites of transcripts are stated. Fike v. Ott, 76 Neb. 439, 107 N.W. 774 (1906).

25-1912.01 Appellate review; motion for new trial; when required.

(1) A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record.

(2) When an action has been tried before a jury a motion for a new trial shall not be a prerequisite to obtaining appellate review of the sufficiency of the evidence, but a motion for a new trial shall be a prerequisite to obtaining appellate review of the issue of inadequate or excessive damages.

Source: Laws 1982, LB 720, § 1.

In order for any question as to the admissibility of evidence to be reviewed on appeal under subsection (1) of this section, the record must show that the objection was brought to the attention of the trial judge and ruled upon. State v. Blair, 227 Neb. 742, 419 N.W.2d 868 (1988).

A motion for a new trial is not a prerequisite to obtain review in most cases, but the timely filing of such a motion will extend the time within which a notice of appeal must be filed to a period of thirty days following the overruling of that motion. In re Interest of C.M.H. and M.S.H., 227 Neb. 446, 418 N.W.2d 226 (1988).

A motion for new trial is not required to obtain appellate review of any issue upon which the ruling of the trial court appears in the record. State v. Wright, 220 Neb. 847, 374 N.W.2d 26 (1985).

The Supreme Court acquires jurisdiction of an equitable appeal when the notice of appeal and docket fee are filed within one month of the judgment. Caro, Inc. v. Roby, 215 Neb. 897, 342 N.W.2d 182 (1983).

25-1913 Appealed causes; parties; how designated.

The cause shall be docketed in the Court of Appeals or Supreme Court under the same title it had in the district court. The party or parties asking for the reversal, vacation, or modification of such judgment, decree, or final order shall be designated as appellant or appellants, and the adverse party or parties shall be designated as appellee or appellees.

Source: Laws 1907, c. 162, § 2, p. 496; R.S.1913, § 8187; C.S.1922, § 9139; C.S.1929, § 20-1913; R.S.1943, § 25-1913; Laws 1991, LB 732, § 53.

An intervener against whom a judgment has been rendered may cross-appeal. Kirchner v. Gast, 169 Neb. 404, 100 N.W.2d 65 (1959).

Party designated as appellee may take cross-appeal. Security Investment Co. v. Golz, 151 Neb. 172, 36 N.W.2d 862 (1949).

25-1914 Appeal; cost bond; cash deposit; appellate proceedings; dismissal.

On appeal in any case taken from the district court to the Court of Appeals or Supreme Court, other than an appeal pursuant to section 71-6904, the appellant or appellants shall, within thirty days after the entry of the judgment, decree, or final order sought to be reversed, vacated, or modified or within thirty days after the entry of the order overruling a motion for a new trial in such cause, (1) file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him or her in the appellate court, or (2) make a cash deposit with the clerk of at least seventy-five dollars for the same purpose. If a supersedeas bond is executed, no bond for costs shall be required. The giving of either form of bond or the making of such deposit shall be certified to by the clerk of the district court in the transcript for the appellate court. The appeal may be dismissed on motion and notice in the appellate court if no bond has been given and certified in the transcript or within such additional time as may be fixed by the appellate court for good cause shown.

Source: Laws 1907, c. 162, § 3, p. 496; R.S.1913, § 8188; C.S.1922, § 9140; Laws 1929, c. 72, § 1, p. 252; C.S.1929, § 20-1914; Laws 1941, c. 32, § 2, p. 142; C.S.Supp.,1941, § 20-1914; R.S. 1943, § 25-1914; Laws 1947, c. 87, § 2, p. 266; Laws 1987, LB 33, § 1; Laws 1991, LB 425, § 10; Laws 1991, LB 732, § 54; Laws 1999, LB 43, § 9.

1. Bond
2. Notice of appeal

1. Bond

Section contains no exceptions to the requirement of filing bond; case dismissed where county did not file bond or make application or showing for an extension of time to file the required bond. County of Hall v. Engleman, 182 Neb. 676, 156 N.W.2d 801 (1968).

Only one cost bond is required even though there are multiple appellants. Dorshorst v. Dorshorst, 174 Neb. 886, 120 N.W.2d 32 (1963).

Appellant in compensation case is not exempted from filing cost bond or making cash deposit in lieu thereof. Hoffman v. State, 142 Neb. 821, 8 N.W.2d 200 (1943).

Where an executor appeals from an order which does not affect him in his representative capacity and fails to give bond, the appeal will be dismissed. In re Vetter's Estate, 139 Neb. 307, 297 N.W. 554 (1941).

A party is not entitled to any of the rights of an appellant in Supreme Court, where he has failed to give a cost or supersedeas bond, and where he has not been designated as a party to the appeal in a praecipe by another party who has appealed. Heinisch v. Travelers Mutual Casualty Co., 135 Neb. 13, 280 N.W. 234 (1938).

Where appellant executes supersedeas bond, but it is filed too late to operate as a supersedeas, it will operate as a cost bond on appeal if filed within time for that purpose. Occidental Bldg. & Loan Assn. v. Carlson, 134 Neb. 574, 279 N.W. 162 (1938).

Statute means appellant must file such bond within time prescribed by statute from rendition of final order in district court; if no such bond is filed, the appeal will be dismissed. In re Estate of Raymond, 124 Neb. 125, 245 N.W. 442 (1932).

Provision for giving bond is mandatory and jurisdictional, and if bond is not filed within time prescribed by statute, appeal will be dismissed. Paper v. Galbreth, 123 Neb. 841, 244 N.W. 896 (1932); Greb v. Hansen, 123 Neb. 426, 243 N.W. 278 (1932).

Where, after petitioner's appeal was dismissed by Nebraska Supreme Court for failure to deposit cash or bond and United States Supreme Court granted certiorari, sections 25-2301 to 25-2307 were enacted permitting appeal in forma pauperis, judgment was vacated, and cause remanded for reconsideration. Huffman v. Boersen, 406 U.S. 337 (1972).

2. Notice of appeal

Filing of transcript in workmen's compensation case was duty of clerk of district court. Miller v. Peterson, 165 Neb. 344, 85 N.W.2d 700 (1957).

Supplemental transcript disclosed that appellant had properly perfected appeal. Stark v. Turner, 154 Neb. 268, 47 N.W.2d 569 (1951).

Where party fails to give notice of appeal in district court, and praecipe on appeal omits party to cause who might be affected by reversal or modification of judgment, appeal will be dismissed. Kansas City Life Ins. Co. v. Neverve, 135 Neb. 630, 283 N.W. 378 (1939).

Trial court cannot extend time for taking appeal by vacating decree after term and reentering same decree. Hoover v. State, 126 Neb. 277, 253 N.W. 359 (1934); Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98 (1933).

Where notice of appeal is properly given in district court, jurisdiction acquired by Supreme Court when transcript is filed, without further notice. Marvel v. Craft, 116 Neb. 802, 219 N.W. 242 (1928).

Notice of appeal is not jurisdictional. Anderson v. Griswold, 87 Neb. 578, 127 N.W. 883 (1910).

25-1915 Appeal; unpaid costs itemized in order; payment.

The order of the Court of Appeals or Supreme Court shall itemize the costs due and unpaid in each case, which costs shall be paid to the clerk of the district court and shall be paid by such clerk to the party adjudged entitled to the same.

Source: Laws 1929, c. 72, § 2, p. 253; C.S.1929, § 20-1915; R.S.1943, § 25-1915; Laws 1991, LB 732, § 55.

25-1916 Appeal; supersedeas; cash or bond; effect; undertakings; amount, terms, and conditions; effect of having corporate surety.

No appeal in any case shall operate as a supersedeas unless the appellant or appellants within thirty days after the entry of such judgment, decree, or final order execute to the adverse party a bond with one or more sureties, make a deposit of United States Government bonds with the clerk, or in lieu thereof make a cash deposit with the clerk for the benefit of the adverse party as follows:

(1) When the judgment, decree, or final order appealed from directs the payment of money, the bond, deposit of United States Government bonds, or cash deposit shall be the lesser of (a) the amount of the judgment, decree, or final order and the taxable court costs in the district court, plus the estimated amount of interest that will accrue on the judgment, decree, or final order between its date and the final determination of the cause in the Court of Appeals or Supreme Court and the estimated amount of the costs of appeal, such estimated interest to accrue and estimated court costs to be determined by the trial court, (b) fifty percent of the appellant's net worth, or (c) fifty million dollars. If an appellee proves by a preponderance of the evidence that an appellant is dissipating or diverting assets outside the ordinary course of business to avoid the payment of a judgment, the court may enter any orders necessary to protect the appellee and require the appellant to provide a bond, deposit of United States Government bonds, or cash deposit up to and including the amount required under subdivision (1)(a) of this section.

Such bond, United States Government bond, or cash deposit shall be conditioned that the appellant or appellants will prosecute such appeal without delay and pay all condemnation money and costs which may be found against him, her, or them on the final determination of the cause in the Court of Appeals or Supreme Court. When a cash deposit is made, United States Government bonds are deposited, or a bond is provided which is written by a corporate surety company authorized to do business within the State of Nebraska and the cash deposit, United States Government bonds, or supersedeas bond is approved by the trial court in which the judgment was rendered and filed in the court, the general lien of the judgment shall be dissolved;

(2) When the judgment, decree, or final order directs the execution of a conveyance or other instrument, the bond, deposit of United States Government bonds, or cash deposit shall be in such sum, not exceeding the lesser of fifty percent of the appellant's net worth or fifty million dollars, as shall be prescribed by the district court, or judge thereof in vacation, conditioned that the appellant or appellants will prosecute such appeal without delay and will abide and perform the judgment or decree rendered or final order which shall be made by the Court of Appeals or Supreme Court in the cause;

(3) When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond, deposit of United States Government bonds, or cash deposit shall be in such sum, not exceeding the lesser of fifty percent of the appellant's net worth or fifty million dollars, as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay, will not during the pendency of such appeal commit or suffer to be committed any waste upon such real estate, and will pay all costs and all rents or damages to such real estate which may accrue during the pendency of such appeal and until the appellee is legally restored thereto; and

(4) When the judgment, decree, or final order dissolves or modifies any order of injunction which has been or hereafter may be granted, the supersedeas bond, deposit of United States Government bonds, or cash deposit shall be in such reasonable sum, not exceeding the lesser of fifty percent of the appellant's net worth or fifty million dollars, as the court or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and will pay all costs which may be found against him, her, or them on the final determination of the cause in the Court of Appeals or Supreme Court. Such supersedeas bond, deposit of United States Government bonds, or cash deposit shall stay the doing of the act or acts sought to be restrained by the suit and continue such injunction in force until the case is heard and finally determined in the Court of Appeals or Supreme Court. The undertaking given upon the allowance of the injunction shall be and remain in effect until it is finally decided whether or not the injunction ought to have been granted.

The changes made to this section by Laws 2004, LB 1207, shall apply to all cases pending on or filed on or after April 16, 2004.

Source: G.S.1873, c. 57, § 3, p. 716; Laws 1889, c. 26, § 1, p. 371; Laws 1903, c. 126, § 1, p. 632; R.S.1913, § 8189; C.S.1922, § 9141; Laws 1925, c. 68, § 1, p. 227; C.S.1929, § 20-1916; Laws 1939, c. 16, § 1, p. 94; C.S.Supp.,1941, § 20-1916; R.S.1943,

§ 25-1916; Laws 1971, LB 377, § 1; Laws 1981, LB 42, § 16; Laws 1986, LB 529, § 26; Laws 1991, LB 732, § 56; Laws 1994, LB 899, § 1; Laws 1999, LB 43, § 10; Laws 2004, LB 1207, § 8.

1. Amount

Where decree orders sale of land, supersedeas bond should be conditioned as set out in subsection (3) hereof with amount fixed by court, but if decree directs payment of money also, supersedeas may be required in amount computed under subsection (1) and conditioned as provided in subsections (1) and (3). The Exchange Bank of Gibbon v. Mid-Nebraska Computer Services, Inc., 188 Neb. 673, 199 N.W.2d 5 (1972).

Bond to pay whatever judgment might be rendered covers only money judgment. German Nat. Bank of Beatrice v. Beatrice Rapid Transit & Power Co., 69 Neb. 115, 95 N.W. 49 (1903).

Bond not providing payment for value of the use and occupation is ineffective. Collins v. Brown, 64 Neb. 173, 89 N.W. 754 (1902).

Order fixing amount of supersedeas bond is not appealable. Green v. Morse, 57 Neb. 798, 78 N.W. 395 (1899).

Court may require additional bond to continue supersedeas if shown insufficient in amount. Tulleys v. Keller, 42 Neb. 788, 60 N.W. 1015 (1894).

2. Terms and conditions

Where a decree orders the sale of land, the law in Nebraska explicitly requires that a supersedeas be set out as stated in subsection (3) of this section. Production Credit Assn. of the Midlands v. Schmer, 233 Neb. 785, 448 N.W.2d 141 (1989).

Where decree of trial court requires execution of a conveyance, trial court may for purpose of appeal prescribe bond to be executed conditional for the performance of the decree, or the party so required may, in lieu thereof, execute the required conveyance and deposit it with the clerk of the court to abide judgment of appellate court. Walter v. Gillan, 129 Neb. 514, 262 N.W. 33 (1935).

Judgment of district court must state who is principal and who are sureties on supersedeas bond, and require plaintiffs to exhaust on execution the property of principal before levying on property of one of sureties. Sonneman v. Dolan, 124 Neb. 830, 248 N.W. 402 (1933); Palmer v. Caywood, 64 Neb. 372, 89 N.W. 1034 (1902), distinguished.

Appeal bond from decree of strict foreclosure should be conditioned to pay value of use and occupation. State ex rel. Pinkos v. Rice, 98 Neb. 36, 151 N.W. 925 (1915).

Where bond is provided for rent for use of property, it can be enforced although petition does not show rendition of money judgment. Locke v. Skow, 76 Neb. 39, 106 N.W. 1013 (1906).

Bond in words of statute superseding decree cancelling deed and quieting title did not cover rents and profits pendente lite. Griswold v. Hazels, 62 Neb. 888, 87 N.W. 1047 (1901).

Bond not properly conditioned will not continue injunction in force. O'Chander v. State, 46 Neb. 10, 64 N.W. 373 (1895).

On foreclosure of chattel mortgage, court may fix reasonable terms and amount of bond. State ex rel. Baker v. Baxter, 4 Neb. Unof. 869, 96 N.W. 647 (1903).

3. Discretion of court

Trial court may in its discretion grant supersedeas in cases not specified in this section, such as a divorce action. Hall v. Hall, 176 Neb. 555, 126 N.W.2d 839 (1964).

In other cases, court in its discretion may allow supersedeas; should fix terms as well as amount of bond. Carson v. Jansen, 65 Neb. 423, 91 N.W. 398 (1902).

Supersedeas may be allowed in other cases in discretion of court, and mandamus will not lie to compel approval. State ex rel. Dickinson Paper Co. v. Scott, 60 Neb. 98, 82 N.W. 320 (1900).

Court in its discretion may allow bond superseding writ of assistance in foreclosure case. Home Fire Ins. Co. v. Dutcher, 48 Neb. 755, 67 N.W. 766 (1886).

Court has no discretion with respect to prescribing amount of penalty for supersedeas of judgment for payment of money only. State ex rel. Walton v. Cornish, 48 Neb. 614, 67 N.W. 481 (1896).

4. Effect

An order determining child custody will not be superseded as a matter of right merely by the filing of a bond pursuant to this section. Friedenbach v. Friedenbach, 204 Neb. 587, 284 N.W.2d 285 (1979).

Where neither cost bond nor supersedeas has been filed, Supreme Court has no jurisdiction on appeal. Heinisch v. Travelers Mutual Casualty Co., 135 Neb. 13, 280 N.W. 234 (1938).

Where appellant executes supersedeas bond, but it is filed too late to operate as a supersedeas, it will operate as a cost bond on appeal if filed within time for that purpose. Occidental Bldg. & Loan Assn. v. Carlson, 134 Neb. 574, 279 N.W. 162 (1938).

Temporary restraining order cannot be continued in effect by giving supersedeas bond in case where trial court denies permanent injunction. Harbin v. Love, 119 Neb. 76, 227 N.W. 145 (1929).

Power of district court is suspended by filing of supersedeas bond. Carroll v. Polfus, 98 Neb. 657, 154 N.W. 213 (1915).

Unless bond is given, judgment is enforceable during pendency of appeal; court may grant supersedeas pending motion for new trial. Rice v. Parrott, 76 Neb. 501, 107 N.W. 840 (1906), affirmed on rehearing 76 Neb. 505, 111 N.W. 583 (1907).

Order granting writ of assistance in foreclosure is not supersedable by waste bond. Escritt v. Michaelson, 73 Neb. 634, 103 N.W. 300 (1905), affirmed on rehearing 73 Neb. 640, 106 N.W. 1016 (1906).

Bond to stay confirmation of order of sale also stays execution on deficiency judgment. Kountze v. Erck, 45 Neb. 288, 63 N.W. 804 (1895).

If not filed in twenty days, bond does not operate as supersedeas. Whitaker v. McBride, 5 Neb. Unof. 411, 98 N.W. 877 (1904).

Under Nebraska law, which applies to a foreign judgment after the judgment is filed in Nebraska, once a party appeals a monetary judgment for money only and files a supersedeas bond which is approved by the court in which judgment was rendered, the general lien resulting from the judgment is dissolved. Anderson v. Werner Enters., Inc., 7 Neb. App. 294, 581 N.W.2d 104 (1998).

5. Miscellaneous

If no motion for new trial is timely filed, a party who wishes to file a supersedeas bond must do so within 30 days of the entry of the judgment, decree, or other final order sought to be reversed, vacated, or modified. If a timely motion for new trial is filed, a party who wishes to file a supersedeas bond must do

so within 30 days of the ruling on the motion for new trial rather than the judgment, decree, or other order to which the motion for new trial was directed. Buffalo County v. Kizzier, 250 Neb. 180, 548 N.W.2d 757 (1996).

Where the owners of property sold in a partition sale appeal confirmation of the sale and file a supersedeas bond, and the confirmation is affirmed on appeal, the stay merely prevented the referee from carrying out the order of the trial court, and the buyer is entitled to profits and liable for taxes during the stay, but is not liable for interest on the unpaid balance of the purchase price, which was not due under the sale terms until delivery of a deed. Kleeb v. Kleeb, 213 Neb. 537, 330 N.W.2d 484 (1983).

This section is cited as illustration of the meaning of the term ''final judgment.'' Kometscher v. Wade, 177 Neb. 299, 128 N.W.2d 781 (1964).

Order approving consolidation of school districts was not a conveyance of property. School Dist. No. 65 of Perkins County v. McQuiston, 163 Neb. 246, 79 N.W.2d 413 (1956).

This section does not make supersedeas prerequisite to review of judgment on appeal. Burke v. Dendinger, 120 Neb. 594, 234 N.W. 405 (1931).

Time for filing of supersedeas bond in law action runs from overruling of motion for new trial, not from entry of judgment. First Nat. Bank of University Place v. Gates, 104 Neb. 230, 176 N.W. 726 (1920).

Dissolution of order appointing guardian for incompetent is supersedable in discretion of court. Prante v. Lompe, 74 Neb. 210, 104 N.W. 1150 (1905).

''Condemnation money'' is ''found'' when judgment below is affirmed. Maloney v. Johnson-McLean Co., 72 Neb. 340, 100 N.W. 423 (1904).

Though bond has been given, court may pass on pending motion for new trial. Armstrong v. Mayer, 69 Neb. 187, 95 N.W. 51 (1903).

Supreme Court may allow supersedeas. Carson v. Jansen, 65 Neb. 423, 91 N.W. 398 (1902).

To maintain action on bond, party need not first exhaust property of appellant. Palmer v. Caywood, 64 Neb. 372, 89 N.W. 1034 (1902).

Appeal without bond does not stay proceedings. Dovey v. McCullough, 60 Neb. 376, 83 N.W. 171 (1900).

Where trial court denies permission to intervene, intervener has no standing to supersede judgment. State ex rel. Bugbee v. Holmes, 59 Neb. 503, 81 N.W. 512 (1900).

Order to receiver to sell real estate is supersedable of right. State ex rel. German Savings Bank v. Fawcett, 58 Neb. 371, 78 N.W. 636 (1899).

Superseding order appointing receiver rests in discretion of court. Lowe v. Riley, 57 Neb. 252, 77 N.W. 758 (1898).

Surety is not released by death of appellant pending appeal by failure to revive action. Bell v. Walker, 54 Neb. 222, 74 N.W. 617 (1898).

Decree for permanent alimony is for payment of money and is supersedable of right. State ex rel. Beard v. Cook, 51 Neb. 822, 71 N.W. 733 (1897).

Third subdivision provides for appeal by owner or party in possession, not by purchaser. Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co., 51 Neb. 659, 71 N.W. 279 (1897).

Bond is not essential to review or appeal; is indispensable to stay proceedings. Creighton v. Keith, 50 Neb. 810, 70 N.W. 406 (1897).

Dissolution of temporary restraining order is not supersedable. State ex rel. Downing v. Greene, 48 Neb. 327, 67 N.W. 162 (1896).

If bond is not given, sale vests title in purchaser regardless of reversal of judgment. Green v. Hall, 43 Neb. 275, 61 N.W. 605 (1895).

Dismissal of appeal for want of prosecution affirms judgment. Dunterman v. Storey, 40 Neb. 447, 58 N.W. 949 (1894).

Unless exception is taken to confirmation of sale, mandamus will not lie to compel supersedeas. State v. Doane, 35 Neb. 707, 53 N.W. 611 (1892).

If decree quiets title in plaintiff and no bond is given, bona fide purchaser gets valid title though decree is later reversed. Parker v. Courtnay, 28 Neb. 605, 44 N.W. 863 (1890).

Fixing supersedeas is ministerial duty where allowed by this section, and mandamus will lie to compel approval. McBride v. Whitaker, 5 Neb. Unof. 399, 98 N.W. 847 (1904).

Administrator need not give bond on appeal. Michigan Mut. Life Ins. Co. v. Klatt, 5 Neb. Unof. 305, 98 N.W. 436 (1904).

Where decree is entered for foreclosure of mortgage and for deficiency judgment, party may supersede latter part of decree. State ex rel. Baker v. Baxter, 4 Neb. Unof. 869, 96 N.W. 647 (1903).

25-1917 Appeal; substitute for undertaking.

Instead of the undertaking prescribed in subdivision (2) of section 25-1916, the conveyance or other instrument may be executed and deposited with the clerk of the court in which the judgment was rendered or order made, to abide the judgment of the appellate court.

Source: R.S.1867, Code § 589, p. 498; R.S.1913, § 8190; C.S.1922, § 9142; C.S.1929, § 20-1917; R.S.1943, § 25-1917; Laws 1994, LB 899, § 2.

Deposit of order approving consolidation of school districts was not a substitute for supersedeas bond. School Dist. No. 65 of Perkins County v. McQuiston, 163 Neb. 246, 79 N.W.2d 413 (1956).

Where decree of trial court requires execution of a conveyance the appellant may, in lieu of bond, execute the required conveyance and deposit it with the clerk to abide the judgment of the appellate court. Walter v. Gillan, 129 Neb. 514, 262 N.W. 33 (1935).

25-1918 Appeal; bond; approval; by whom made.

Before any bond executed as aforesaid shall operate as a supersedeas, the execution of the same, and the sufficiency of the sureties therein, must be approved by the clerk of the court in which the judgment or decree was rendered or the final order was made.

Source: G.S.1873, c. 57, § 4, p. 717; R.S.1913, § 8191; C.S.1922, § 9143; C.S.1929, § 20-1918.

If sureties are responsible, clerk must approve. State ex rel. Beard v. Cook, 51 Neb. 822, 71 N.W. 733 (1897).

25-1919 Appeal; briefs; rules; plain error.

The Supreme Court shall by rule provide for the filing of briefs in all causes appealed to the Court of Appeals or Supreme Court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation, or modification of the judgment, decree, or final order alleged to be erroneous, but no petition in error or other assignment of errors shall be required beyond or in addition to such requirement. The Court of Appeals or Supreme Court may at its option consider a plain error not specified in appellant's brief.

Source: Laws 1907, c. 162, § 4, p. 496; R.S.1913, § 8192; C.S.1922, § 9144; C.S.1929, § 20-1919; R.S.1943, § 25-1919; Laws 1991, LB 732, § 57.

1. Assignments of error
2. Failure to assign error
3. Discussion of error
4. Plain error
5. Miscellaneous

1. Assignments of error

The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. State v. Erlewine, 234 Neb. 855, 452 N.W.2d 764 (1990).

This statute, in addition to Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), requires that each error assigned be separately stated in the appellant's brief. McCombs v. Prenosil, 226 Neb. 839, 415 N.W.2d 453 (1987).

Assignments of error must be set out in appellant's brief in order to be reviewed by the court. State v. Eckstein, 223 Neb. 943, 395 N.W.2d 515 (1986); United States Nat. Bank v. Feenan, 182 Neb. 524, 156 N.W.2d 29 (1968).

Assignments of error in brief are required to advise what questions are submitted for determination. Cook v. Lowe, 180 Neb. 39, 141 N.W.2d 430 (1966).

Brief of appellant is required to set out particularly each error relied upon for reversal. Northwestern Public Service Co. v. Juhl, 177 Neb. 625, 129 N.W.2d 570 (1964).

Assignments of error were sufficient. Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N.W.2d 486 (1962); First Nat. Bank of Elgin v. Adams, 82 Neb. 801, 118 N.W. 1055 (1908).

Function of assignments of error is to set out the issues presented on appeal. Backer v. City of Sidney, 165 Neb. 816, 87 N.W.2d 610 (1958).

The function of assignments of error is to set out the issues presented on appeal. Smallcomb v. Smallcomb, 165 Neb. 191, 84 N.W.2d 217 (1957).

Assignment of errors in brief is required, except that court may note a plain error not assigned. Schaffer v. Strauss Brothers, 164 Neb. 773, 83 N.W.2d 543 (1957).

An assignment of error must point out the error of which complaint is made. Van Wye v. Wagner, 163 Neb. 205, 79 N.W.2d 281 (1956); Okuda v. Hampton, 154 Neb. 886, 50 N.W.2d 108 (1951).

Brief of appellant is required to set out particularly each error asserted and intended to be urged on appeal. Guyette v. Schmer, 150 Neb. 659, 35 N.W.2d 689 (1949).

Where sufficiency of evidence to support verdict was assigned as error in motion for new trial and discussed in the briefs, Supreme Court would consider question although not formally assigned as error in the brief. In re Inda's Estate, 146 Neb. 179, 19 N.W.2d 37 (1945).

Brief must contain specific statement of errors complained of. Mauder v. State, 97 Neb. 380, 149 N.W. 800 (1914).

Brief should be upon particular questions involved, not a mere general classification of subjects. Witt v. Caldwell, 95 Neb. 484, 145 N.W. 1006 (1914).

Only one brief is required specifying errors; technical assignments are unnecessary. Waxham v. Fink, 86 Neb. 180, 125 N.W. 145 (1910).

2. Failure to assign error

Generalized and vague assertions do not advise the Supreme Court of the issues submitted for decision. In such a circumstance, the decision appealed from will be affirmed unless the Supreme Court elects to note plain error. In re Interest of Rasmussen, 236 Neb. 572, 462 N.W.2d 621 (1990).

Where the appellant's brief does not contain specific assignments of error as required by this section and Neb. Ct. R. of Prac. 9D(1)d, the judgment will be affirmed in the absence of any plain error this court may note. State v. Tracy, 228 Neb. 610, 423 N.W.2d 479 (1988); Nebraska Mut. Ins. Co. v. Farmland Indus., 227 Neb. 93, 416 N.W.2d 221 (1987).

If a brief filed in the Supreme Court fails to make any specific assignments of error, and absent any plain error which the court may note, the judgment of the lower court will be affirmed. In re Interest of P.W., 224 Neb. 197, 397 N.W.2d 36 (1986).

In the absence of an assigned error, the judgment of the district court will be affirmed unless the record discloses plain error prejudicial to the appellant. Baggett v. City of Omaha, 220 Neb. 805, 373 N.W.2d 391 (1985).

Generally, repetition of statutory grounds for new trial is insufficient as assignments of error upon appeal. Wieck v. Blessin, 165 Neb. 282, 85 N.W.2d 628 (1957); Labs v. Farmers State Bank of Millard, 135 Neb. 130, 280 N.W. 452 (1938).

Contention that damages were excessive, not having been alleged as ground of error in brief, will not be considered on appeal. Kuhlman v. Schacht, 130 Neb. 511, 265 N.W. 549 (1936).

Failure to assign errors in brief, as provided hereby, was sufficient to justify affirmance. Federal Land Bank of Omaha v. Elsemann, 121 Neb. 397, 237 N.W. 288 (1931).

Where there is no assignment of errors, or same are not sufficiently specific, judgment should be affirmed. Gorton v. Goodman, 107 Neb. 671, 187 N.W. 45 (1922); Sellers v. Johnson, 107 Neb. 669, 186 N.W. 989 (1922); Wielinga v. Beatrice Creamery Co., 95 Neb. 406, 145 N.W. 987 (1914).

Assignments of error not definitely set out or discussed in brief are not ordinarily considered. Packard v. De Voe, 94 Neb. 740, 144 N.W. 813 (1913); First Nat. Bank v. Hedgecock, 87 Neb. 220, 127 N.W. 171 (1910).

Where appellant, in an appeal from a county court decision, fails to file in district court a statement of errors within the time required by Neb. Ct. R. of Cty. Cts. 52(I)(G), the district court is precluded from considering appellant's assigned errors, and instead must review the record only for plain error; the judgment of the district court will be affirmed absent plain error in the record. State v. Harlan, 1 Neb. App. 184, 488 N.W.2d 374 (1992).

3. Discussion of error

The general rule is that the consideration of appeals to this court is limited to errors assigned and discussed. Unless assigned and argued, claimed errors relied upon for reversal will not be considered. Wellman v. Birkel, 220 Neb. 1, 367 N.W.2d 716 (1985).

Errors assigned but not discussed will generally not be considered on appeal. Holt County Co-op Assn. v. Corkle's, Inc., 214 Neb. 762, 336 N.W.2d 312 (1983); State v. Hochstetler, 214 Neb. 482, 334 N.W.2d 455 (1983).

Consideration of assignments of error by this court is limited to those discussed in the briefs; any not accordingly discussed will not be addressed. Flakus v. Schug, 213 Neb. 491, 329 N.W.2d 859 (1983).

Consideration of a cause on appeal is limited to errors assigned and discussed. McClellen v. Dobberstein, 189 Neb. 669, 204 N.W.2d 559 (1973); Trute v. Skeede, 162 Neb. 266, 75 N.W.2d 672 (1956).

Errors assigned but not argued in brief may be disregarded. Garska v. Harris, 172 Neb. 339, 109 N.W.2d 529 (1961).

4. Plain error

The Nebraska Supreme Court and Court of Appeals reserve the right to review the record for plain error, regardless of whether the error was raised at trial or on appeal. Miller v. Brunswick, 253 Neb. 141, 571 N.W.2d 245 (1997).

While this section provides that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, it also permits the Court of Appeals or Supreme Court to note any plain error not assigned. Law Offices of Ronald J. Palagi v. Dolan, 251 Neb. 457, 558 N.W.2d 303 (1997).

While this section and Neb. Ct. R. of Prac. 9D(1)d provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, they also permit the Supreme Court to note any plain error not assigned. Biddlecome v. Conrad, 249 Neb. 282, 543 N.W.2d 170 (1996).

Generally this court only considers errors assigned and discussed; however, by statute and court rule we may note plain error not assigned. Tautfest v. Tautfest, 215 Neb. 233, 338 N.W.2d 49 (1983); Hartman v. Hartmann, 150 Neb. 565, 35 N.W.2d 482 (1948).

The Supreme Court at its option may consider plain error not specified in appellant's brief. Schmidt v. Richman Gordman, Inc., 191 Neb. 345, 215 N.W.2d 105 (1974); Hamaker v. Patrick, 123 Neb. 809, 244 N.W. 420 (1932); American State Bank of Springfield v. Phelps, 120 Neb. 370, 232 N.W. 612 (1930).

The right of the Supreme Court to notice a plain error not assigned rests on this section and rule of court. Kirchner v. Gast, 169 Neb. 404, 100 N.W.2d 65 (1959).

Supreme Court may note a plain error not assigned. State ex rel. Fitzgerald v. Barkus, 168 Neb. 257, 95 N.W.2d 674 (1959); Dell v. City of Lincoln, 168 Neb. 174, 95 N.W.2d 336 (1959).

In divorce suit, court may at its option note a plain error not assigned. Zych v. Zych, 165 Neb. 586, 86 N.W.2d 611 (1957).

Court may consider error not specifically assigned to prevent improper disposal of public funds. State ex rel. J. L. Brandeis & Sons v. Melcher, 87 Neb. 359, 127 N.W. 241 (1910).

5. Miscellaneous

Where LSD tablet was used up in test and graph was not preserved, but it was stipulated results of laboratory test, investigation, and experiments were produced and copies given to defendant and no specific request for graph was made in discovery motion, refusal of court to suppress evidence was not error. State v. Batchelor, 191 Neb. 148, 214 N.W.2d 276 (1974).

Where appellee desires to have reviewed a portion of judgment against him, he must cross-appeal and assign error in relation thereto. Bastian v. Weber, 150 Neb. 709, 35 N.W.2d 791 (1949).

Sufficient exceptions were taken on behalf of accused. Scott v. State, 121 Neb. 232, 236 N.W. 608 (1931).

Affirmance for want of briefs is as conclusive as if case was briefed and argued. DeBolt v. McBrien, 96 Neb. 237, 147 N.W. 462 (1914).

25-1920 Appeal; injunctions; cause advanced, when.

In all actions in which a temporary injunction has been granted and entered in the district court, which order allowing the temporary injunction is or has been superseded for by law, and in which action the trial court, on the merits, determined that the temporary injunction ought not to have been granted and a permanent injunction was refused in such action, such cause shall be advanced by the Court of Appeals or Supreme Court for hearing. In all such actions, if the relief demanded involves the delivery of irrigation water and the Director of Natural Resources, as defined in section 25-1062.01, is a party, any appeal from the judgment or decree of the district court shall be perfected within thirty days after the entry of such judgment, decree, or final order by the district court, and the cause shall be advanced for hearing before the Court of Appeals or Supreme Court.

Source: Laws 1913, c. 100, § 1, p. 255; R.S.1913, § 8193; C.S.1922, § 9145; C.S.1929, § 20-1920; Laws 1941, c. 29, § 8, p. 136; C.S.Supp.,1941, § 20-1920; R.S.1943, § 25-1920; Laws 1959, c.

102, § 5, p. 426; Laws 1961, c. 113, § 2, p. 353; Laws 1987, LB 33, § 2; Laws 1991, LB 732, § 58; Laws 1999, LB 43, § 11; Laws 2000, LB 900, § 67.

25-1921 Repealed. Laws 1965, c. 126, § 1.

25-1922 Repealed. Laws 1965, c. 126, § 1.

25-1923 Appeal; original bill of exceptions; return to district court; disposition.

When any case or proceeding in which the record or transcript has been so made up has been finally determined in the Court of Appeals or Supreme Court, the original bill or bills of exceptions shall be by the Clerk of the Supreme Court transmitted to the clerk of the district court from which such case or proceeding was removed. It shall be the duty of the clerk of the district court to preserve such bill or bills of exceptions in the files of the office for a period of ten years from the time of receipt from the Clerk of the Supreme Court. After the lapse of such time, if the record in the district court does not show any unfinished matter pending in the case and upon such notice as the district court may direct, such bill or bills of exceptions may be removed from the files and disposed of in any way that the judge of the district court directs when approval is given by the State Records Administrator pursuant to the Records Management Act.

Source: Laws 1881, c. 28, § 3, p. 205; R.S.1913, § 8196; C.S.1922, § 9148; C.S.1929, § 20-1923; Laws 1941, c. 34, § 1, p. 44; C.S.Supp.,1941, § 20-1923; R.S.1943, § 25-1923; Laws 1969, c. 105, § 7, p. 482; Laws 1991, LB 732, § 59.

Cross References

Records Management Act, see section 84-1220.

25-1924 Appeal; original bill of exceptions; return to appellate court if rehearing allowed.

In the event a rehearing of any such cause or proceeding is allowed by the Court of Appeals or Supreme Court or if for any other reason the appellate court needs or desires the use of such original bill or bills of exceptions or testimony in equity and law cases, it may order the return of the same to it, and it shall be the duty of the clerk of the court in whose custody the same may be to transmit the same to the Clerk of the Supreme Court upon being personally served with a copy of such order of the appellate court, duly certified under the seal of the appellate court. The expense of the transmittal of such bills and testimony and the costs made in recording, certifying, and serving such order shall be taxed to the unsuccessful party to such suit or proceeding unless the appellate court orders otherwise. The party at whose instance such expense of transmittal is to be made shall advance the same to the clerk if required by him or her. Service of the certified copy of the order may be made by any person. If done by the sheriff of any county, his or her official return shall be sufficient evidence of the fact of service. If by any other person, the service shall be sufficiently proved by his or her affidavit to the fact.

Source: Laws 1885, c. 96, § 4, p. 379; R.S.1913, § 8197; C.S.1922, § 9149; C.S.1929, § 20-1924; R.S.1943, § 25-1924; Laws 1991, LB 732, § 60.

25-1925 Appeal; suits in equity; trial de novo.

In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

Source: Laws 1903, c. 125, § 1, p. 631; R.S.1913, § 8198; C.S.1922, § 9150; C.S.1929, § 20-1925; R.S.1943, § 25-1925; Laws 1991, LB 732, § 61.

1. Scope
2. Findings of trial court
3. Miscellaneous

1. Scope

In an appeal of an action in equity, this court tries the factual issues raised by the appellant's assignments of error de novo on the record and reaches its conclusions independent of the findings of the trial court. Romshek v. Osantowski, 237 Neb. 426, 466 N.W.2d 482 (1991).

An action to rescind a written instrument is an equity action. In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record. Kracl v. Loseke, 236 Neb. 290, 461 N.W.2d 67 (1990).

In an appeal in a dissolution of marriage action, the Supreme Court's review of the trial court's action is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. Brandt v. Brandt, 227 Neb. 325, 417 N.W.2d 339 (1988).

In an equitable action, the Supreme Court reviews the facts de novo without reference to the findings of fact made by the trial court, and reaches an independent conclusion. Lanphier v. OPPD, 227 Neb. 241, 417 N.W.2d 17 (1987); Dupuy v. Western State Bank, 221 Neb. 230, 375 N.W.2d 909 (1985); Haller v. Chiles, Heider & Co., Inc., 195 Neb. 65, 236 N.W.2d 822 (1975); Hansen v. Commonwealth Co., 174 Neb. 70, 115 N.W.2d 895 (1962); Nitzel & Co. v. Nelson, 144 Neb. 662, 14 N.W.2d 197 (1944); Sherwood v. Salisbury, 139 Neb. 838, 299 N.W. 185 (1941); Thurston v. Travelers Ins. Co., 128 Neb. 141, 258 N.W. 66 (1934); Kline v. Department of Public Works, 126 Neb. 587, 253 N.W. 861 (1934); Chizek v. City of Omaha, 126 Neb. 333, 253 N.W. 441 (1934).

In an appeal of a declaratory judgment action concerning an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record. Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha, 226 Neb. 50, 409 N.W.2d 574 (1987).

The record of an equity action is reviewed de novo on appeal. Lincoln East Bancshares v. Rierden, 225 Neb. 440, 406 N.W.2d 337 (1987).

Action in equity for restitution of value of improvements to leasehold is reviewed by Nebraska Supreme Court by trial de novo. Schmeckpeper v. Koertje, 222 Neb. 800, 388 N.W.2d 51 (1986).

Findings of fact in declaratory judgment decrees are reviewed de novo on the record by the Supreme Court. OB-GYN v. Blue Cross, 219 Neb. 199, 361 N.W.2d 550 (1985).

The district court may simply affirm a decision of the county court after giving that decision a de novo review. The Supreme Court will review probate matters de novo. In re Testamentary Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983).

An action for specific performance is an equity action and will be tried de novo on the record in the Supreme Court. Rybin Investment Co., Inc. v. Wade, 210 Neb. 707, 316 N.W.2d 744 (1982); Dowd Grain Co., Inc. v. Pflug, 193 Neb. 483, 227 N.W.2d 610 (1975); Friehe Farms, Inc. v. Haberman, 191 Neb. 292, 214 N.W.2d 916 (1974); Smith v. Hornkohl, 166 Neb. 702, 90 N.W.2d 347 (1958); Mainelli v. Neuhaus, 157 Neb. 392, 59 N.W.2d 607 (1953).

Acquisition of a prescriptive easement is an equitable action and, as such, it is the duty of the Supreme Court to try the issues de novo on the record and reach independent conclusions without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court observed the witnesses and their demeanor. Sturm v. Mau, 209 Neb. 865, 312 N.W.2d 272 (1981).

A lien foreclosure is an action in equity, and it is therefor the duty of the Supreme Court to retry the issues of fact upon the evidence in the record and reach an independent conclusion. O'Neill Production Credit Assoc. v. Mitchell, 209 Neb. 206, 307 N.W.2d 115 (1981).

A real estate foreclosure action is an action in equity, and upon appeal to the Supreme Court is tried de novo in conformity with this section, subject however to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the court will, in determining the weight of the evidence, consider the fact the trial court observed the witnesses and their manner of testifying and has accepted one version of the testimony rather than the opposite. Tilden v. Beckmann, 203 Neb. 293, 278 N.W.2d 581 (1979).

An action based on the claim of adverse possession is an action in equity and the Supreme Court will try the issue de novo on the record without reference to findings of the trial court; such independent conclusions of fact will be determined in accordance with ordinary rules governing burden of proof and competency and materiality of the evidence. Rentscheler v. Walnofer, 203 Neb. 84, 277 N.W.2d 548 (1979).

Equity appeals in Supreme Court are retried de novo on the record to reach an independent conclusion. Schupack v. McDonald's System, Inc., 200 Neb. 485, 264 N.W.2d 827 (1978); Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962).

Appeal from district court finding involving dependent children, voluntarily relinquished, is heard de novo on the record. State v. Worrell, 198 Neb. 507, 253 N.W.2d 843 (1977).

Appeals in proceedings to transfer land from one school district to another are governed by this section. Klecan v. Schmal, 196 Neb. 100, 241 N.W.2d 529 (1976).

An action to quiet title is an action in equity and is considered de novo on appeal. Bartlett v. Kloepping, 195 Neb. 755, 240

N.W.2d 592 (1976); Neylon v. Parker, 177 Neb. 187, 128 N.W.2d 690 (1964); Fitch v. Slama, 177 Neb. 96, 128 N.W.2d 377 (1964); Walker v. Bell, 154 Neb. 221, 47 N.W.2d 504 (1951); Eirich v. Ostwald, 154 Neb. 8, 46 N.W.2d 686 (1951); Duke v. Durfee, 308 F.2d 209 (8th Cir. 1962).

In appeals in equity, Supreme Court must try issues of fact de novo in accordance with rules governing burden of proof and competency and materiality of the evidence and reach independent conclusion. Campbell v. Buckler, 192 Neb. 336, 220 N.W.2d 248 (1974).

Issues of alimony and attorney's fees made de novo by Supreme Court on appeal. Barnes v. Barnes, 192 Neb. 295, 220 N.W.2d 22 (1974).

Trial de novo on appeal in Supreme Court not required by this section in proceeding under Political Subdivision Tort Claims Act. Craig v. Gage County, 190 Neb. 320, 208 N.W.2d 82 (1973).

Where appeal was pending in divorce case when the no fault divorce law became effective, the cause was triable de novo by the Supreme Court on the record in compliance with the provisions of that act. Lienemann v. Lienemann, 189 Neb. 626, 204 N.W.2d 170 (1973).

Issue of whether, under terms of the joint venture involved herein, one of its members had duty to account to joint venture was triable de novo in the Supreme Court. Cedars Corp. v. H. Krasne & Son, Inc., 189 Neb. 220, 202 N.W.2d 205 (1972).

Final order of separate juvenile court is triable de novo on the record in the Supreme Court. Grant v. Doeschot, 189 Neb. 121, 200 N.W.2d 252 (1972).

Review in the Supreme Court of proceedings in Court of Industrial Relations is in the manner provided by law for disposition of equity cases including an independent conclusion as to disputed issues of fact. City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N.W.2d 860 (1971).

Action in equity to establish a highway by prescription was required to be tried de novo upon appeal. Satterfield v. Dunne, 180 Neb. 274, 142 N.W.2d 345 (1966).

Proceeding for disconnection of land from a village is triable de novo in Supreme Court. Shelton Grain & Supply Co. v. Village of Shelton, 178 Neb. 695, 134 N.W.2d 815 (1965).

On review in Supreme Court, examination of the conclusion of the district court is not prohibited. Weise v. Klassen, 177 Neb. 496, 129 N.W.2d 527 (1964).

Proceeding to determine statutory allowances in estate proceeding was triable de novo in Supreme Court. Parker v. Comstock, 177 Neb. 197, 128 N.W.2d 696 (1964).

Proceeding for formation of sanitary and improvement district was triable de novo in Supreme Court. Zwink v. Ahlman, 177 Neb. 15, 128 N.W.2d 121 (1964).

On appeal in divorce case, Supreme Court is required to try case de novo on the record. Upah v. Upah, 175 Neb. 606, 122 N.W.2d 507 (1963); Jones v. Jones, 173 Neb. 880, 115 N.W.2d 462 (1962); Jablonski v. Jablonski, 173 Neb. 544, 114 N.W.2d 1 (1962); Scholz v. Scholz, 172 Neb. 184, 109 N.W.2d 156 (1961); Spencer v. Spencer, 158 Neb. 629, 64 N.W.2d 348 (1954); Schwarting v. Schwarting, 158 Neb. 99, 62 N.W.2d 315 (1954); Hoffmeyer v. Hoffmeyer, 157 Neb. 842, 62 N.W.2d 138 (1954); Mason v. Mason, 157 Neb. 279, 59 N.W.2d 365 (1953); NcNamee v. McNamee, 154 Neb. 212, 47 N.W.2d 383 (1951); Zoppelli v. Zoppelli, 153 Neb. 577, 45 N.W.2d 599 (1951); Nickerson v. Nickerson, 152 Neb. 799, 42 N.W.2d 861 (1950); Ristow v. Ristow, 152 Neb. 615, 41 N.W.2d 924 (1950); Peterson v. Peterson, 152 Neb. 571, 41 N.W.2d 847 (1950); Eicher v. Eicher, 148 Neb. 173, 26 N.W.2d 808 (1947).

Action to declare zoning ordinance void was triable de novo in Supreme Court. Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963).

Proceeding for remission of bail is equitable in nature. State v. Seaton, 170 Neb. 687, 103 N.W.2d 833 (1960).

Action to quiet title against tax deed alleged to be void was triable de novo in Supreme Court. Thomas v. Flynn, 169 Neb. 458, 100 N.W.2d 37 (1959).

Action to enjoin liquor nuisance was triable de novo on appeal to Supreme Court. State ex rel. Fitzgerald v. Kubik, 167 Neb. 219, 92 N.W.2d 533 (1958).

Claims for benefits under Employment Security Law are tried de novo in Supreme Court. A. Borchman Sons v. Carpenter, 166 Neb. 322, 89 N.W.2d 123 (1958).

Where suit at inception was one in equity, review in Supreme Court was governed by this section. Dargue v. Chaput, 166 Neb. 69, 88 N.W.2d 148 (1958).

Action for rescission of a contract is triable de novo. Caruso v. Moy, 164 Neb. 68, 81 N.W.2d 826 (1957).

Action to detach lands from municipality is triable de novo in Supreme Court. Egan v. Village of Meadow Grove, 159 Neb. 207, 66 N.W.2d 425 (1954).

Action to set aside deed was triable de novo in Supreme Court. Eggert v. Schroeder, 158 Neb. 65, 62 N.W.2d 266 (1954); Cain v. Killian, 156 Neb. 132, 54 N.W.2d 368 (1952); Wiskocil v. Kliment, 155 Neb. 103, 50 N.W.2d 786 (1952).

Action to enjoin violation of restrictive covenant was triable de novo on appeal. Gallagher v. Vogel, 157 Neb. 670, 61 N.W.2d 245 (1953).

Action to enjoin construction of ditches to drain land was triable de novo. Bussell v. McClellan, 155 Neb. 875, 54 N.W.2d 81 (1952).

Appeals in guardianship matters are heard de novo in Supreme Court. Cass v. Pense, 155 Neb. 792, 54 N.W.2d 68 (1952).

Action to establish oral agreement of joint adventure was triable de novo. Rossbach v. Bilby, 155 Neb. 575, 52 N.W.2d 747 (1952).

Action for accounting of partnership assets was triable de novo in Supreme Court. Byram v. Thompson, 154 Neb. 756, 49 N.W.2d 628 (1951).

Contest over sufficiency of election by widow to take under statute was triable de novo in Supreme Court. In re Estate of Bergren, 154 Neb. 289, 47 N.W.2d 582 (1951).

Equity case is tried de novo on appeal. Molczyk v. Molczyk, 154 Neb. 163, 47 N.W.2d 405 (1951); Trowbridge v. Donner, 152 Neb. 206, 40 N.W.2d 655 (1950); Pitman v. Henkens, 125 Neb. 621, 251 N.W. 282 (1933).

Action of partition was triable de novo in Supreme Court. Frankenberger v. Holm, 154 Neb. 80, 46 N.W.2d 901 (1951).

Action to establish plaintiff's right to a road was triable de novo. Magnuson v. Coburn, 154 Neb. 24, 46 N.W.2d 775 (1951).

Action to have warranty deed declared void for lack of delivery was an equitable action reviewable de novo in Supreme Court. Cerveny v. Cerveny, 154 Neb. 1, 46 N.W.2d 632 (1951).

Action in equity to recover proceeds of insurance policy was triable de novo on appeal. Hall v. Modern Woodmen of America, 153 Neb. 600, 45 N.W.2d 630 (1951).

Actions in equity are triable de novo in Supreme Court, subject to observance of witnesses rule. Sopcich v. Tangeman, 153 Neb. 506, 45 N.W.2d 478 (1951).

Action to reform contract for purchase of lands is equitable in nature, and is triable de novo on appeal by the Supreme Court. Kear v. Hausmann, 152 Neb. 512, 41 N.W.2d 850 (1950).

Action for specific performance of a contract to convey real estate was triable de novo in the Supreme Court. Nelson v. Cross, 152 Neb. 197, 40 N.W.2d 663 (1950).

Action to establish rights of partners to assets of partnership was equitable in nature and required trial de novo in Supreme Court. Baum v. McBride, 152 Neb. 152, 40 N.W.2d 649 (1950).

In proceeding by State Fire Marshal to condemn building, review in Supreme Court is by trial de novo as in equity. In re Application of Iverson, 151 Neb. 802, 39 N.W.2d 797 (1949).

Proceedings to detach agricultural lands from municipality are triable de novo in the Supreme Court. Kuebler v. City of Kearney, 151 Neb. 698, 39 N.W.2d 415 (1949).

Actions in equity are tried de novo on appeal in Supreme Court subject to specified conditions. Maddox v. Maddox, 151 Neb. 626, 38 N.W.2d 547 (1949).

Appeal in equity case presents entire record in Supreme Court for trial de novo. Security Investment Co. v. Golz, 151 Neb. 172, 36 N.W.2d 862 (1949).

It is duty of Supreme Court to retry issues in equity case without reference to the conclusion reached in the district court. Garner v. City of Aurora, 149 Neb. 295, 30 N.W.2d 917 (1948); Gable v. Carpenter, 136 Neb. 669, 287 N.W. 70 (1939).

Where damages are sought in an action for mandatory injunction requiring defendant to increase the carrying capacity of a canal, the case is properly triable de novo in the Supreme Court. Faught v. Platte Valley P. P. & I. Dist., 147 Neb. 1032, 25 N.W.2d 889 (1947).

An appeal from a judgment quieting title on cross-petition of a defendant in mortgage foreclosure suit is tried in Supreme Court de novo. Evers v. Evers, 146 Neb. 104, 18 N.W.2d 673 (1945).

In an equity case the Supreme Court must try the case de novo and reach an independent conclusion as to the findings of fact and of the law. Robinson v. Dawson County Irr. Co., 145 Neb. 32, 15 N.W.2d 231 (1944).

An appeal to the district court from a county board of equalization is heard as an equity matter, and on appeal to Supreme Court is for trial de novo. Weller v. County of Valley, 141 Neb. 69, 2 N.W.2d 606 (1942).

In suit by heirs against administrator of estate seeking to hold him liable as trustee, appeal to Supreme Court is tried de novo. Meade v. Van de Voorde, 139 Neb. 827, 299 N.W. 175 (1941).

Appeal in suit to enjoin defendant from engaging in business in violation of contract is tried de novo on appeal to Supreme Court. Conrad v. Kaup, 137 Neb. 900, 291 N.W. 687 (1940).

Appeal is for trial de novo hereunder. Petersen Baking Co. v. Bryan, 124 Neb. 464, 247 N.W. 39 (1933).

In mechanic's lien foreclosure, Supreme Court is required to try case de novo. York Brick & Tile Co. v. Ude Motor Co., 123 Neb. 154, 242 N.W. 361 (1932).

Action in nature of creditor's bill was for trial de novo in Supreme Court. Cary v. Reiter, 122 Neb. 476, 240 N.W. 582 (1932).

Action for annulment of marriage was required to be tried de novo. O'Reilly v. O'Reilly, 120 Neb. 720, 234 N.W. 916 (1931).

Interpleader suit is one in equity, and is determined de novo on appeal. Citizens Nat. Bank of Wisner v. McNamara, 120 Neb. 252, 231 N.W. 781 (1930).

If allegations are sufficient to present executor's right to retain and apply legacy on debt, issue is determined on appeal de novo regardless of surplusage. First Trust Co. of Lincoln v. Cornell, 114 Neb. 126, 206 N.W. 749 (1925).

Suit to rescind subscription to corporate stock is triable de novo on appeal. Edgar v. Skinner Packing Co., 112 Neb. 752, 200 N.W. 992 (1924); Brown v. Stroud & Co., 112 Neb. 210, 199 N.W. 33 (1924).

Suit to cancel mortgages and remove cloud is triable de novo. King v. DeTar, 112 Neb. 535, 199 N.W. 847 (1924).

Action originally commenced at law, but heard in equity below on motion of party, is triable de novo on appeal. Miller v. Baker, 112 Neb. 375, 199 N.W. 845 (1924).

In suit to redeem by party not served with process, validity of sheriff's return showing service is triable de novo. First Nat. Bank of Lexington v. Anderson, 106 Neb. 204, 182 N.W. 1021 (1921).

In ejectment, where only defense is equitable, case is triable de novo in Supreme Court. Tillson v. Holloway, 94 Neb. 635, 143 N.W. 939 (1913).

Section is not applicable to trials to court in law cases. First Nat. Bank of West Point v. Crawford, 78 Neb. 665, 111 N.W. 587 (1907).

Suit to enjoin payment of guaranty fund assessments was tried de novo in Supreme Court. Abie State Bank v. Weaver, 282 U.S. 765 (1931).

2. Findings of trial court

In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. Hughes v. Enterprise Irrigation Dist., 226 Neb. 230, 410 N.W.2d 494 (1987); Schmidt v. Chimney Rock Irrigation Dist., 209 Neb. 1, 305 N.W.2d 888 (1981); Kinkenon v. Hue, 207 Neb. 698, 301 N.W.2d 77 (1981).

An equitable matter is reviewed by this court de novo on the record, subject to the rules that where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, and where the trial court has viewed the premises, this court is required to consider any competent and relevant facts revealed by the viewing and any finding made by the trial court, provided that the record contains competent evidence to support the findings. Burgess v. Omahawks Radio Control Org., 219 Neb. 100 362 N.W.2d 27 (1985).

This court reviews matters equitable in nature de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. Masid v. First State Bank, 213 Neb. 431, 329 N.W.2d 560 (1983); Seybold v. Seybold, 191 Neb. 480, 216 N.W.2d 179 (1974); Rettinger v. Pierpont, 145 Neb. 161, 15 N.W.2d 393 (1944); Otto v. L. L. Coryell & Son, 141 Neb. 498, 3 N.W.2d 915 (1942); Chitwood Packing Co. v. Warner, 138 Neb. 800, 295 N.W. 882 (1941); First Trust Co. of Lincoln v. Airedale Ranch & Cattle Co., 136 Neb. 521, 286 N.W. 766 (1939); Kennedy v. Buffalo County, 134 Neb. 744, 279 N.W. 464 (1938); Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N.W. 869 (1934); Gaunt v. Smith, 103 Neb. 506, 172 N.W. 365 (1919); Shafer v. Beatrice State Bank, 99 Neb. 317, 156 N.W. 632 (1916).

On trial de novo of equity case with irreconcilable evidence on material issue, fact that district court made personal observation of physical facts should be considered. Winkle v. Mitera, 195 Neb. 821, 241 N.W.2d 329 (1976).

Upon appeal in mechanics' lien actions, when the testimony of witnesses orally examined before the court upon the vital issues is conflicting, the Supreme Court, while trying the case de novo, will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Modern Plumbing & Heating, Inc. v. Journey West Campground, Inc., 193 Neb. 781, 229 N.W.2d 192 (1975).

Appeals from the Court of Industrial Relations are to be heard and disposed of de novo, but the superior position of the original trier of fact is to be respected and accorded great weight. Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N.W.2d 752 (1975); Mid-Plains Education Assn. v. Mid-Plains Nebraska Tech. College, 189 Neb. 37, 199 N.W.2d 747 (1972).

In actions in equity, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the district court. Shirk v. Schmunk, 192 Neb. 25, 218 N.W.2d 433 (1974); Stocker v. Wells, 150 Neb. 51, 33 N.W.2d 445 (1948).

On appeal in equity, Supreme Court is required to make independent conclusions of fact and review is not restricted by fact there may be some evidence to support district court's conclusion or judgment. Schuller v. Schuller, 191 Neb. 266, 214 N.W.2d 617 (1974).

This section does not disturb conclusiveness of decisions of fact by juries or by trial judges sitting in their stead in law cases. Larutan Corp. v. Magnolia Homes Manuf. Co., 190 Neb. 425, 209 N.W.2d 177 (1973).

Where district court had only cold record before it, the rule pertaining to Supreme Court's consideration of the opportunity of the trial court in equity to observe the witnesses is inapplicable. C & L Co. v. Nebraska Liquor Control Commission, 190 Neb. 91, 206 N.W.2d 49 (1973).

In equity, issues of fact are tried de novo in the Supreme Court and, in reviewing findings insofar as credibility of witnesses is concerned, the Supreme Court will take into consideration that the trial court observed the witnesses and their manner of testifying. First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 553, 203 N.W.2d 770 (1973); O'Brien v. Fricke, 148 Neb. 369, 27 N.W.2d 403 (1947); Beskas v. Calkins, 135 Neb. 323, 281 N.W. 29 (1938); Ohme v. Thomas, 134 Neb. 727, 279 N.W. 480 (1938); Burrows v. Keebaugh, 120 Neb. 136, 231 N.W. 751 (1930); Peterson v. Winkelmann, 114 Neb. 714, 209 N.W. 499 (1926); Magill v. Magill, 114 Neb. 636, 209 N.W. 241 (1926); Enterprise Planing Mill Co. v. Methodist Episcopal Church of Sterling, 100 Neb. 29, 158 N.W. 386 (1916); Nelson v. City of Florence, 94 Neb. 847, 144 N.W. 791 (1913); Tillson v. Holloway, 94 Neb. 635, 143 N.W. 939 (1913).

In equity case, Supreme Court is required to reach an independent conclusion without reference to findings of district court. Mid-America Appliance Corp. v. Federated Finance Co., 172 Neb. 270, 109 N.W.2d 381 (1961); Toelle v. Preuss, 172 Neb. 239, 109 N.W.2d 293 (1961).

Supreme Court may take into consideration view of premises by trial court. Hehnke v. Starr, 158 Neb. 575, 64 N.W.2d 68 (1954); Lackaff v. Bogue, 158 Neb. 174, 62 N.W.2d 889 (1954).

Actions in equity are triable de novo in the Supreme Court, subject to the condition arising from determination of credibility of witnesses by trial court. Parrott v. Hofmann, 151 Neb. 249, 37 N.W.2d 199 (1949).

In equity suit, trial de novo is necessary and Supreme Court is required to reach an independent conclusion, without reference to the fact that there may be some evidence in support of findings of trial court. Goodwin v. Freadrich, 135 Neb. 203, 280 N.W. 917 (1938).

In determination of appeals in equity, Supreme Court will reach independent conclusions as to findings under pleadings and evidence without reference to those of the district court. Ericson v. Nebraska-Iowa Farm Inv. Co., 134 Neb. 391, 278 N.W. 841 (1938).

Where testimony is in conflict and principal fact to be determined rests on evidence of interested witnesses, court will give considerable weight to judgment of trial court. Dvorak v. Kucera, 130 Neb. 341, 264 N.W. 737 (1936).

In trial de novo court will give weight to findings of trial court on questions of fact but if convinced that the facts are otherwise will so find. Coe v. Talcott, 130 Neb. 32, 263 N.W. 596 (1935).

Where trial court has made a personal examination of physical facts involved and where oral evidence as to material issues is conflicting, appellate court will consider trial court's decision thereon in reaching independent conclusion hereunder. City of Wilber v. Bednar, 123 Neb. 324, 242 N.W. 644 (1932).

Supreme Court is required to dispose of appeal without reference to conclusion of court below. State v. Lovell, 117 Neb. 710, 222 N.W. 625 (1929); Colby v. Foxworthy, 80 Neb. 239, 114 N.W. 174 (1907), rehearing denied 80 Neb. 244, 115 N.W. 1076 (1908).

Where evidence on material issues is in irreconcilable conflict, court will consider findings below. In re Estate of Waller, 116 Neb. 352, 217 N.W. 588 (1928); Jones v. Dooley, 107 Neb. 162, 185 N.W. 307 (1921); Greusel v. Payne, 107 Neb. 84, 185 N.W. 336 (1921); Wetherell v. Adams, 80 Neb. 584, 114 N.W. 778 (1908).

Where trial court has examined physical facts and oral evidence is conflicting, Supreme Court will consider trial court's examination and observation of witnesses. State v. Delaware-Hickman Ditch Co., 114 Neb. 806, 210 N.W. 279 (1926).

It is the duty of Supreme Court to retry case. Coad v. Coad, 87 Neb. 290, 127 N.W. 455 (1910).

Findings below are not conclusive but entitled to consideration if not to considerable weight. Corn Exchange Nat. Bank of Chicago v. Jansen, 70 Neb. 579, 97 N.W. 814 (1903).

3. Miscellaneous

Specific performance of contract on realty denied where circumstances revealed time was of the essence. Menke v. Foote, 199 Neb. 800, 261 N.W.2d 635 (1978).

Assignments of error are required even though trial is de novo. Smallcomb v. Smallcomb, 165 Neb. 191, 84 N.W.2d 217 (1957).

Upon trial de novo, finding of nonexistence of valid option was sustained. Budde v. Anderson, 156 Neb. 812, 58 N.W.2d 204 (1953).

In equity case, presumption obtains that trial court considered only such evidence as was competent and relevant. Rohn v. Kelley, 156 Neb. 463, 56 N.W.2d 711 (1953).

In action in equity where trial is de novo, court may do that which in equity and good conscience should be done. Mangiameli v. Mangiameli, 153 Neb. 753, 45 N.W.2d 910 (1951).

Where, in a trial in equity, the district court receives evidence over objection, and a motion for new trial is not made, the Supreme Court upon trial de novo will consider such evidence preserved in the bill of exceptions and give it whatever probative value it may have. Nemetz v. Nemetz, 147 Neb. 187, 22 N.W.2d 619 (1946).

Since equity suit is tried de novo in Supreme Court, remarks of trial court indicating prejudice will not cause reversal. Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N.W.2d 634 (1944).

Rule that appeals in equity must be tried de novo in Supreme Court is subject to the qualification that where defendant moves to dismiss at the close of plaintiff's case, and motion is sustained, the court on appeal will treat the plaintiff's testimony as true, together with every conclusion which may fairly and reasonably be drawn therefrom. Meyer v. Platt, 137 Neb. 714, 291 N.W. 86 (1940).

On trial de novo evidence was insufficient to prove alleged lost or stolen contract on which plaintiff relied. Cohen v. Swanson Petroleum Co., 133 Neb. 581, 276 N.W. 190 (1937).

In proceedings to establish heirship, where only questions of fact are involved, parties are entitled to jury; no trial de novo on appeal. In re O'Connor's Estate, 117 Neb. 636, 222 N.W. 57 (1928).

Appeal suspends divorce decree, and brings case up for trial de novo. Westphalen v. Westphalen, 115 Neb. 217, 212 N.W. 429 (1927).

Facts alleged must be supported by competent evidence to entitle plaintiff to decree in trial de novo on appeal. Miksch v. Tassler, 108 Neb. 208, 187 N.W. 796 (1922).

Judgment should be affirmed if, for sufficient reason appearing in record, it was correct. Dappen v. Weber, 106 Neb. 812, 184 N.W. 952 (1921).

Evidence must be preserved in bill of exceptions for trial of issue of fact de novo. Thies v. Thies, 103 Neb. 499, 172 N.W. 364 (1919), affirmed on rehearing 103 Neb. 501, 175 N.W. 646 (1919).

Supreme Court is not required to try whole case de novo, but to try and independently decide such issues only as are presented by appeal. Northwestern Mutual Life Ins. Co. v. Mallory, 93 Neb. 579, 141 N.W. 190 (1913).

Ordinary rules as to burden of proof, competency, and materiality of evidence, apply. Beckman v. Lincoln & N. W. R. R. Co., 79 Neb. 89, 112 N.W. 348 (1907).

Presumption in favor of findings exists where testimony was given orally but not by deposition. Roe v. Howard County, 75 Neb. 448, 106 N.W. 587 (1906).

Amended petition to conform to facts proved in record may be filed. Raley v. Raymond Bros. Clarke Co., 73 Neb. 496, 103 N.W. 57 (1905).

Findings based upon depositions are disregarded; if based on oral testimony are not regarded unless upon whole record appear correct. Naudain v. Fullenwider, 72 Neb. 221, 100 N.W. 296 (1904).

There is no presumption in favor of findings. Michigan Trust Co. v. City of Red Cloud, 69 Neb. 585, 96 N.W. 140 (1903), rehearing denied 69 Neb. 592, 98 N.W. 413 (1904).

Court may still remand for further proceedings. Hanson v. Hanson, 4 Neb. Unof. 880, 97 N.W. 23 (1903).

Plaintiff's death during de novo appeal has the same effect as if he or she had died before the trial court's judgment. Fitzgerald v. Clarke, 9 Neb. App. 898, 621 N.W.2d 844 (2001).

25-1926 Appeal; reversal of judgment; mandate.

When a judgment or final order is reversed either in whole or in part in the Court of Appeals or Supreme Court, the appellate court shall proceed to render such judgment as the court below should have rendered or remand the cause to the court below for such judgment. The appellate court shall not issue execution in causes that are removed to it on error on which it pronounced judgment but shall send a special mandate to the court below, as the case may require, to award execution thereupon. The court to which such special mandate is sent shall proceed in such case in the same manner as if such judgment or final order had been rendered therein, and on motion and good cause shown, it may suspend any execution made returnable before it by order of the appellate court in the same manner as if such execution had been issued from its own court, but such power shall not extend further than to stay proceedings until the matter can be further heard by the appellate court.

Source: R.S.1867, Code § 594, p. 499; Laws 1875, § 1, p. 40; R.S.1913, § 8199; Laws 1915, c. 21, § 2, p. 82; C.S.1922, § 9151; C.S. 1929, § 20-1926; R.S.1943, § 25-1926; Laws 1991, LB 732, § 62.

1. Affirmance
2. Reversal
3. Remanded with directions
4. Miscellaneous

1. Affirmance

When evidence is substantially same as on first appeal questions held foreclosed by former decision. Hruby v. Sovereign Camp, W. O. W., 83 Neb. 800, 120 N.W. 427 (1909).

Judgment will not be reversed for mere technical error not prejudicial to appellant. Kimmerly v. McMichael, 83 Neb. 789, 120 N.W. 487 (1909).

On affirmance clerk may issue execution. Porter v. Sherman County Banking Co., 40 Neb. 274, 58 N.W. 721 (1894); State ex rel. Noble v. Sheldon, 26 Neb. 151, 42 N.W. 335 (1889).

2. Reversal

The rule, that a verdict will not be disturbed where there is some evidence tending to support it, does not apply where the verdict is opposed to the undisputed physical facts of the case. Parish v. County Fire Ins. Co. of Philadelphia, 134 Neb. 563, 279 N.W. 170 (1938).

In election contest where contestant failed to prove illegal acts alleged, judgment will be reversed and suit dismissed. Mehrens v. Election Canvassing Board of Douglas County, 134 Neb. 151, 278 N.W. 252 (1938).

In case where trial court sought to correct a supposed error in failing to sustain a motion for directed verdict by vacating the verdict returned and then dismissing the action, Supreme Court will, upon reversing the judgment of dismissal, if no other error is presented by the record, proceed to render such judgment as the court below should have rendered, or remand the cause to lower court for that purpose. LeBarron v. City of Harvard, 129 Neb. 460, 262 N.W. 26 (1935).

It is optional with Supreme Court to render such judgment as court below should have rendered or to remand cause to the district court for such judgment. Harvey v. Godding, 77 Neb. 289, 109 N.W. 220 (1906).

3. Remanded with directions

When the Supreme Court vacates or sets aside a general verdict it should either grant a new trial or remand the cause to the trial court for such judgment. In re George's Estate, 144 Neb. 915, 18 N.W.2d 68 (1945).

Where trial court erroneously vacated verdict and judgment and dismissed action, Supreme Court, on reversing judgment of dismissal, if no other error is presented, will remand cause with directions that verdict and judgment be reinstated. Netusil v. Novak, 120 Neb. 751, 235 N.W. 335 (1931).

In reversing a law action, Supreme Court has jurisdiction to direct district court to render judgment in favor of successful party. Armsby Co. v. Raymond Bros.-Clarke Co., 90 Neb. 773, 134 N.W. 920 (1912).

New parties cannot be brought in after case is remanded with specific directions. Gund v. Ballard, 80 Neb. 385, 114 N.W. 420 (1907).

When case is remanded without directions, trial court should retrace steps to place where first material error occurred. Colby v. Foxworthy, 78 Neb. 288, 110 N.W. 857 (1907).

Where case is remanded generally, district court has discretion as to further proceedings. Gadsden v. Thrush, 72 Neb. 1, 99 N.W. 835 (1904).

4. Miscellaneous

Supreme Court can make any order that district court is authorized to make. Fick v. Herman, 161 Neb. 110, 72 N.W.2d 598 (1955).

Supreme Court may remove guardian appointed by trial court, and appoint another having no interest in ward's estate. Keiser v. Keiser, 113 Neb. 645, 204 N.W. 394 (1925).

Supreme Court has jurisdiction to entertain plea in abatement based on matters happening after appeal perfected. Irwin v. Jetter Brewing Co., 101 Neb. 409, 163 N.W. 470 (1917).

Supreme Court may order remittitur, and reverse if not filed, where judgment below is clearly excessive. Nutter v. Standard Land Co., 100 Neb. 548, 160 N.W. 948 (1916).

Judgment in obedience to mandate is final and will not be superseded or reversed on appeal. Kerr v. McCreary, 86 Neb. 786, 126 N.W. 299 (1910).

Supreme Court cannot enlarge scope of trial court's findings. Sowerwine v. Central Irr. Dist., 85 Neb. 687, 124 N.W. 118 (1909).

A judgment is not considered an entirety unless the interests of the judgment debtors are inseparable. Sturgis, Cornish & Burn Co. v. Miller, 79 Neb. 404, 112 N.W. 595 (1907).

Applicability to appeal cases is questioned. Hoagland v. Stewart, 71 Neb. 102, 98 N.W. 428 (1904), rehearing denied 71 Neb. 106, 100 N.W. 133 (1904).

District court must obey mandate; cannot permit intervention. State ex. rel. Bradbury v. Thompson, 69 Neb. 157, 95 N.W. 47 (1903).

Obedience to mandate may be enforced by mandamus. State ex rel. Horton v. Dickinson, 63 Neb. 869, 89 N.W. 431 (1902).

Court may recall mandate during term before it is acted upon. Horton v. State ex rel. Hayden, 63 Neb. 34, 88 N.W. 146 (1901).

Mistake in entry of judgment may be corrected without remanding cause for new trial. Youngson v. Pollock, 25 Neb. 431, 41 N.W. 279 (1889).

25-1927 Original cause in Supreme Court; complete record upon final determination; waiver.

A complete record of every original cause in the Supreme Court, as soon as it is finally determined, shall be made by the clerk of such court, unless both parties shall declare in open court, at the term at which the final order or judgment shall be made or hearing had, their agreement that no record shall be made.

Source: G.S.1873, c. 57, § 12, p. 713; Laws 1899, c. 86, § 1, p. 342; R.S.1913, § 8200; C.S.1922, § 9152; C.S.1929, § 20-1927.

25-1928 Appeal; mistake of clerk; effect; procedure.

A mistake, neglect or omission of the clerk shall not be a ground of error, until the same has been presented and acted upon in the court in which the mistake, neglect or omission occurred.

Source: R.S.1867, Code § 597, p. 500; R.S.1913, § 8201; C.S.1922, § 9153; C.S.1929, § 20-1928.

Clerk's mistake, neglect, or omission in entering judgment on verdict is not ground of error until presented and acted upon in court in which it occurred. Crete Mills v. Stevens, 120 Neb. 794, 235 N.W. 453 (1931).

Section applied to error in inserting erroneous answer day in summons in county court. Ley v. Pilger, 59 Neb. 561, 81 N.W. 507 (1900).

25-1929 Appeal; remittitur; effect.

Whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that the remittitur should not have been required either in whole or in part.

Source: Laws 1915, c. 247, § 1, p. 567; C.S.1922, § 9154; C.S.1929, § 20-1929.

Where interest before judgment is not prayed for as an element of damages, action of trial court in ordering remittitur will not be disturbed upon ground that party was entitled to interest upon claim before judgment. Welch v. Reeves, 142 Neb. 171, 5 N.W.2d 275 (1942).

Where recovery is had upon cause of action for wrongful death and also for cause of action for pain and suffering sustained by the deceased until his death and for medical and burial expenses, remittitur ordered by trial court of lump sum from verdict was treated as applying to latter cause of action. Vanderlippe v. Midwest Studios, 137 Neb. 289, 289 N.W. 341 (1939).

Request to restore amount remitted was denied in negligence case. Banta v. McChesney, 127 Neb. 764, 257 N.W. 68 (1934).

Where trial court ordered remittitur cutting verdict by half, Supreme Court will vacate that portion of remittitur which is excessive. Mangiameli v. Ariano, 126 Neb. 629, 253 N.W. 871 (1934).

Where issues of fact are controverted and findings of jury under the court's instructions warrant recovery, trial court may not require successful party to file remittitur of such recovery. Loy v. Storz Electric Refrigeration Co., 122 Neb. 357, 240 N.W. 423 (1932).

Supreme Court may reduce amount of remittitur ordered by the district court. Christoffersen v. Weir, 110 Neb. 390, 193 N.W. 922 (1923); Miller v. Central Taxi Co., 110 Neb. 306, 193 N.W. 919 (1923).

Order requiring remittitur resting on substantial basis in the evidence will not be reversed. Hellerich v. Central Granaries Co., 104 Neb. 818, 178 N.W. 919 (1920).

Where not convinced that trial court erred in requiring remittitur, order will not be disturbed. Chicago & N. W. Ry. Co. v. Queenan, 102 Neb. 391, 167 N.W. 410 (1918); Wunrath v. Peoples Furniture & Carpet Co., 100 Neb. 539, 160 N.W. 971 (1916).

(c) GENERAL PROVISIONS

25-1930 Civil cases; writs of error abolished.

Writs of error to reverse, vacate, or modify judgments or final orders in civil cases are abolished, but courts shall have the same power to compel complete and perfect transcripts of the proceedings containing the judgment or final order sought to be reversed to be furnished as they formerly had under writs of error.

Source: R.S.1867, Code § 599, p. 500; R.S.1913, § 8202; C.S.1922, § 9155; C.S.1929, § 20-1930; R.S.1943, § 25-1930; Laws 1991, LB 732, § 63.

Writ of prohibition was not abolished by this section. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Effect of abolishment of writ of certiorari stated. Engles v. Morgenstern, 85 Neb. 51, 122 N.W. 688 (1909); Mathews v. Hedlund, 82 Neb. 825, 119 N.W. 17 (1908); Moline, Milburn & Stoddard Co. v. Curtis, 38 Neb. 520, 57 N.W. 161 (1893).

Supreme Court may order court to send up perfect transcript but cannot order amendment of record. Thompson & Sons Mfg. Co. v. Nicholls, 52 Neb. 312, 72 N.W. 217 (1897).

Order entered in habeas corpus proceedings may be reviewed on error. In re Van Sciever, 42 Neb. 772, 60 N.W. 1037 (1894).

25-1931 Time for commencement; persons under disability.

Proceedings under section 25-1901 for reversing, vacating, or modifying judgments or final orders shall be commenced within thirty days after the rendition of the judgment or making of the final order complained of, except that when the person entitled to such proceedings is an infant, mentally incompetent, or imprisoned, he or she shall have one year, exclusive of the time of his or her disability, within which to commence such proceedings.

Source: R.S.1867, Code § 592, p. 498; Laws 1875, § 1, p. 40; Laws 1877, § 1, p. 14; Laws 1899, c. 85, § 1, p. 341; Laws 1901, c. 82, § 1, p. 475; R.S.1913, § 8203; C.S.1922, § 9156; Laws 1925, c. 69, § 1, p. 229; C.S.1929, § 20-1931; R.S.1943, § 25-1931; Laws 1949, c. 57, § 1, p. 168; Laws 1987, LB 33, § 3; Laws 1999, LB 43, § 12; Laws 2000, LB 921, § 16.

1. Time for commencement
2. Persons under disability

1. Time for commencement

Timeliness of an appeal is a jurisdictional necessity. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly; an appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. State v. Marshall, 253 Neb. 676, 573 N.W.2d 406 (1998).

Timely filing of both the petition and the transcript is mandatory to confer jurisdiction of the reviewing court. Imprisonment is not a disability entitling a prisoner to a period of exclusion from the normal time limits set forth in this section. There must be a showing of a recognizable disability, separate from the imprisonment, that prevents a person from protecting his or her rights under the statute. Lewis v. Camp, 236 Neb. 94, 459 N.W.2d 211 (1990).

To confer jurisdiction on a district court for proceedings in error, a proper transcript must be filed with the district court within one calendar month after rendition of a final judgment or order to be reviewed. Clark v. Cornwell, 223 Neb. 282, 388 N.W.2d 848 (1986).

In a proceeding in error, the jurisdiction of the court does not attach until there is presented to it, within the one-month limitation contained in this section, a duly authenticated transcript containing the final order of which complaint is made. Moell v. Mennonite Deaconess Home & Hosp., 221 Neb. 168, 375 N.W.2d 618 (1985).

A petitioner in error must, within one calendar month after judgment is announced under the law and facts by an inferior tribunal, file his petition with a transcript containing the final judgment sought to be reversed. Marcotte v. City of Omaha, 196 Neb. 217, 241 N.W.2d 838 (1976).

No authenticated copy of proceedings including order appealed from having been filed within one calendar month, dismissal was proper. Downer v. Ihms, 192 Neb. 594, 223 N.W.2d 148 (1974).

Error proceedings must be commenced within one month from rendition of the judgment or final order. Friedman v. State, 183 Neb. 9, 157 N.W.2d 855 (1968); Adams v. City of Omaha, 179 Neb. 684, 139 N.W.2d 885 (1966); Brown v. City of Omaha, 179 Neb. 224, 137 N.W.2d 814 (1965); Frankforter v. Turner, 175 Neb. 252, 121 N.W.2d 377 (1963).

Where review is sought of decision of school district committee, proceeding must be brought within one month of the decision. Longe v. County of Wayne, 175 Neb. 245, 121 N.W.2d 196 (1963).

Petition in error and transcript must be filed in appellate court within one month of decision of lower tribunal. Harms v. County Board of Supervisors of Dodge County, 173 Neb. 687, 114 N.W.2d 713 (1962).

Error proceedings may be taken within one month from imposition of sentence or overruling of motion for new trial, whichever is the later. Kennedy v. State, 170 Neb. 193, 101 N.W.2d 853 (1960).

Error proceedings from order in school district reorganization proceedings must be instituted within one month. Keedy v. Reid, 165 Neb. 519, 86 N.W.2d 370 (1957).

Limitation of one month in which to institute error proceedings is applicable where the proceeding is for review of judgment or final order in criminal action. Cunningham v. State, 153 Neb. 912, 46 N.W.2d 636 (1951).

Time to institute error proceedings begins to run when ruling on motion for new trial has been entered on journal. Fisher v. State, 153 Neb. 226, 43 N.W.2d 600 (1950).

Where defendant fails to file transcript and petition in error in Supreme Court within time provided by law from rendition of judgment or making of final order, error proceedings will be dismissed. Iron Bear v. State, 149 Neb. 634, 32 N.W.2d 130 (1948).

Trial court may not extend time in which an appeal can be taken by vacating and reentering the same judgment. Dimmel v. State, 128 Neb. 191, 258 N.W. 271 (1935).

Time commences to run from entry of judgment on court journal as shown by transcript; cannot be contradicted by detached certificate of clerk. In re Getchell's Estate, 98 Neb. 788, 154 N.W. 537 (1915).

By analogy to this section, time to file appeal bond from justice judgment dates from entry thereof on docket. Bishop v. Lincoln Baseball Club, 98 Neb. 558, 153 N.W. 586 (1915).

Where motion for new trial was filed, time commences to run from overruling of motion. Bowers v. Raitt, 96 Neb. 460, 148 N.W. 93 (1914); Clark v. McDowell, 58 Neb. 593, 79 N.W. 158 (1899).

Section applies to criminal cases. Dirksen v. State, 86 Neb. 334, 125 N.W. 618 (1910).

If transcript is not filed within time provided by law, appellate court has no jurisdiction. Amendment of 1901 was constitutional. Chicago, R. I. & P. Ry. Co. v. Sporer, 72 Neb. 372, 100 N.W. 813 (1904).

Where ruling on motion for new trial was not made until after rendition of judgment, time in which to institute error proceedings would not begin to run until ruling on motion. City of Lincoln v. First Nat. Bank of Lincoln, 64 Neb. 725, 90 N.W. 874 (1902).

If transcript is so incomplete as not to affirmatively disclose error, proper order is affirmance, not dismissal. Hesser v. Johnson, 57 Neb. 155, 77 N.W. 406 (1898).

Jurisdiction attaches though transcript is defective; by leave may amend. Moss v. Robertson, 56 Neb. 774, 77 N.W. 403 (1898).

Time for instituting proceedings cannot be extended by agreement of parties. Tootle, Hosea & Co. v. Shirey, 52 Neb. 674, 72 N.W. 1045 (1897).

Omission to file transcript is not excused by failure to obtain bill of exceptions in time. Stull v. Cass County, 51 Neb. 760, 71 N.W. 777 (1897).

Time cannot be extended by court. Omaha Loan & Trust Co. v. Ayer, 38 Neb. 891, 57 N.W. 567 (1894).

Time commences to run from rendition of judgment. Phenix Ins. Co. v. Swantkowski, 31 Neb. 245, 47 N.W. 917 (1891).

All parties to judgment must be brought before court within time prescribed. Curten v. Atkinson, 29 Neb. 612, 46 N.W. 91 (1890).

2. Persons under disability

A showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights is required in order for a prisoner to be entitled to a period of exclusion from the normal time limitation of this section. Cole v. Kilgore, 241 Neb. 620, 489 N.W.2d 843 (1992); Scott v. Hall, 241 Neb. 420, 488 N.W.2d 549 (1992); Lewis v. Camp, 236 Neb. 94, 459 N.W.2d 211 (1990).

Provision allowing infant one year exclusive of disability to institute error proceedings does not apply to criminal cases. Newquist v. State, 153 Neb. 917, 46 N.W.2d 639 (1951).

Imprisonment under sentence in criminal case is not a disability, excusing failure to timely bring proceedings. Kock v. State, 73 Neb. 354, 102 N.W. 768 (1905).

''Unsound mind'' means ''insane,'' total want of understanding. Witte v. Gilbert, 10 Neb. 539, 7 N.W. 288 (1880).

25-1932 Judgment prematurely rendered as error.

Rendering judgment before the action stood for trial, according to the provisions of this code, shall be deemed a clerical error.

Source: R.S.1867, Code § 598, p. 500; R.S.1913, § 8204; C.S.1922, § 9157; C.S.1929, § 20-1932.

Premature default and forfeiture of bail bond on morning of day defendant was required to appear is not jurisdictional defect and became final after term. State v. Ingoldsby, 111 Neb. 787, 197 N.W. 960 (1924).

25-1933 Costs; how taxed.

When a judgment, decree or final order is reversed, vacated or modified, the court may render judgment for all costs against the appellee or appellees or some of them, or may direct that each party pay his own costs or apportion the costs among parties or direct that judgment for costs abide the event of a new trial as, in its discretion, the equities of the cause may require.

Source: Laws 1907, c. 162, § 5, p. 496; R.S.1913, § 8205; C.S.1922, § 9158; C.S.1929, § 20-1933.

Upon modification of judgment, Supreme Court is authorized to apportion costs. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N.W.2d 397 (1961).

Costs can only be taxed against parties to the litigation. Ludwig v. Board of County Commissioners of Sarpy County, 170 Neb. 600, 103 N.W.2d 838 (1960).

Where appellant obtained reversal in part, all costs in Supreme Court could be taxed to appellee. Ricenbaw v. Kraus, 157 Neb. 723, 61 N.W.2d 350 (1953).

On reversal, Supreme Court may tax costs as the equities of the cause require. Stocker v. Wells, 155 Neb. 472, 52 N.W.2d 284 (1952).

When a judgment is reversed on appeal to Supreme Court, the court in its discretion may render judgment for all costs in favor of one party, direct each party to pay his own costs, apportion the costs among the parties, or direct that costs abide the event of a new trial. Rehn v. Bingaman, 152 Neb. 171, 40 N.W.2d 673 (1950).

If appellant seeks reversal and appellee consents thereto, Supreme Court will ordinarily tax costs to appellee. In re Estate of Simon, 149 Neb. 382, 31 N.W.2d 231 (1948).

Interest on amount paid for bill of exceptions is not allowable as costs until entry of mandate on appeal. Nemaha Valley Drainage Dist. No. 2 v. Stocker, 95 Neb. 663, 146 N.W. 936 (1914).

25-1934 Money judgment; enforcement notwithstanding supersedeas; undertaking required.

In an action arising on contract for the payment of money only, notwithstanding the execution of an undertaking to stay proceedings, if the defendant in error or appellee give adequate security to make restitution in case the judgment is reversed or modified, he may upon leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment. Such security must be an undertaking executed to the plaintiff in error by at least two sufficient sureties, to the effect that if the judgment be reversed or modified, he will make full restitution to the plaintiff in error or appellee of the money by him received under the judgment.

Source: R.S.1867, Code § 591, p. 498; R.S.1913, § 8206; C.S.1922, § 9159; C.S.1929, § 20-1934.

Defendant's payment of judgment to avoid sale of his property on execution will not deprive him of right to appeal. Burke v. Dendinger, 120 Neb. 594, 234 N.W. 405 (1931).

Unless appellee has given bond, he cannot plead judgment as set off to another action. Spencer v. Johnston, 58 Neb. 44, 78 N.W. 482 (1899).

If appellee gives bond and has leave to enforce, appellant cannot enjoin. Bodewig v. Standard Cattle Co., 56 Neb. 217, 76 N.W. 580 (1898).

25-1935 Opinion of appellate court; certified to clerk of district court.

It shall be the duty of the Clerk of the Supreme Court immediately upon the entering of a judgment by the Court of Appeals or Supreme Court to certify without cost a copy of the opinion of the court to the clerk of the district court from which the appeal was prosecuted.

Source: Laws 1933, c. 39, § 1, p. 245; C.S.Supp.,1941, § 20-1935; R.S.1943, § 25-1935; Laws 1991, LB 732, § 64.

Opinion of Supreme Court, duly certified, must be filed in the case in the trial court. Equitable Life Assur. Soc. v. Gillan, 70 F.Supp. 640 (D. Neb. 1945).

25-1936 Order of remittitur deemed a final order.

Whenever in any action at law in the district court a verdict of the jury has been returned for the recovery of money and the court orders a remittitur by the prevailing party of a part of the amount of such verdict, either as a condition to allowing the verdict so reduced to stand or otherwise, such order of remittitur shall be deemed a final order from which such party may prosecute an appeal to the Court of Appeals. The provisions of this section shall not in any manner affect the rights of parties on appeal as provided for in section 25-1929.

Source: Laws 1937, c. 45, § 1, p. 190; C.S.Supp.,1941, § 20-1936; R.S.1943, § 25-1936; Laws 1991, LB 732, § 65.

25-1937 Appeals; general procedure.

When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court. Appeals from the district court to the Court of Appeals shall be taken in the same manner provided by law for appeals from the district court in civil cases. This section shall not apply if the Administrative Procedure Act otherwise provides.

Source: Laws 1963, c. 138, § 1, p. 515; Laws 1988, LB 352, § 26; Laws 1991, LB 732, § 66.

Cross References

Administrative Procedure Act, see section 84-920.

This section provides for appeal when a statute confers the right to appeal but fails to prescribe the procedure. Hawkins v. City of Omaha, 261 Neb. 943, 627 N.W.2d 118 (2001).

This section provides the procedure for appeal when a statute confers a right to appeal, but fails to prescribe the procedure therefor. Prucha v. Kahlandt, 260 Neb. 366, 618 N.W.2d 399 (2000).

This section and others cited provide for appeals from action of county superintendent in school reorganization case. Schroeder v. Oeltjen, 184 Neb. 8, 165 N.W.2d 81 (1969).

Remedy by appeal under this section is not exclusive. Moser v. Turner, 180 Neb. 635, 144 N.W.2d 192 (1966).

This section provides the procedure for appeal when right of appeal is given but procedure is not provided. School Dist. of Wilbur v. Pracheil, 180 Neb. 121, 141 N.W.2d 768 (1966).

ARTICLE 20

VACATION OR MODIFICATION OF JUDGMENTS AT SUBSEQUENT TERM

Section
25-2001. District court; power to vacate or modify judgments or orders.
25-2002. District court judgment; proceedings to vacate or modify; summons; waiver of error.
25-2003. Repealed. Laws 2000, LB 921, § 38.
25-2004. District court judgment; grounds for vacation or modification; determination.
25-2005. District court judgment; vacation; existence of valid claim or defense a prerequisite; preservation of liens upon modification.
25-2006. District court judgment; proceedings to vacate or modify; injunction.
25-2007. District court judgment; rendition before action regularly stood for trial; rights of defendant; no showing of valid defense required.
25-2008. District court judgment; proceedings to vacate or modify; statute of limitations.
25-2009. Supreme Court, Court of Appeals, and county court judgments; laws applicable.

25-2001 District court; power to vacate or modify judgments or orders.

(1) The inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order.

(2) The power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not limited by this section.

(3) Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion

of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the case is submitted for decision in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(4) A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made (a) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; (b) for fraud practiced by the successful party in obtaining the judgment or order; (c) for newly discovered material evidence which could neither have been discovered with reasonable diligence before trial nor have been discovered with reasonable diligence in time to move for a new trial; (d) for erroneous proceedings against an infant or person of unsound mind if the condition of such defendant does not appear in the record of the proceedings; (e) for the death of one of the parties before the judgment in the action; (f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending; and (g) for taking judgments upon warrants of attorney for more than was due to the plaintiff when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

Source: R.S.1867, Code § 602, p. 500; Laws 1899, c. 87, § 1, p. 342; R.S.1913, § 8207; C.S.1922, § 9160; C.S.1929, § 20-2001; R.S. 1943, § 25-2001; Laws 1947, c. 84, § 2, p. 261; Laws 1997, LB 1, § 2; Laws 2000, LB 921, § 17.

1. Scope
2. Fraud
3. Irregularity
4. Equitable relief
5. Unavoidable casualty
6. County court jurisdiction
7. Omissions and mistakes
8. Other grounds
9. Miscellaneous

1. Scope

After the final adjournment of the term of court at which a judgment has been rendered, a court has no authority to modify a judgment except for the reasons stated and within the time limited in this section. Andersen v. American Family Mut. Ins. Co., 249 Neb. 169, 542 N.W.2d 703 (1996).

Under this section, a district court has the power to vacate or modify its own judgment after term for one of nine reasons enumerated in the statute. However, this section is not the exclusive remedy for vacating or modifying a judgment after term; this section is concurrent with the courts' independent equity jurisdiction. DeVaux v. DeVaux, 245 Neb. 611, 514 N.W.2d 640 (1994).

This statute provides the only vehicle for a direct action aimed at vacating an out-of-term district court decree. State ex rel. Ward v. Pape, 237 Neb. 283, 465 N.W.2d 760 (1991).

This section is not the exclusive remedy for vacating a judgment after the term has expired, but is concurrent with an independent equity jurisdiction. Joyce v. Joyce, 229 Neb. 831, 429 N.W.2d 355 (1988); Emry v. American Honda Motor Co., 214 Neb. 435, 334 N.W.2d 786 (1983).

This section authorizes the trial court to vacate its order for mistake, neglect, or omission of the clerk or for unavoidable casualty or misfortune, preventing the party from prosecuting or defending. In re Interest of C.M.H. and M.S.H., 227 Neb. 446, 418 N.W.2d 226 (1988).

The court has no authority to vacate or modify a judgment after the final adjournment of the term of court at which it was rendered except for the reasons stated and within the time limited in this section. State ex rel. Birdine v. Fuller, 216 Neb. 86, 341 N.W.2d 613 (1983); Emry v. American Honda Motor Co., 214 Neb. 435, 334 N.W.2d 786 (1983); In re Estate of Weinberger, 207 Neb. 711, 300 N.W.2d 818 (1981); Lienemann v. Lienemann, 197 Neb. 449, 249 N.W.2d 902 (1977); State v. Byrd, 186 Neb. 330, 183 N.W.2d 234 (1971); Kasparek v. May, 174 Neb. 732, 119 N.W.2d 512 (1963); Pep Sinton, Inc. v. Thomas, 174 Neb. 508, 118 N.W.2d 621 (1962); Stanton v. Stanton, 146 Neb. 71, 18 N.W.2d 654 (1945); Feldt v. Wanek, 134 Neb. 334, 278 N.W. 557 (1938).

Under section 24-310, R.R.S.1943, a trial court retains the authority to rule on a motion to vacate if the motion was made during the original term, even if none of the grounds listed in section 25-2001, R.R.S.1943, are met. Moackler v. Finley, 207 Neb. 353, 299 N.W.2d 166 (1980).

In absence of appeal, determination of trial court that class action was properly brought was final and, not being void, judgment could not be set aside. Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975).

This section does not apply to subsequent proceedings authorized by statute that relate to the division, disposition, and enforcement of the judgment, including application for attorney's fees. Versch v. Tichota, 192 Neb. 251, 220 N.W.2d 8 (1974).

Power to vacate judgment after term is not in any way affected by the taking of an appeal from original judgment. Simmons v. Lincoln, 176 Neb. 71, 125 N.W.2d 63 (1963).

Divorce decree may be vacated at subsequent term. Attebery v. Attebery, 172 Neb. 671, 111 N.W.2d 553 (1961).

After adjournment of the term, a new trial may be granted on any of the grounds stated in this section. Harman v. Swanson, 169 Neb. 452, 100 N.W.2d 33 (1959).

Injunction decree could not be modified at subsequent term of court except as provided by this section. Rose v. Vonderfecht, 167 Neb. 276, 92 N.W.2d 691 (1958).

District court may set aside an order vacating a decree of divorce. Vasa v. Vasa, 165 Neb. 69, 84 N.W.2d 185 (1957).

After adjournment of term dismissal without prejudice can only be set aside upon compliance with this section. Brown v. Lincoln, 157 Neb. 840, 61 N.W.2d 836 (1954).

After final adjournment of term, court could not set aside confirmation of sale except in accord with this section. Gasper v. Mazur, 155 Neb. 856, 54 N.W.2d 66 (1952).

In appropriate and timely proceedings, district court has jurisdiction to set aside approval of property settlement in divorce decree. Pasko v. Trela, 153 Neb. 759, 46 N.W.2d 139 (1951).

To be entitled to maintain an action in equity to vacate a judgment and obtain a new trial, the litigant must show, without fault or laches on his part, he was prevented from proceeding under this section. Nemetz v. Nemetz, 152 Neb. 178, 40 N.W.2d 685 (1950).

District court has power to vacate or modify its judgment entered on appeal from workmen's compensation court. Miller v. Schlereth, 151 Neb. 33, 36 N.W.2d 497 (1949).

If application to vacate judgment is filed more than ten days after rendition in a subsequent term, it must set out one of grounds necessary to authorize vacation at subsequent term. Shipley v. McNeel, 149 Neb. 793, 32 N.W.2d 636 (1948).

District court has inherent power during term to vacate default judgment. Barney v. Platte Valley, P. P. & I. Dist., 147 Neb. 375, 23 N.W.2d 335 (1946).

Trial court may vacate a judgment rendered at a previous term only for reasons enumerated and within time limited by statute. Elvidge v. Brant, 131 Neb. 1, 267 N.W. 169 (1936); Cronkleton v. Lane, 130 Neb. 17, 263 N.W. 388 (1935).

District court has power to vacate or modify its judgments or orders after term at which made only for reasons stated and within time limited in this article. Hoeppner v. Bruckman, 129 Neb. 390, 261 N.W. 572 (1935); Lyman v. Dunn, 125 Neb. 770, 252 N.W. 197 (1934); State ex rel. Sorensen v. Security State Bank of Plainview, 125 Neb. 516, 251 N.W. 97 (1933).

Order granting new trial under this section is reviewable on direct appeal to Supreme Court. Ward v. Geary, 115 Neb. 58, 211 N.W. 208 (1926).

Probable, but not decided, that proceedings were sufficient to justify relief hereunder. Nelson v. Nelson, 113 Neb. 453, 203 N.W. 640 (1925).

Order setting aside divorce decree after term can be vacated only in manner prescribed herein. Carmony v. Carmony, 112 Neb. 651, 200 N.W. 830 (1924).

Where defendant's attorney failed, because of illness, to file transcript on appeal in time, party must proceed hereunder. Welsh v. Valla, 102 Neb. 84, 165 N.W. 895 (1917).

Order approving guardian's final account was vacated where based on signed statement fraudulently procured from ward. In re Hilton, 99 Neb. 387, 156 N.W. 659 (1916).

Provisions of this section are concurrent with independent equity jurisdiction. Abbott v. Johnston, 93 Neb. 726, 141 N.W. 821 (1913).

After term party cannot open decree except for grounds named or on petition in equity. Hitchcock County v. Cole, 87 Neb. 43, 126 N.W. 513 (1910).

In exercise of original jurisdiction of Supreme Court, this section applies. State ex rel. Caldwell v. Lincoln Street Ry. Co., 80 Neb. 352, 118 N.W. 326 (1908).

Discretion to vacate judgments ends with term. State v. State Journal Co., 77 Neb. 771, 111 N.W. 118 (1907).

There is no jurisdiction after term except for causes named. Meade Plumbing, Heating & Lighting Co. v. Irwin, 77 Neb. 385, 109 N.W. 391 (1906).

Failure to proceed by motion to obtain new trial does not preclude action in equity. Bankers Union of the World v. Landis, 75 Neb. 625, 106 N.W. 973 (1906).

Interlocutory order may be reversed and vacated at subsequent term without compliance with this section. Huffman v. Rhodes, 72 Neb. 57, 100 N.W. 159 (1904).

Section is applicable to divorce decrees. Schafer v. Schafer, 71 Neb. 708, 99 N.W. 482 (1904).

Decree setting aside fraudulent conveyance could not be vacated at subsequent term except by petition in equity or under the provisions of this section. Sherman County v. Nichols, 65 Neb. 250, 91 N.W. 198 (1902).

Error in rendering decision is not ground for new trial after term. Dillon v. Chicago, K. & N. R. R. Co., 58 Neb. 472, 78 N.W. 927 (1899).

This section applies only to judgments and orders possessing some degree of legal validity, and not to such as are absolutely void. Kaufmann v. Drexel, 56 Neb. 229, 76 N.W. 559 (1898).

2. Fraud

Pursuant to subsection (4) of this section, in order to set aside a judgment after term on the ground of fraud practiced by the successful party, the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence. McCarson v. McCarson, 263 Neb. 534, 641 N.W.2d 62 (2002).

If a party's lawyer colludes in a material and factual misrepresentation which otherwise constitutes an intentional fraud or deceit and results in a judgment adverse to the interests of the party represented by such collusive lawyer, relief by vacating such fraudulently obtained judgment is available to the injured party under subsection (4) of this section. In re Estate of West, 226 Neb. 813, 415 N.W.2d 769 (1987).

In reviewing a trial court's action, under subsection (4) of this section, in vacating or refusing to vacate a judgment or order made in a prior term of court and allegedly obtained through fraud practiced by the successful party, the Supreme Court will uphold the trial court's decision in the absence of an abuse of discretion. In re Estate of West, 226 Neb. 813, 415 N.W.2d 769 (1987).

Proceeding authorized by subsection (4) of this section to vacate a judgment is not an equitable cause of action based on fraud, but is a remedy at law conferred by statute. Whether relief is sought by a motion addressed to a court's equity jurisdiction or by a petition based on a statute which supplies a legal remedy, vacating a judgment or order is equitable in nature. In re Estate of West, 226 Neb. 813, 415 N.W.2d 769 (1987).

Under subsection (4) of this section, party seeking to vacate judgment in order allegedly obtained through fraud practiced by the successful party must prove: (1) judgment or order has been obtained or produced through fraud; (2) it is inequitable to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault or neglect; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud. In re Estate of West, 226 Neb. 813, 415 N.W.2d 769 (1987).

In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as allowed by this section, the petitioning party must prove all diligence was exercised by him or her at the former trial and the failure to secure a just decision was not attributable to his or her fault or negligence. Caddy v. Caddy, 218 Neb. 582, 358 N.W.2d 184 (1984).

Demurrer was properly sustained, in an action to vacate a tax foreclosure judgment on ground of fraud, where statute authorized service by publication on a dissolved corporation. County of Madison v. City of Norfolk, 198 Neb. 718, 255 N.W.2d 54 (1977).

In order to vacate judgment for fraud or for death of party, action must be brought within required time. McNally v. McNally, 152 Neb. 845, 43 N.W.2d 170 (1950).

Where facts alleged to constitute fraud were discovered within two years, action brought more than two years after rendition of decree was barred. Watters v. Harris, 147 Neb. 1081, 26 N.W.2d 182 (1947).

Where petition alleges fraud in procuring service by publication and fails to set forth that the facts constituting the fraud were not discovered within two years, equity is powerless to relieve where action was instituted more than two years after order was entered for service by publication. Katz v. Swanson, 147 Neb. 791, 24 N.W.2d 923 (1946).

Under subdivision (4), it is only when a judgment is clearly shown to have been obtained by fraud or false testimony, and which it would be against good conscience to enforce, that judgment will be vacated upon application of unsuccessful party upon proper showing of due diligence. County of Lincoln v. Provident Loan & Investment Co., 147 Neb. 169, 22 N.W.2d 609 (1946); Pinches v. Village of Dickens, 131 Neb. 573, 268 N.W. 645 (1936); Kielian v. Kent & Burke Co., 131 Neb. 308, 268 N.W. 79 (1936).

Where fraud charged was violation of an oral agreement between attorneys, evidence was sufficient to sustain denying application to vacate judgment. Drake v. Ralston, 137 Neb. 72, 288 N.W. 377 (1939).

Where new trial is sought by means of petition filed after term, alleging fraud and perjury in procurement of judgment, party seeking new trial must introduce evidence adduced at the former trial. Weber v. Allen, 121 Neb. 833, 238 N.W. 740 (1931).

Attorney's fees are properly taxed on refusal to vacate for fraud judgment for plaintiff on fire policy. Messing v. Dwelling House Mut. Ins. Co., 119 Neb. 36, 226 N.W. 914 (1929).

Petition to vacate judgment for fraud after two years is properly stricken, where it shows on face fraud was discovered within two-year period. Brandeen v. Beale, 117 Neb. 291, 220 N.W. 298 (1928).

Petition must show fraud was not discovered within two years from rendition of judgment if action commenced later. State ex rel. Nelson v. Lincoln Med. College, 86 Neb. 269, 125 N.W. 517 (1910).

Action against receiver for fraud in purchasing claims against estate is not limited by section. State v. Merchants Bank, 81 Neb. 710, 120 N.W. 157 (1909).

Courts will relieve against a decree on the ground of fraud committed by the successful party. State v. Omaha Country Club, 78 Neb. 178, 110 N.W. 693 (1907).

Intentional production of false testimony is ground, if opponent shows diligence at trial. Secord v. Powers, 61 Neb. 615, 85 N.W. 846 (1901).

Fraud must have been practiced in connection with trial of case. Munro v. Callahan, 55 Neb. 75, 75 N.W. 151 (1898).

Negligence of counsel is not ground for granting new trial, unless amounting to fraud. Scott v. Wright, 50 Neb. 849, 70 N.W. 396 (1897).

Court has general power to set aside divorce decree obtained by fraud. Wisdom v. Wisdom, 24 Neb. 551, 39 N.W. 594 (1888).

Taking judgment contrary to oral agreement for continuance is fraud. Mordhorst v. Reynolds, 23 Neb. 485, 37 N.W. 80 (1888).

3. Irregularity

This section is concurrent with an independent equity jurisdiction and with a court's inherent powers of equity. A district court has no authority to set aside a judgment after the term when any mistake, inadvertence, or neglect was the party's own. The purpose of subsection (3) of this section is to address mishaps beyond a party's control. A litigant seeking vacation or modification of a judgment after term may take one of two routes: The litigant may proceed either under this section or under the district court's independent equity jurisdiction. With regard to subsection (3) of this section, the operative definition of ''irregularity'' limits the term to the doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. A judgment marred by irregularity is one rendered contrary to the course of law and practice of the court. Roemer v. Maly, 248 Neb. 741, 539 N.W.2d 40 (1995).

The first part of subsection (3) of this section, providing that a judgment may be vacated ''for mistake, neglect, or omission of the clerk,'' applies only to the actions of the district court clerk; the second part of subsection (3), dealing with ''irregularity in obtaining a judgment or order,'' refers to judgments or orders rendered contrary to the course of law and the practice of the courts. Therefore, relief for errors of law or judicial acts may not be sought under subsection (3). State ex rel. Ward v. Pape, 237 Neb. 283, 465 N.W.2d 760 (1991).

Absence of required allegation in petition resulting in default judgment is not irregularity in obtaining decree. Gasper v. Mazur, 157 Neb. 857, 62 N.W.2d 117 (1954).

Where findings are made in judgment that are foreign to any pleading and not necessary to relief grantable to any litigant in case, it is an irregularity in obtaining judgment which court has power to modify after expiration of term. Petersen v. Dethlefs, 139 Neb. 572, 298 N.W. 155 (1941).

Where order on claim in probate proceedings is entered by judge, it cannot be set aside under subdivision (3). Estate of McKenna v. McCormick, 60 Neb. 595, 83 N.W. 844 (1900).

Court may set aside judgment rendered without jurisdiction as irregular. Bankers Life Ins. Co. v. Robbins, 53 Neb. 44, 73 N.W. 269 (1897).

Defects in service by publication not rendering service void constitute irregularity. Scarborough v. Myrick, 47 Neb. 794, 66 N.W. 867 (1896).

Omission of clerk to journalize judgment when entered does not constitute irregularity in obtaining judgment. Slater v. Skirving, 45 Neb. 594, 63 N.W. 848 (1895).

Failure to give notice of appeal and to give notice of application for default judgment did not authorize vacation of judgment on ground of irregularity. McBrien v. Riley, 38 Neb. 561, 57 N.W. 385 (1894).

Taking of stay is not a waiver of right to apply for correction of mistake in entry of decree. Hoagland v. Way, 35 Neb. 387, 53 N.W. 207 (1892).

4. Equitable relief

In order to seek vacation or modification of judgment under the district court's equity jurisdiction, a litigant must show that this section cannot provide adequate relief. Hornig v. Martel Lift Systems, Inc., 258 Neb. 764, 606 N.W.2d 764 (2000).

With regard to the invocation of the equity powers of this section, the applicant, to be successful, must first allege and prove that he exercised due diligence and that his failure to secure a proper decision in the prior term was not due to his own fault or negligence. Thrift Mart v. State Farm Fire & Cas. Co., 251 Neb. 448, 558 N.W.2d 531 (1997).

A litigant seeking the vacation of a prior decree or judgment after term may either proceed under this section or under the district court's independent equity jurisdiction. Welch v. Welch, 246 Neb. 435, 519 N.W.2d 262 (1994).

Equity power conferred by Constitution on district court is ample for granting relief against default judgment attributable to fraud of attorney, notwithstanding limited powers granted by this section. Seward v. Churn Ranch Co., 136 Neb. 804, 287 N.W. 610 (1939).

This section does not provide exclusive remedy for vacation of judgment for fraud, but is concurrent with independent equity jurisdiction, which may be exercised by county court. In re Estate of Jensen, 135 Neb. 602, 283 N.W. 196 (1939).

Statutory grounds for vacating judgment after term are not exclusive but concurrent with independent equity jurisdiction. Pavlik v. Burns, 134 Neb. 175, 278 N.W. 149 (1938).

In action in equity to set aside order dismissing law action, plaintiff must show that, without fault or laches on his part, he was prevented from proceeding under this section to obtain a new trial. Lindstrom v. Nilsson, 133 Neb. 184, 274 N.W. 485 (1937).

Provisions of statute are concurrent with equity jurisdiction, and where circumstances call for equitable relief, a decree may be set aside after expiration of term at which rendered. Howard Stove & Furnace Co. v. Rudolf, 128 Neb. 665, 260 N.W. 189 (1935).

Statute is not always the measure of equitable relief; general powers of equity court may be invoked to redress wrong resulting from abuse of confidential relation. Hall v. Hall, 123 Neb. 280, 242 N.W. 607 (1932).

Statute is not exclusive but declaratory of the equitable power of the court at time of its enactment. Hall v. Hall, 122 Neb. 228, 239 N.W. 825 (1932).

Party failing to show reasonable diligence in producing evidence of adverse party's perjury may not have judgment vacated by producing such evidence in equity suit. Gutru v. Johnson, 115 Neb. 309, 212 N.W. 622 (1927).

Equity will afford relief against fraudulent judgment where fraud was not discovered in time to proceed to vacate hereunder. Krause v. Long, 109 Neb. 846, 192 N.W. 729 (1923).

Where this section is inadequate to prevent sale upon judgment obtained by fraud in county court and transcribed to another county, injunction may be allowed. Spence v. Miner, 90 Neb. 108, 132 N.W. 942 (1911).

Remedy under this section for fraud in obtaining judgment is declaratory of equity practice, and concurrent with remedy in equity. Schneider v. Lobingier, 82 Neb. 174, 117 N.W. 473 (1908).

In equity, party must show good reason why special remedy of code is not available. Van Antwerp v. Lathrop, 70 Neb. 747, 98 N.W. 35 (1904).

Section is declaratory of equity power; substantial injury must be shown. Van Every v. Sanders, 69 Neb. 509, 95 N.W. 870 (1903).

Equity will not enjoin if relief is possible under this section. Woodward v. Pike, 43 Neb. 777, 62 N.W. 230 (1895).

Petition in equity for new trial must be founded upon some equitable ground, as fraud, accident or mistake. Douglas County v. Connell, 15 Neb. 617, 19 N.W. 591 (1884).

5. Unavoidable casualty

This section provides for circumstances which prevent parties from participating in an action by virtue of unavoidable casualty or misfortune; it is not an excuse to disregard court orders. The casualty must be such that it prevents the party from prosecuting or defending. Aetna Cas. & Surety Co. v. Dickinson, 216 Neb. 660, 345 N.W.2d 8 (1984).

Lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune. Emry v. American Honda Motor Co., 214 Neb. 435, 334 N.W.2d 786 (1983); Johnston Grain Co. v. Tridle, 175 Neb. 859, 124 N.W.2d 463 (1963).

Unavoidable casualty alone does not provide a basis for vacating a judgment after term. That casualty must also be one preventing the party from prosecuting or defending. Emry v. American Honda Motor Co., 214 Neb. 435, 334 N.W.2d 786 (1983).

The lack of diligence of a party or his attorney is not an ''unavoidable casualty or misfortune'' under this section preventing the party from defending an action at a former term of court. Lyman v. Dunn, 125 Neb. 770, 252 N.W. 197 (1934).

Unavoidable casualty must be such as prevents from prosecuting or defending in trial court, and is not applicable to appeals. Loss of bill of exceptions by fire is not ground hereunder, but may be in equity. Norfolk Packing Co. v. American Ins. Co., 116 Neb. 118, 216 N.W. 309 (1927).

Unavoidable casualty was shown to exist. Poeggler v. Supreme Council of Catholic Mutual Benefit Assn., 102 Neb. 608, 168 N.W. 194 (1918); Hodder v. Olson, 102 Neb. 429, 167 N.W. 575 (1918).

Dishonesty of attorney, permitting default judgment, is unavoidable casualty. Anthony & Co. v. Karbach, 64 Neb. 509, 90 N.W. 243 (1902).

Lack of knowledge by client of holding of term of court and failure of counsel to attend did not authorize vacation of judgment on ground of unavoidable casualty. Ganzer v. Schiffbauer, 40 Neb. 633, 59 N.W. 98 (1894).

Where husband withheld summons from wife, properly left at residence, it was unavoidable casualty. Morse v. Engle, 28 Neb. 534, 44 N.W. 859 (1890).

Circumstances must have been entirely beyond control of party, without negligence on his part, to constitute unavoidable casualty. Pope v. Hooper, 6 Neb. 178 (1877).

6. County court jurisdiction

This section applies to county courts as well as to district courts, and the fact that the county court rules on a demurrer at a subsequent term is immaterial. In re Reikofski Estate, 144 Neb. 735, 14 N.W.2d 379 (1944).

County court has power to vacate order appointing administrator obtained by fraud. In re Estate of Sheerer, 137 Neb. 374, 289 N.W. 529 (1940).

County court cannot vacate judgment in case beyond justice jurisdiction after expiration of monthly term, except under this section; attempt to vacate without notice is void. Stone v. Jensen, 118 Neb. 254, 224 N.W. 284 (1929).

Order of county court vacating fraudulent judgment is reviewable by district court on appeal. Gainsforth v. Peterson, 114 Neb. 442, 207 N.W. 935 (1926).

Justices and county courts within justice jurisdiction have no power to vacate judgment after expiration of time for appeal. Carlson v. Ray, 104 Neb. 18, 175 N.W. 886 (1919).

County court may vacate probate of will procured by fraud and permit contest. In re Estate of Kelly, 103 Neb. 513, 175 N.W. 653 (1919).

County court may vacate erroneous judgment against incompetent defendant where condition of such defendant does not appear of record. Spence v. Miner, 90 Neb. 108, 132 N.W. 942 (1911); Spence v. Miner, 89 Neb. 610, 131 N.W. 1044 (1911).

Applicable to county court in term cases. Oakdale Heat & Light Co. v. Seymour, 78 Neb. 50, 114 N.W. 643 (1908).

County court cannot set aside award in condemnation proceedings procured by fraud. Mattheis v. Fremont, E. & M. V. R. R. Co., 53 Neb. 681, 74 N.W. 30 (1898).

7. Omissions and mistakes

The failure of the clerk of the court to send notice of a summary judgment is beyond the control of the parties and within the statutory grounds for vacating or modifying an order under subsection (4) of this section. Nye v. Fire Group Partnership, 263 Neb. 735, 642 N.W.2d 149 (2002).

The first part of subsection (3) of this section, providing that a judgment may be vacated ''for mistake, neglect, or omission of the clerk,'' applies only to the actions of the district court clerk; the second part of subsection (3), dealing with ''irregularity in obtaining a judgment or order,'' refers to judgments or orders rendered contrary to the course of law and the practice of the courts. Therefore, relief for errors of law or judicial acts may not be sought under subsection (3). State ex rel. Ward v. Pape, 237 Neb. 283, 465 N.W.2d 760 (1991).

This section governs the vacation or modification of judgments after the term, and for mistake or omissions by the clerk, proceedings may be commenced within three years. Pofahl v. Pofahl, 196 Neb. 347, 243 N.W.2d 55 (1976).

Where clerk omitted to enter proper judgment after first trial, court, on second trial of cause, may correct record to show judgment as it should have shown as result of first trial. Crete Mills v. Stevens, 120 Neb. 794, 235 N.W. 453 (1931).

Where, by mistake of clerk in placing case on trial docket after judgment, it was dismissed, latter order was a nullity. Jacoby v. Dvorak, 111 Neb. 683, 197 N.W. 428 (1924).

Court has power, where clerk fails to enter judgment, to order judgment entered nunc pro tunc, subject to rights of innocent third parties, who may oppose. Clark & Leonard Inv. Co. v. Rich, 81 Neb. 321, 115 N.W. 1084 (1908).

For mistakes of clerk, party must apply to court for correction of record. Tootle-Weakley Millinery Co. v. Billingsley, 74 Neb. 531, 105 N.W. 85 (1905).

Entry by probate judge, acting as his own clerk, on records of probate court, was not an act of mistake, neglect or omission of clerk under this section. Estate of McKenna v. McCormick, 60 Neb. 595, 83 N.W. 844 (1900).

Neglect and mistakes of clerk as such, not as agent of parties, constitute ground for new trial. Thompson v. Sharp, 17 Neb. 69, 22 N.W. 78 (1885).

8. Other grounds

Pursuant to subsection (2) of this section, a district court has inherent authority to vacate or modify a decision within the same term that the decision is rendered. Such decision will be reversed only if it is shown that the district court abused its discretion. Hartman v. Hartman, 265 Neb. 515, 657 N.W.2d 646 (2003).

As a general rule, in order to make a sufficient showing for a new trial on the ground of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that the evidence is not merely cumulative but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted. DeVaux v. DeVaux, 245 Neb. 611, 514 N.W.2d 640 (1994).

Newly discovered evidence is not grounds for a motion for new trial where the exercise of reasonable diligence would have produced the evidence. A motion for new trial on the basis of newly discovered evidence must allege that the evidence could not have been discovered during term with the exercise of reasonable diligence. Reasonable diligence means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful. DeVaux v. DeVaux, 245 Neb. 611, 514 N.W.2d 640 (1994).

Judgment may be attacked after two years where relief is sought upon the ground of lack of jurisdiction. Thomas v. Flynn, 169 Neb. 458, 100 N.W.2d 37 (1959).

Court is not authorized to set aside judgment or order after term because of plaintiff's own mistake, inadvertence or neglect. State ex rel. Spillman v. Commercial State Bank of Omaha, 143 Neb. 490, 10 N.W.2d 268 (1943).

One seeking writ of error coram nobis to vacate judgment against him on ground that he was of unsound mind must begin proceedings within two years after disability is removed. Newcomb v. State, 129 Neb. 69, 261 N.W. 348 (1935).

In compensation case, decree may be modified any time after six months on ground of decrease or increase of disability. Metropolitan Dining Room v. Jensen, 126 Neb. 765, 254 N.W. 405 (1934).

Failure to appoint guardian ad litem in partition suit is erroneous, and appropriate remedy is by a proceeding in error, not by proceeding to vacate judgment hereunder. Schleuning v. Tatro, 122 Neb. 3, 238 N.W. 741 (1931).

Conditions for granting a new trial upon newly discovered evidence stated. Smith v. Goodman, 100 Neb. 284, 159 N.W. 418 (1916).

Court of equity will grant new trial where party is deprived of bill of exceptions by failure of reporter to furnish in time. Ferber v. Leise, 97 Neb. 795, 151 N.W. 307 (1915).

Minor must institute action to vacate decree within two years after becoming of age. Kiplinger v. Joslyn, 93 Neb. 40, 139 N.W. 1019 (1913).

New trial may be granted for perjury of successful party. Wirth v. Weigand, 85 Neb. 115, 122 N.W. 714 (1909).

Interlocutory order may be vacated at subsequent term without compliance with this section. Godfrey v. Cunningham, 77 Neb. 462, 109 N.W. 765 (1906).

Section is not applicable to matters arising subsequent to judgment depriving party of review. Ritchey v. Seeley, 73 Neb. 164, 102 N.W. 256 (1905).

Provisions of code in regard to vacation of judgments and granting of new trials is not exclusive. Meyers v. Smith, 59 Neb. 30, 80 N.W. 273 (1899).

If record shows defendant is infant, remedy is by error. Manfull v. Graham, 55 Neb. 645, 76 N.W. 19 (1898).

Petition to set aside judgment must allege one or more of the statutory grounds for granting new trial. Kirkham v. Gibson, 52 Neb. 23, 71 N.W. 960 (1897).

Court has power to correct record to conform to facts. Wachsmuth v. Orient Ins. Co., 49 Neb. 590, 68 N.W. 935 (1896).

Court has power to correct decree to conform to pleadings; stay of execution is not waiver of right to correction. Hoagland v. Way, 35 Neb. 387, 53 N.W. 207 (1892).

Court may correct record to conform to judgment actually rendered. Brownlee v. Davidson, 28 Neb. 785, 45 N.W. 51 (1890).

Section applies to voidable but not void judgments. Baldwin v. Burt, 2 Neb. Unof. 377, 2 Neb. Unof. 383, 96 N.W. 401 (1902).

9. Miscellaneous

An appellate court will reverse a decision on a motion to vacate or modify a judgment under the statutory grounds listed in this section only if the litigant shows that the district court abused its discretion. Nye v. Fire Group Partnership, 263 Neb. 735, 642 N.W.2d 149 (2002).

As a discretionary matter, the determination of whether a default judgment should be set aside after term will, on appeal, be presumed to have been made in proper exercise of that discretion where the contrary does not appear from the record. Diplomat Inn, Inc. v. Weindorf, 206 Neb. 565, 293 N.W.2d 861 (1980).

Where defendant not properly served, had no knowledge of his attorney's withdrawal, and had a meritorious defense, the district court may properly vacate its default judgment. Tietsort v. Ranne, 200 Neb. 651, 264 N.W.2d 860 (1978).

This section does not provide the district court power to vacate a judgment after term on claim of error of law. Paine v. United States Nat. Bank of Omaha, 199 Neb. 248, 257 N.W.2d 826 (1977).

One seeking to open up a judgment secured by constructive service must act within five years and must, by a preponderance of the evidence, show that he had no notice prior to judgment and he must file a meritorious answer. Wittwer v. Dorland, 198 Neb. 361, 253 N.W.2d 26 (1977).

Costs may be retaxed at subsequent term when court has failed to follow a mandatory statutory duty to tax costs, in event of clerical error, failure to perform a ministerial act, and in instances authorized by this section for vacation or modification of judgments at a subsequent term. Muff v. Mahloch Farms Co., Inc., 186 Neb. 151, 181 N.W.2d 258 (1970).

This section is cited as illustration of the meaning of the term ''final judgment.'' Kometcher v. Wade, 177 Neb. 299, 128 N.W.2d 781 (1964).

Power to modify judgment ends with adjournment of term. Meier v. Nelsen, 156 Neb. 666, 57 N.W.2d 273 (1953).

Failure to institute proceedings to set aside tax foreclosure did not bar easement. Jurgensen v. Ainscow, 155 Neb. 701, 53 N.W.2d 196 (1952).

Remedy under this section is concurrent with exercise of independent equity jurisdiction. Shinn v. Shinn, 148 Neb. 832, 29 N.W.2d 629 (1947).

Order at subsequent term directing that all parties be placed in status quo was unauthorized where judicial sale had not been vacated, although confirmation had been set aside at same term. Enquist v. Enquist, 146 Neb. 708, 21 N.W.2d 404 (1946).

Where court found that petition to modify decree did not state facts sufficient to grant relief, it was error to re-enter decree with additional findings therein. Hallgren v. Williams, 146 Neb. 525, 20 N.W.2d 499 (1945).

Procedure for vacation of judgments does not apply to municipal courts. State Furniture Co. v. Abrams, 146 Neb. 342, 19 N.W.2d 627 (1945).

An order, fixing a time for the filing of petitions in intervention by a claimant whose claim has been classified as invalid by the receiver of an insolvent bank, is not a judgment within the meaning of this article. State ex rel. Sorensen v. South Omaha State Bank, 135 Neb. 478, 282 N.W. 382 (1938).

Court which rendered judgment alone can vacate regardless of residence of parties. Rasmussen v. Rasmussen, 131 Neb. 724, 269 N.W. 818 (1936); Trimble & Blackman v. Corey & Son, 78 Neb. 639, 111 N.W. 376 (1907).

Statute authorizing new trial in civil actions at subsequent term on ground of newly discovered evidence is not available in criminal case. Carlsen v. State, 129 Neb. 84, 261 N.W. 339 (1935).

In mortgage foreclosure, petition to set aside decree after term of court at which it was rendered cannot be maintained after sale under decree on ground of error in computation of interest where parties knew or should have known of error and, after knowledge of error, took a stay of order of sale. Federal Land Bank of Omaha v. Arthur, 124 Neb. 496, 247 N.W. 17 (1933).

Evidence was not sufficient to sustain grounds to vacate or modify judgment hereunder. Citizens Bank of Ogallala v. Lister, 123 Neb. 386, 242 N.W. 926 (1932).

Judge at chambers is without jurisdiction to modify or correct judgment except by consent. Nicholson v. Getchell, 113 Neb. 248, 202 N.W. 618 (1925); Kime v. Fenner, 54 Neb. 476, 74 N.W. 869 (1898).

Statutory time to bring proceedings hereunder is not applicable to orders nunc pro tunc. Calloway v. Doty, 108 Neb. 319, 188 N.W. 104 (1922).

Statements by third party that action had been settled did not constitute ground for vacating default. Kulhanek v. Kulhanek, 106 Neb. 595, 184 N.W. 139 (1921).

New trial was denied where issue was disputed on whether court promised extension of time in which to settle bill of exceptions. Ferber v. Leise, 101 Neb. 374, 163 N.W. 317 (1917).

Requires service of summons or voluntary appearance and due proof. Wunrath v. Peoples Furniture & Carpet Co., 98 Neb. 342, 152 N.W. 736 (1915).

Error in computation of interest in decree cannot be remedied hereunder. Girard Trust Co. v. Null, 97 Neb. 324, 149 N.W. 809 (1914).

General statement that petitioner has meritorious action or defense is sufficient in absence of attack by motion or demurrer. Wagener v. Whitmore, 79 Neb. 558, 113 N.W. 238 (1907).

Party must show due diligence at former trial. Citizens Ins. Co. v. Herpolsheimer Imp. Co., 78 Neb. 707, 111 N.W. 606 (1907).

Court cannot vacate judgment upon void service. McCormick Harv. Machine Co. v. Stires, 68 Neb. 432, 94 N.W. 629 (1903)

Motion to vacate until acted upon has no effect on decree. Omaha Loan & Trust Co. v. Walenz, 64 Neb. 89, 89 N.W. 623 (1902).

Where proceeding is brought under this section, ruling thereon is res judicata in subsequent suit to enjoin enforcement of judgment. Slater v. Skirving, 51 Neb. 108, 70 N.W. 493 (1897).

Court should not set aside judgment until it first ascertains that applicant has valid cause of action or defense. Western Assur. Co. of Toronto v. Klein, 48 Neb. 904, 67 N.W. 873 (1896).

Affidavit for attachment must be filed before notice is served. State ex rel. Austrian, Wise & Co. v. Duncan, 37 Neb. 631, 56 N.W. 214 (1893).

Remedy afforded by this section is not a new action, but proceeding in original action. Morse & Co. v. Engle, 26 Neb. 247, 41 N.W. 1098 (1889).

The plain language of this section limits the operation of subsection (3) to nunc pro tunc orders as they existed under prior case law; that is, a nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended. In re Interest of Antone C. et al., 12 Neb. App. 466, 677 N.W.2d 190 (2004).

A court may modify or vacate a judgment after the term has expired under any of the nine reasons set out in this statute or under the court's independent equity jurisdiction. Portland v. Portland, 5 Neb. App. 364, 558 N.W.2d 605 (1997).

25-2002 District court judgment; proceedings to vacate or modify; summons; waiver of error.

The proceedings to vacate or modify the judgment or order on the grounds mentioned in subsection (4) of section 25-2001 shall be by complaint, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such complaint a summons shall issue and be served as in the commencement of an action. Summons shall not issue in any case in which there is upon the minutes of the court, or among the files of the case, a waiver of error by the party or the party's attorney, unless the court or a judge thereof endorses upon the complaint permission to issue such summons.

Source: R.S.1867, Code § 603, p. 501; R.S.1913, § 8208; C.S.1922, § 9161; C.S.1929, § 20-2002; R.S.1943, § 25-2002; Laws 2000, LB 921, § 18; Laws 2002, LB 876, § 28.

1. Jurisdiction
2. Pleading
3. Evidence
4. Miscellaneous

1. Jurisdiction

The provisions of this section apply only to a modification of a judgment entered at a subsequent term. Hyde v. Shapiro, 216 Neb. 785, 346 N.W.2d 241 (1984).

Fraud may only be taken advantage of by action. Gasper v. Mazur, 157 Neb. 857, 62 N.W.2d 117 (1954).

Final order of county court in proceeding to set aside fraudulent judgment after term is reviewable by district court on appeal. Gainsforth v. Peterson, 114 Neb. 442, 207 N.W. 935 (1926).

District judge is not vested with jurisdiction at chambers to modify judgment, except by consent. Nicholson v. Getchell, 113 Neb. 248, 202 N.W. 618 (1925).

2. Pleading

Proceedings to vacate or modify a judgment or order on the grounds mentioned in section 25-2001 shall be by petition verified by affidavit. Haen v. Haen, 210 Neb. 380, 314 N.W.2d 276 (1982).

To obtain relief for vacation of judgment at subsequent term, petition must be filed. Shipley v. McNeel, 149 Neb. 793, 32 N.W.2d 636 (1948).

Application for modification should set forth the defense the applicant has to the original action. Hoeppner v. Bruckman, 129 Neb. 390, 261 N.W. 572 (1935).

Petition to vacate judgment for fraud filed more than two years after the entry thereof, which showed discovery of fraud within two-year period but alleged no ground for extending period, was properly stricken. Brandeen v. Beale, 117 Neb. 291, 220 N.W. 298 (1928).

Suit in equity to cancel judgment should be dismissed where facts pleaded fail to disclose meritorious defense. Westman v. Carlson, 86 Neb. 847, 126 N.W. 515 (1910).

Petition need not be verified positively. Anthony & Co. v. Karbach, 64 Neb. 509, 90 N.W. 243 (1902).

Petition must show one of grounds in preceding section. Kirkham v. Gibson, 52 Neb. 23, 71 N.W. 960 (1897).

3. Evidence

Not error to deny defendant a separate trial where codefendant's inculpating testimony subject to full cross-examination and no prejudice shown to defendant. State v. Edwards, 197 Neb. 354, 248 N.W.2d 775 (1977).

It is error to vacate judgment assailed by petition without evidence to sustain allegation of petition. Trimble & Blackman v. Corey & Son, 78 Neb. 639, 111 N.W. 376 (1907).

4. Miscellaneous

To vacate for irregularity, it is unnecessary to tender answer with motion. Fisk v. Thorp, 60 Neb. 713, 84 N.W. 79 (1900).

Defense need not be complete to entire claim; it is sufficient if it be to a substantial part. Kime v. Fenner, 54 Neb. 476, 74 N.W. 869 (1898).

25-2003 Repealed. Laws 2000, LB 921, § 38.

25-2004 District court judgment; grounds for vacation or modification; determination.

The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action.

Source: R.S.1867, Code § 605, p. 501; R.S.1913, § 8210; C.S.1922, § 9163; C.S.1929, § 20-2004.

Court should not try out merits of controversy at same time it determines whether or not a valid cause of action or defense has been presented. Miller v. Schlereth, 151 Neb. 33, 36 N.W.2d 497 (1949).

Attempt of county court to vacate judgment in civil action after term, without notice, was void. Stone v. Jensen, 118 Neb. 254, 224 N.W. 284 (1929).

Court should hear evidence on petition to vacate before entry of order. Trimble & Blackman v. Corey & Son, 78 Neb. 639, 111 N.W. 376 (1907).

General finding is sufficient in absence of request for special findings. Anthony & Co. v. Karbach, 64 Neb. 509, 90 N.W. 243 (1902).

It is not necessary to tender an answer with a motion to vacate. Fisk v. Thorp, 60 Neb. 713, 84 N.W. 79 (1900).

25-2005 District court judgment; vacation; existence of valid claim or defense a prerequisite; preservation of liens upon modification.

A judgment shall not be vacated on motion or complaint, until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action; and when a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

Source: R.S.1867, Code § 606, p. 501; R.S.1913, § 8211; C.S.1922, § 9164; C.S.1929, § 20-2005; R.S.1943, § 25-2005; Laws 2002, LB 876, § 29.

Prerequisite to vacation of judgment is showing of valid defense. Gasper v. Mazur, 157 Neb. 857, 62 N.W.2d 117 (1954).

Plaintiff seeking vacation of judgment after term must allege and prove valid cause of action. Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98 (1933).

Court must adjudge that cause of action is prima facie valid before it is authorized to take action on motion. Gavin v. Reed, 73 Neb. 237, 102 N.W. 455 (1905).

Mere showing of want of service of summons is not sufficient. Baldwin v. Burt, 54 Neb. 287, 74 N.W. 594 (1898).

Party seeking to vacate judgment after term must plead and prove valid cause or defense. Gilbert v. Marrow, 54 Neb. 77, 74 N.W. 420 (1898).

''Adjudged'' means judicially determined. Western Assur. Co. of Toronto v. Klein, 48 Neb. 904, 67 N.W. 873 (1896).

Applicant must allege and prove valid defense or cause of action. Bond v. Wycoff, 42 Neb. 214, 60 N.W. 564 (1894).

Motion to vacate must be accompanied by answer. McBrien v. Riley, 38 Neb. 561, 57 N.W. 385 (1894).

25-2006 District court judgment; proceedings to vacate or modify; injunction.

The party seeking to vacate or modify a judgment or order, may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court, or any judge thereof, upon its being rendered probable, by affidavit or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.

Source: R.S.1867, Code § 607, p. 502; R.S.1913, § 8212; C.S.1922, § 9165; C.S.1929, § 20-2006.

25-2007 District court judgment; rendition before action regularly stood for trial; rights of defendant; no showing of valid defense required.

When the judgment was rendered before the action stood for trial, the suspension may be granted as provided in section 25-2006, although no valid defense to the action is shown; and the court shall make such orders concerning the executions to be issued on the judgment, as shall give to the defendant the same rights of delay he would have had if the judgment had been rendered at the proper time.

Source: R.S.1867, Code § 608, p. 502; R.S.1913, § 8213; C.S.1922, § 9166; C.S.1929, § 20-2007.

Notice required by this section only applies when a default is to be taken in chambers. Frazier, Inc. v. Alexander, 183 Neb. 451, 161 N.W.2d 505 (1968).

Where trial court vacated order of confirmation but did not set aside sale, return of purchase money was not warranted. Enquist v. Enquist, 146 Neb. 708, 21 N.W.2d 404 (1946).

25-2008 District court judgment; proceedings to vacate or modify; statute of limitations.

Proceedings to vacate or modify a judgment or order, for the causes mentioned in subsection (4) of section 25-2001 must be commenced no later than two years after the entry of the judgment or order unless the party entitled thereto is an infant or person of unsound mind, and then no later than two years after removal of such disability.

Source: R.S.1867, Code § 609, p. 502; Laws 1899, c. 88, § 1, p. 344; R.S.1913, § 8214; C.S.1922, § 9167; C.S.1929, § 20-2008; R.S. 1943, § 25-2008; Laws 2000, LB 921, § 19.

1. Statute of limitations
2. Miscellaneous

1. Statute of limitations

Equity will afford relief against a judgment procured by fraud of the successful party, when it appears that the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing the proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief that such a proceeding would be successful if begun. In re Estate of West, 226 Neb. 813, 415 N.W.2d 769 (1987).

This section governs the vacation or modification of judgments after the term, and for mistake or omissions by the clerk, proceedings may be commenced within three years. Pofahl v. Pofahl, 196 Neb. 347, 243 N.W.2d 55 (1976).

If defendant's motion is viewed as an application for a writ of coram nobis, it was not effective because not filed within time limited by statute. State v. Rhodes, 192 Neb. 557, 222 N.W.2d 837 (1974).

Judgment may be attacked after two years where relief is sought upon the ground of lack of jurisdiction. Thomas v. Flynn, 169 Neb. 458, 100 N.W.2d 37 (1959).

District court may, after term at which order was entered, set aside order vacating decree of divorce, within time prescribed. Vasa v. Vasa, 165 Neb. 69, 84 N.W.2d 185 (1957).

Application to vacate approval of property settlement in divorce proceeding was filed in time. Pasko v. Trela, 153 Neb. 759, 46 N.W.2d 139 (1951).

To vacate judgment on ground of death of party, action must be brought within three years after defendant had notice of judgment. McNally v. McNally, 152 Neb. 845, 43 N.W.2d 170 (1950).

Proceedings to vacate judgment approving settlement in workmen's compensation case must be commenced within two years from rendition of judgment. Miller v. Schlereth, 151 Neb. 33, 36 N.W.2d 497 (1949).

Limitation of two years does not prevent setting aside of divorce decree where parties resumed marital relations within six months from entry of decree. Shinn v. Shinn, 148 Neb. 832, 29 N.W.2d 629 (1947).

Proceeding to set aside judgment for fraud must be brought within two years unless fraud was not discovered within that period. Katz v. Swanson, 147 Neb. 791, 24 N.W.2d 923 (1946).

Petition to set aside order rejecting claim in receivership proceeding upon ground of fraud was properly dismissed when filed more than two years after entry of order. State ex rel. Spillman v. Commercial State Bank of Omaha, 143 Neb. 490, 10 N.W.2d 268 (1943).

Proceeding to set aside judgment of district court disallowing will and denying probate thereof is barred after two years from rendition of the judgment. In re McLean's Estate, 138 Neb. 752, 295 N.W. 270 (1940).

A petition filed more than two years after judgment to set aside the judgment for fraud, which shows on its face the fraud was discovered within the two year period, does not state a cause of action. In re Estate of Jensen, 135 Neb. 602, 283 N.W. 196 (1939).

Where no good cause was shown by plaintiff why proceedings were not instituted within two years to vacate order of dismissal as provided by statute, equity will refuse relief. Lindstrom v. Nilsson, 133 Neb. 184, 274 N.W. 485 (1937).

Proceedings to modify judgment or order must be commenced within two years. Hoeppner v. Bruckman, 129 Neb. 390, 261 N.W. 572 (1935).

Proceeding to vacate judgment for fraud practiced against one of unsound mind, must be commenced within two years of time disability is removed. Newcomb v. State, 129 Neb. 69, 261 N.W. 348 (1935); Scott v. Scott, 125 Neb. 32, 248 N.W. 923 (1933).

Petition to vacate judgment for fraud after two years is properly stricken where it shows on face fraud discovered within two-year period. Brandeen v. Beale, 117 Neb. 291, 220 N.W. 298 (1928).

A female under this section must commence her suit within two years after becoming of age. Kiplinger v. Joslyn, 93 Neb. 40, 139 N.W. 1019 (1913).

To open judgment for fraud petition must show facts were not discovered within two years. State ex rel. Nelson v. Lincoln Med. Col., 86 Neb. 269, 125 N.W. 517 (1910).

Proceeding to vacate judgment for mistake, neglect, or omission of clerk must be brought within three years. Brownlee v. Davidson, 28 Neb. 785, 45 N.W. 51 (1890).

Motion to retax costs must be made within three years. Cattle v. Haddox, 17 Neb. 307, 22 N.W. 565 (1885).

2. Miscellaneous

On refusal of application to vacate judgment for plaintiff on fire policy, court may award reasonable attorney's fee to plaintiff. Messing v. Dwelling House Mut. Ins. Co., 119 Neb. 36, 226 N.W. 914 (1929).

Equity will afford relief against fraudulent judgment where fraud was not discovered in time for statutory proceedings to vacate after term. Krause v. Long, 109 Neb. 846, 192 N.W. 729 (1923).

This section is not applicable to motion for entry of judgment or order nunc pro tunc. Calloway v. Doty, 108 Neb. 319, 188 N.W. 104 (1922).

Action may be brought by infant at any time before maturity. Martin v. Long, 53 Neb. 694, 74 N.W. 43 (1898).

This section is not applicable to a motion for an entry nunc pro tunc of a judgment or order. Hyde v. Michelson, 52 Neb. 680, 72 N.W. 1035 (1897).

25-2009 Supreme Court, Court of Appeals, and county court judgments; laws applicable.

The provisions of Chapter 25 shall apply to the Supreme Court, Court of Appeals, and county court, so far as the same may be applicable to the judgments or final orders of such courts. The parties shall be limited to the same time in which to commence proceedings; and in estimating time, the county court shall, for such purpose, be considered as holding, in each year, a regular term of court commencing on January 1.

Source: R.S.1867, Code § 610, p. 502; R.S.1913, § 8215; C.S.1922, § 9168; C.S.1929, § 20-2009; Laws 1941, c. 30, § 1, p. 139; C.S.Supp.,1941, § 20-2009; R.S.1943, § 25-2009; Laws 2006, LB 1115, § 17.

1. Power
2. Procedure
3. Miscellaneous

1. Power

A county court in the exercise of its probate jurisdiction is not bound by the statute which fixes its terms within which its jurisdiction in civil cases must be exercised. In re Reikofski Estate, 144 Neb. 735, 14 N.W.2d 379 (1944).

County court has power to vacate order in probate proceedings at subsequent term. In re Estate of Sheerer, 137 Neb. 374, 289 N.W. 529 (1940).

County court cannot vacate or modify judgment in civil cases beyond jurisdiction of justice after monthly term except as provided by statute. Stone v. Jensen, 118 Neb. 254, 224 N.W. 284 (1929).

Justices and county courts exercising justice jurisdiction are not empowered to vacate judgment after time to appeal has expired, nor to vacate fraudulent judgment after term. Carlson v. Ray, 104 Neb. 18, 175 N.W. 886 (1919).

County court may vacate probate procured by fraud and permit contest of will. In re Estate of Kelly, 103 Neb. 513, 172 N.W. 758 (1919), rehearing denied 103 Neb. 524, 175 N.W. 653 (1919).

2. Procedure

This section makes proceedings to vacate or modify judgment at subsequent term applicable to Supreme and county courts. In re Estate of Jensen, 135 Neb. 602, 283 N.W. 196 (1939).

Law authorizing district court to vacate judgment cannot be invoked after judgment is pronounced regular by Supreme Court. Brandeen v. Beale, 117 Neb. 291, 220 N.W. 298 (1928).

Final order of county court in proceeding to set aside fraudulent judgment is reviewable by district court on appeal. Gainsforth v. Peterson, 114 Neb. 442, 207 N.W. 935 (1926).

Procedure to vacate judgment applies to county court in exercise of probate jurisdiction. Oakdale Heat & Light Co. v. Seymour, 78 Neb. 50, 114 N.W. 643 (1908).

3. Miscellaneous

Statutory provision is exclusive. State v. State Journal Co., 77 Neb. 771, 111 N.W. 118 (1907).

ARTICLE 21

ACTIONS AND PROCEEDINGS IN PARTICULAR CASES

Cross References

County officers, removal, see Chapter 23, article 20.
County treasurer, action against, see sections 77-1762 to 77-1766.
Divorce and annulment, see Chapter 42, articles 1 and 3.
Drainage, see Chapter 31.
Election contests, see Chapter 32, article 11.
Food, donation or contribution to charitable or nonprofit organization, liability, see sections 25-21,189 and 28-1483.
Habeas corpus, person receiving treatment pursuant to the Nebraska Mental Health Commitment Act or the Sex Offender Commitment Act, see section 71-959.
Irrigation, see Chapter 46.
Mandamus to pay judgment, see section 77-1623.
Monopolies, see Chapter 59.
Name, action to change, see sections 25-21,270 to 25-21,273.
Occupying claimants, see Chapter 76, article 3.
Public Service Commission, orders violated, see sections 75-140 to 75-144.
Quo warranto, restraint of trade, see Chapter 59.
Tax sales, see Chapter 77, article 19.

(a) ACTION ON OFFICIAL BONDS

Section
25-2101. Action on bonds or insurance; by whom and how brought.
25-2102. Further action; authorized.

(b) ARBITRATION

25-2103. Repealed. Laws 1987, LB 71, § 25.
25-2104. Repealed. Laws 1987, LB 71, § 25.
25-2105. Repealed. Laws 1987, LB 71, § 25.
25-2106. Repealed. Laws 1987, LB 71, § 25.
25-2107. Repealed. Laws 1987, LB 71, § 25.
25-2108. Repealed. Laws 1987, LB 71, § 25.
25-2109. Repealed. Laws 1987, LB 71, § 25.
25-2110. Repealed. Laws 1987, LB 71, § 25.
25-2111. Repealed. Laws 1987, LB 71, § 25.
25-2112. Repealed. Laws 1987, LB 71, § 25.
25-2113. Repealed. Laws 1987, LB 71, § 25.
25-2114. Repealed. Laws 1987, LB 71, § 25.
25-2115. Repealed. Laws 1987, LB 71, § 25.
25-2116. Repealed. Laws 1987, LB 71, § 25.
25-2117. Repealed. Laws 1987, LB 71, § 25.
25-2118. Repealed. Laws 1987, LB 71, § 25.
25-2119. Repealed. Laws 1987, LB 71, § 25.
25-2120. Repealed. Laws 1987, LB 71, § 25.

(c) CONTEMPTS

25-2121. Conduct constituting contempt; powers of court of record to punish.
25-2122. Punishment; procedure.
25-2123. Effect of punishment upon criminal liability.

(d) EJECTMENT, TRESPASS, AND WASTE

25-2124. Ejectment; complaint; allegations.
25-2125. Ejectment; answer; contents.

Section

(t) NONPROFIT SPORTS PROGRAMS

(u) SURROGATE PARENTHOOD CONTRACTS

(v) ACTIONS IN WHICH THE STATE OR A STATE AGENCY IS A PARTY

(w) FORCIBLE ENTRY AND DETAINER

Section

(x) RELEASE OF ANIMALS

(y) MOTOR VEHICLE GUEST STATUTE

(z) LEASED TRUCK AND TRAILER LIABILITY

(aa) DIRECTORS AND OFFICERS OF INSURED FINANCIAL DEPOSITORY INSTITUTIONS

(bb) PUBLIC PETITION AND PARTICIPATION

(cc) HEALTH CARE PAYORS

(dd) TERRORISTIC THREATS

(ee) EQUINE ACTIVITIES

(ff) ENVIRONMENTAL AUDITS

(gg) COMPUTER DATE FAILURES

Section

(hh) CHANGE OF NAME

25-21,270. Change of name; authority of district court.
25-21,271. Change of name; persons; procedure.
25-21,272. Change of name; town, village, or city; procedure.
25-21,273. Change of name; effect; costs; how taxed.

(ii) MOTOR VEHICLE COLLISION WITH DOMESTIC ANIMAL

25-21,274. Motor vehicle collision with domestic animal; principles applied.

(jj) DIVERSION OF UTILITY SERVICES

25-21,275. Diversion of utility services; terms, defined.
25-21,276. Diversion of utility services; civil actions; recovery authorized.
25-21,277. Diversion of utility services; rebuttable presumption; when.
25-21,278. Diversion of utility services; additional remedies.

(kk) CRIME VICTIM'S REPARATIONS AND ASSISTANCE

25-21,279. Action to seek injunction; authorized.

(ll) EMERGENCY RESPONSE TO ASTHMA OR ALLERGIC REACTIONS

25-21,280. School, educational service unit, early childhood education program, school nurse, medication aide, and nonmedical staff person; immunity; when.

(mm) ANHYDROUS AMMONIA

25-21,281. Tampering with anhydrous ammonia or anhydrous ammonia equipment; effect on liability.

(nn) FIRE CONTROL OR RESCUE EQUIPMENT DONATIONS

25-21,282. Immunity from liability; exceptions.

(a) ACTION ON OFFICIAL BONDS

25-2101 Action on bonds or insurance; by whom and how brought.

When an officer, executor, or administrator within this state, by misconduct or neglect of duty, forfeits his or her bond or commercial insurance policy or renders his or her sureties liable, any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon in his or her own name against the officer, executor, or administrator, and his or her sureties, to recover the amount to which he or she may be entitled by reason of the delinquency. The action may be instituted and proceeded in on a certified copy of the bond or commercial insurance policy, which copy shall be furnished by the person holding the original thereof.

Source: R.S.1867, Code § 643, p. 507; R.S.1913, § 8216; C.S.1922, § 9169; C.S.1929, § 20-2101; R.S.1943, § 25-2101; Laws 2004, LB 884, § 13.

Section refers to bond given under statutory authority only. Cushing v. Lickert, 79 Neb. 384, 112 N.W. 616 (1907).

Any person entitled to benefit of bond may sue thereon in his own name. Barker v. Wheeler, 71 Neb. 740, 99 N.W. 548 (1904).

That bond is joint instead of joint and several is no defense. Wilcox v. Perkins County, 70 Neb. 139, 97 N.W. 236 (1903).

County is not a necessary party. Stewart v. Carter, 4 Neb. 564 (1876).

25-2102 Further action; authorized.

A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency.

Source: R.S.1867, Code § 644, p. 507; R.S.1913, § 8217; C.S.1922, § 9170; C.S.1929, § 20-2102.

(b) ARBITRATION

25-2103 Repealed. Laws 1987, LB 71, § 25.

25-2104 Repealed. Laws 1987, LB 71, § 25.

25-2105 Repealed. Laws 1987, LB 71, § 25.

25-2106 Repealed. Laws 1987, LB 71, § 25.

25-2107 Repealed. Laws 1987, LB 71, § 25.

25-2108 Repealed. Laws 1987, LB 71, § 25.

25-2109 Repealed. Laws 1987, LB 71, § 25.

25-2110 Repealed. Laws 1987, LB 71, § 25.

25-2111 Repealed. Laws 1987, LB 71, § 25.

25-2112 Repealed. Laws 1987, LB 71, § 25.

25-2113 Repealed. Laws 1987, LB 71, § 25.

25-2114 Repealed. Laws 1987, LB 71, § 25.

25-2115 Repealed. Laws 1987, LB 71, § 25.

25-2116 Repealed. Laws 1987, LB 71, § 25.

25-2117 Repealed. Laws 1987, LB 71, § 25.

25-2118 Repealed. Laws 1987, LB 71, § 25.

25-2119 Repealed. Laws 1987, LB 71, § 25.

25-2120 Repealed. Laws 1987, LB 71, § 25.

(c) CONTEMPTS

25-2121 Conduct constituting contempt; powers of court of record to punish.

Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of (1) disorderly, contemptuous, or insolent behavior towards the court, or any of its officers in its presence; (2) any breach of the peace, noise, or other disturbance tending to interrupt its proceedings; (3) willful disobedience of or resistance willfully offered to any lawful process or order of said court; (4) any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; or (5) contumacious and unlawful refusal to be sworn or affirmed as a witness, and when sworn or affirmed, refusal to answer any legal and proper interrogatory.

Source: R.S.1867, Code § 669, p. 512; R.S.1913, § 8236; C.S.1922, § 9189; C.S.1929, § 20-2121.

1. Grounds
2. Procedure
3. Punishment

1. Grounds

For purposes of subsection (3) of this section, ''willful'' means the violation was committed intentionally, with knowledge that the act was in violation of the lawful process or court order. In re Contempt of Sileven, 219 Neb. 34, 361 N.W.2d 189 (1985); State v. Thalken, 2 Neb. App. 867, 516 N.W.2d 635 (1994).

Disobedience of an injunction must be willful before a breach thereof is contempt. Paasch v. Brown, 199 Neb. 683, 260 N.W.2d 612 (1977).

Question asked must be pertinent to issue in the case to justify conviction of contempt for refusal to answer question. Tastee Inn, Inc. v. Beatrice Foods Co., Inc., 167 Neb. 264, 92 N.W.2d 664 (1958).

Conduct of bondsman hindered administration of justice. Cornett v. State, 155 Neb. 766, 53 N.W.2d 747 (1952).

Willful disobedience of or resistance willfully offered to any lawful process or order of court constitutes criminal contempt. In re Application of Niklaus, 144 Neb. 503, 13 N.W.2d 655 (1944).

False statements made to court by attorney in respect to substitution of page in pleading constituted criminal contempt. Butterfield v. State, 144 Neb. 388, 13 N.W.2d 572 (1944).

Unless the disobedience of an order of court is willful, it is not contempt. Whipple v. Nelson, 138 Neb. 514, 293 N.W. 382 (1940).

Supreme Court can punish, as contempt, contumacious refusal of witness to answer a legal and proper interrogatory propounded to him in hearing before referee in disbarment proceeding. State v. Degele, 137 Neb. 810, 291 N.W. 554 (1940).

Where layman engages in the practice of ''ambulance chasing,'' he is guilty of contempt of court. State ex rel. Wright v. Hinckle, 137 Neb. 735, 291 N.W. 68 (1940).

Notary may commit a witness for contempt when, during taking of deposition, witness refuses to answer proper questions. Ehlers v. State, 133 Neb. 241, 274 N.W. 570 (1937).

Former husband's failure to make payments for support of children as required by decree of divorce is not contumacious if due to lack of means and ability to procure means to pay such support money. Scott v. State, 132 Neb. 39, 270 N.W. 833 (1937).

Willful disobedience of injunction order constituted contempt. McFry v. City of Lincoln, 127 Neb. 404, 255 N.W. 239 (1934).

Obstructing sheriff in holding foreclosure sale was contempt of court. Lux v. State, 126 Neb. 133, 252 N.W. 897 (1934).

Editorial relating to case pending on appeal to Supreme Court was contemptuous per se. State v. Lovell, 117 Neb. 710, 222 N.W. 625 (1929).

Discussion of merits of case by juror with person outside of court was contempt. Rozean v. State, 109 Neb. 354, 191 N.W. 319 (1922).

Abuse of freedom of the press relating to undetermined cases in court will sustain conviction of contempt. Bee Pub. Co. v. State, 107 Neb. 74, 185 N.W. 339 (1921).

Reprehensible misconduct in open court is contempt. Aabel v. State, 86 Neb. 711, 126 N.W. 316 (1910).

Section is merely confirmatory of common law power. State v. Rosewater, 60 Neb. 438, 83 N.W. 353 (1900); State v. Bee Pub. Co., 60 Neb. 282, 83 N.W. 204 (1900).

Party may be guilty of contempt in disobeying erroneous order. Jenkins v. State, 59 Neb. 68, 80 N.W. 268 (1899).

Power to punish for contempt is inherent in courts of common law jurisdiction regardless of statute. Nebraska Children's Home Soc. v. State, 57 Neb. 765, 78 N.W. 267 (1899).

Failure to pay decree for alimony is not contempt per se. Leeder v. State, 55 Neb. 133, 75 N.W. 541 (1898); Segear v. Segear, 23 Neb. 306, 36 N.W. 536 (1888).

Statement of grounds of objection to trial before presiding judge, if on good points, is not contempt. Le Hane v. State, 48 Neb. 105, 66 N.W. 1017 (1896).

Attorney's refusal to practice before certain judge with statement of reasons, is not contempt. Hawes v. State, 46 Neb. 149, 64 N.W. 699 (1895).

Publication regarding a cause during its pendency in court of an article which tends to embarrass administration of justice is a contempt. Percival v. State, 45 Neb. 741, 64 N.W. 221 (1895).

Party ignoring alternative writ of mandamus may be guilty of contempt. McAleese v. State, 42 Neb. 886, 61 N.W. 88 (1894).

Exception to charge of judge to grand jury for purpose of securing ruling thereon is not contempt. Clair v. State, 40 Neb. 534, 59 N.W. 118 (1894).

The power to punish for contempt of court is inherent in every judicial tribunal. Rhodes v. Houston, 202 F.Supp. 624 (D. Neb. 1962).

2. Procedure

Where an affidavit is used to prosecute a contempt charge, failure to use the word ''willful'' is not fatal where the reading of the affidavit clearly indicates intentional disobedience. Sempek v. Sempek, 198 Neb. 300, 252 N.W.2d 284 (1977).

The right of confrontation does not apply to criminal contempt proceedings and defendant's presence is not required if there have been suitable notice and adequate opportunity to appear and be heard. State v. Rhodes, 192 Neb. 557, 222 N.W.2d 837 (1974).

Deposition of defendant can be taken in contempt proceeding. State ex rel. Beck v. Lush, 168 Neb. 367, 95 N.W.2d 695 (1959).

Procedure to punish for violation of mandatory injunction is authorized. Meier v. Nelsen, 156 Neb. 666, 57 N.W.2d 273 (1953).

Criminal contempts must be prosecuted by information in separate action by state. Leeman v. Vocelka, 149 Neb. 702, 32 N.W.2d 274 (1948).

Conviction for contempt may be reviewed only on petition in error, as in criminal cases. Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N.W. 574 (1931); State v. Dodd, 99 Neb. 800, 157 N.W. 1010 (1916).

Formal complaint must be filed and opportunity given to defend, where evidence must be adduced to determine whether contempt has been committed. Gonzalez v. State, 119 Neb. 13, 226 N.W. 801 (1929).

Without formal complaint, finding by court that party to civil action is guilty of contempt is insufficient to sustain conviction. Finegold v. State, 112 Neb. 64, 198 N.W. 572 (1924).

Where offense is committed in court's presence, notice to accused is not essential. In re Dunn, 85 Neb. 606, 124 N.W. 120 (1909).

Where act alleged is contempt per se, accused is not entitled to acquittal on mere denial. Emery v. State, 78 Neb. 547, 111 N.W. 374 (1907).

Presumptions and intendments will not be indulged in to sustain convictions for contempt. Crites v. State, 74 Neb. 687, 105 N.W. 469 (1905).

Disavowal of intent is receivable in extenuation. Mackay v. State, 60 Neb. 143, 82 N.W. 372 (1900).

Proceedings in contempt, in their nature, are criminal. Boyd v. State, 19 Neb. 128, 26 N.W. 925 (1886).

3. Punishment

This section does not limit the court's inherent authority to impose sanctions in addition to those listed herein. Tyler v. Heywood, 258 Neb. 901, 607 N.W.2d 186 (2000).

This section is a codification of the common law of contempt and does not supplant a court's inherent contempt powers. The fact that this section does not list attorney fees as punishment that a court of record may impose in a contempt proceeding

does not necessarily prohibit the court from awarding attorney fees under certain circumstances. Attorney fees may also be recovered when a recognized and accepted uniform course of procedure allows recovery of an attorney fee. In re Interest of Krystal P. et al., 251 Neb. 320, 557 N.W.2d 26 (1996).

Failure to support wife and child in violation of court order could be punished by contempt proceedings. State v. Pitzel, 181 Neb. 176, 147 N.W.2d 524 (1966).

Information was sufficient hereunder; sentence of four months in county jail and one hundred dollars fine for attempt to bribe juror was sustained. Kopp v. State, 124 Neb. 363, 246 N.W. 718 (1933).

Proceeding against party for contempt hereunder is in nature of criminal prosecution and governed by rules of construction applicable thereto; sentence of six months in county jail and two hundred fifty dollars fine for attempt to bribe juror was sustained. McCauley v. State, 124 Neb. 102, 245 N.W. 269 (1932).

District court could punish disobedience of its lawful orders by fine or imprisonment, or both. Back v. State, 75 Neb. 603, 106 N.W. 787 (1906).

Power to punish for contempt is conferred, not upon judges, but upon courts of record. Johnson v. Bouton, 35 Neb. 898, 53 N.W. 995 (1892).

25-2122 Punishment; procedure.

Contempts committed in the presence of the court may be punished summarily; in other cases the party upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense.

Source: R.S.1867, Code § 670, p. 512; R.S.1913, § 8237; C.S.1922, § 9190; C.S.1929, § 20-2122.

1. Procedure
2. Review

1. Procedure

Before a sanction for criminal contempt of court committed outside the presence of the court may be levied, defendant must be brought before the court, notified of the accusation against him, and given reasonable time to make his defense. State ex rel. Collins v. Beister, 227 Neb. 829, 420 N.W.2d 309 (1988).

Appellant, who was found in contempt for tardiness after receiving notice, adequate time to prepare for a hearing, and a hearing at which he could have offered an excuse or explanation for his tardiness, cannot complain that he was convicted of constructive contempt without a hearing, technically proper notice, and the production of evidence. In re Contempt of Potter, 207 Neb. 769, 301 N.W.2d 560 (1981).

Where an affidavit is used to prosecute a contempt charge, failure to use the word ''willful'' is not fatal where the reading of the affidavit clearly indicates intentional disobedience. Sempek v. Sempek, 198 Neb. 300, 252 N.W.2d 284 (1977).

The right of confrontation does not apply to criminal contempt proceedings and defendant's presence is not required if there have been suitable notice and adequate opportunity to appear and be heard. State v. Rhodes, 192 Neb. 557, 222 N.W.2d 837 (1974).

Only requirement as to information is that the accused shall be notified of the charge against him when brought before the court. In re Application of Niklaus, 144 Neb. 503, 13 N.W.2d 655 (1944).

Notary may commit a witness for contempt for refusal to answer proper questions during taking of deposition. Ehlers v. State, 133 Neb. 241, 274 N.W. 570 (1937).

Preliminary examination is not necessary in proceedings for contempt. Kopp v. State, 124 Neb. 363, 246 N.W. 718 (1933).

Contempt proceedings are in nature to be deemed criminal, and governed by same rules. Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N.W. 574 (1931).

Summary proceedings for contempt lie only where contempt committed in court's presence and court has judicial cognizance of facts. Judgment not stating facts constituting alleged contempt will not sustain sentence. Gonzalez v. State, 119 Neb. 13, 226 N.W. 801 (1929).

Without formal complaint, finding by court that party to civil action is guilty of contempt will not sustain conviction. Finegold v. State, 112 Neb. 64, 198 N.W. 572 (1924).

Affidavit charging constructive contempt, made by county attorney, is sufficient, though on information and belief. Tasich v. State, 111 Neb. 465, 196 N.W. 688 (1923).

Summary conviction may be had only for contempt committed in presence of court. Gordon v. State, 73 Neb. 221, 102 N.W. 458 (1905).

Proceedings are strictly construed; accused is entitled to be heard in own defense. Beckett v. State, 49 Neb. 210, 68 N.W. 473 (1896); Hawes v. State, 46 Neb. 149, 64 N.W. 699 (1895).

When committed in presence of court, affidavit must state sufficient facts to show that the case is one over which the court has jurisdiction. Hawthorne v. State, 45 Neb. 871, 64 N.W. 359 (1895).

Material facts must be stated. Ludden v. State, 31 Neb. 429, 48 N.W. 61 (1891).

This section does allow summary punishments of contempts committed in the presence of the court. In re Interest of Simon H., 8 Neb. App. 225, 590 N.W.2d 421 (1999).

Charge of contempt committed outside presence of court must be made by information. Rhodes v. Houston, 202 F.Supp. 624 (D. Neb. 1962).

2. Review

Where punishment for contempt not committed in presence of court is imposed by void order without accusation, notice or opportunity to make defense, and without evidence or trial, such order may be reviewed without motion for new trial. Muffly v. State, 129 Neb. 334, 261 N.W. 560 (1935).

Proceeding must be reviewed on error, not by appeal. Hanika v. State, 87 Neb. 845, 128 N.W. 526 (1910).

Judgment may be reviewed on error. Gandy v. State, 13 Neb. 445, 14 N.W. 143 (1882).

25-2123 Effect of punishment upon criminal liability.

Persons punished for contempt under the preceding provisions shall nevertheless be liable to indictment, if such contempt shall amount to an indictable

offense; but the court before which the conviction shall be had may, in determining the punishment, take into consideration the punishment before inflicted in mitigation of the sentence.

Source: R.S.1867, Code § 671, p. 513; R.S.1913, § 8238; C.S.1922, § 9191; C.S.1929, § 20-2123.

The right of confrontation does not apply to criminal contempt proceedings and defendant's presence is not required if there have been suitable notice and adequate opportunity to appear and be heard. State v. Rhodes, 192 Neb. 557, 222 N.W.2d 837 (1974).

Action for criminal contempt for practicing law without license was not barred by lapse of time or by statute making it a misdemeanor, there being no statute limiting time for prosecution of such action and no prejudice shown to defendant by delay. State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N.W. 282 (1937).

Failure of information for contempt to use word "willful" is not fatal. Kammer v. State, 105 Neb. 224, 180 N.W. 39 (1920).

(d) EJECTMENT, TRESPASS, AND WASTE

25-2124 Ejectment; complaint; allegations.

In an action for the recovery of real property, it shall be sufficient if the complaint states that the plaintiff has a legal estate therein, and is entitled to the possession thereof, describing the same, and that the defendant unlawfully keeps the plaintiff out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

Source: R.S.1867, Code § 626, p. 505; R.S.1913, § 8239; C.S.1922, § 9192; C.S.1929, § 20-2124; R.S.1943, § 25-2124; Laws 2002, LB 876, § 30.

1. Allegations
2. Title
3. Miscellaneous

1. Allegations

The essential elements of ejectment are legal estate, a right of possession in the plaintiff, and unlawful detention by the defendant. K & K Farming v. Federal Intermediate Credit Bank, 237 Neb. 846, 468 N.W.2d 99 (1991); Bridenbaugh v. Bryant, 79 Neb. 329, 112 N.W. 571 (1907).

In a proceeding in equity to establish corners and boundaries to land and protection of right of possession thereof, it is not necessary to allege how plaintiff's estate or ownership is derived. McGowan v. Neimann, 139 Neb. 639, 298 N.W. 411 (1941).

Special pleading is not required in ejectment action. Fitch v. Walsh, 94 Neb. 32, 142 N.W. 293 (1913).

In suit by administrator or executor, it is not necessary to allege that plaintiff has a legal estate in the land. Tillson v. Holloway, 90 Neb. 481, 134 N.W. 232 (1912).

Plaintiff must have both legal title and right of possession. Zion Evangelical Lutheran Church v. St. John's Evangelical Lutheran Church, 75 Neb. 774, 106 N.W. 1010 (1906).

Petition must allege plaintiff is entitled to possession. Wells v. Steckelberg, 52 Neb. 597, 72 N.W. 865 (1897); George v. McCullough, 48 Neb. 680, 67 N.W. 758 (1896).

Description of land in petition must be such as would enable a competent surveyor to locate it. Lane v. Abbott, 23 Neb. 489, 37 N.W. 82 (1888).

Where petition contains a particular description, by courses and distances, such description will prevail over a general statement that the land is part of a certain lot. Cushing v. Conness, 4 Neb. Unof. 669, 95 N.W. 855 (1903).

2. Title

Ejectment may be maintained by a vendor of real property against his vendee under an executory contract of sale where vendee is in default and contract provides for forfeiture. Abbas v. Demont, 152 Neb. 77, 40 N.W.2d 265 (1949).

Tax deed constitutes color of title. White v. Musser, 87 Neb. 628, 127 N.W. 1058 (1910).

Plaintiff must recover on strength of own title; adverse possession is defense. Abbott v. Coates, 62 Neb. 247, 86 N.W. 1058 (1901); Comstock v. Kerwin, 57 Neb. 1, 77 N.W. 387 (1898); Chicago, B. & Q. R. R. Co. v. Schalkopf, 54 Neb. 448, 74 N.W. 826 (1898); Omaha Real Estate & Trust Co. v. Kragscow, 47 Neb. 592, 66 N.W. 658 (1896).

Tax sale certificate is not color of title. Webb v. Thiele, 56 Neb. 752, 77 N.W. 56 (1898); McKeighan v. Hopkins, 14 Neb. 361, 15 N.W. 711 (1883).

Plaintiff must show legal estate, but evidence thereof need not be a perfect legal paper title. Lantry v. Wolff, 49 Neb. 374, 68 N.W. 494 (1896).

In trial of title, ejectment is proper proceeding. Snowden v. Tyler, 21 Neb. 199, 31 N.W. 661 (1887).

3. Miscellaneous

In an action in ejectment, a trial court's findings will not be set aside unless clearly wrong. K & K Farming v. Federal Intermediate Credit Bank, 237 Neb. 846, 468 N.W.2d 99 (1991).

Remedy for recovery of real estate by one claiming legal title against another in possession claiming an estate therein is an action of ejectment. Johnston v. Robertson, 171 Neb. 324, 106 N.W.2d 192 (1960).

Ejectment may be maintained by heir. Lewon v. Heath, 53 Neb. 707, 74 N.W. 274 (1898).

Verdict must respond to issues. Cannon v. Smith, 47 Neb. 917, 66 N.W. 999 (1896).

Record must affirmatively show plaintiff has interest in land. Wildman v. Shambaugh, 43 Neb. 371, 61 N.W. 578 (1895).

Action presents two questions, viz: title and right of possession. Malloy v. Malloy, 35 Neb. 224, 52 N.W. 1097 (1892).

Prior possession is sufficient to maintain. Robinson v. Gantt, 1 Neb. Unof. 51, 95 N.W. 506 (1901).

25-2125 Ejectment; answer; contents.

It shall be sufficient in such action if the answer denies generally the title alleged in the complaint, or that the defendant withholds possession, as the case may be; but if the defendant denies the title of the plaintiff, possession by the defendant shall be taken as admitted. If the defendant does not defend for the whole premises, the answer shall describe the particular part for which defense is made.

Source: R.S.1867, Code § 627, p. 505; R.S.1913, § 8240; C.S.1922, § 9193; C.S.1929, § 20-2125; R.S.1943, § 25-2125; Laws 2002, LB 876, § 31.

Defendant's general denials in an ejectment action are sufficient to raise the question of the defendant's equity in the property as a defense to the ejectment action. Miller v. Radtke, 230 Neb. 561, 432 N.W.2d 542 (1988).

Ejectment of a vendee may be granted as a remedy for violating the terms of a land contract only where the equities of the particular case justify such a disposition, where the property is of less value than the contract price, and where such a procedure would not offend against justice and equity. Miller v. Radtke, 230 Neb. 561, 432 N.W.2d 542 (1988).

In an ejectment action, where defendant presents an equitable defense, the case is tried, and reviewed, as an action in equity. Miller v. Radtke, 230 Neb. 561, 432 N.W.2d 542 (1988).

In enforcing a vendor's rights in a land contract, ejectment is a more severe disposition than is the remedy of strict foreclosure. Miller v. Radtke, 230 Neb. 561, 432 N.W.2d 542 (1988).

Under general denial, defendant may prove estoppel to defeat plaintiff's cause of action. Fitch v. Walsh, 94 Neb. 32, 142 N.W. 293 (1913).

Proof of adverse possession is admissible under general denial. Murray v. Romine, 60 Neb. 94, 82 N.W. 318 (1900).

Where answer denies title and right of possession, defendant may interpose defense of adverse possession. Fink v. Dawson, 52 Neb. 647, 72 N.W. 1037 (1897).

Defendant may interpose any number of defenses. Wanser v. Lucas, 44 Neb. 759, 62 N.W. 1108 (1895).

Defendant under general denial may prove any fact which will defeat plaintiff's cause of action. Staley v. Housel, 35 Neb. 160, 52 N.W. 888 (1892).

Statute of limitations is a defense. Gue v. Jones, 25 Neb. 634, 41 N.W. 555 (1889); Colvin v. Republican Valley Land Assn., 23 Neb. 75, 36 N.W. 361 (1888).

25-2126 Ejectment; actions between tenants in common; complaint; allegations.

In an action by a tenant in common of real property against a cotenant the plaintiff must state, in addition to what is required in section 25-2124, that the defendant either denies the plaintiff's right, or did some act amounting to such denial.

Source: R.S.1867, Code § 628, p. 505; R.S.1913, § 8241; C.S.1922, § 9194; C.S.1929, § 20-2126.

Lease by tenant in common of an entire estate is void as to interest of his cotenants. Jackson v. O'Rorke, 71 Neb. 418, 98 N.W. 1068 (1904).

Where tenant in common denies title of cotenants, and is in possession of and claiming property, such holding is adverse. Craven v. Craven, 68 Neb. 459, 94 N.W. 604 (1903).

Statute of limitations need not be pleaded. Oldig v. Fisk, 53 Neb. 156, 73 N.W. 661 (1897).

Tenant in common can recover only to extent of his title. Kirk v. Bowling, 20 Neb. 260, 29 N.W. 928 (1886).

25-2127 Ejectment; plaintiff's right terminating while action pending; verdict; judgment.

In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property.

Source: R.S.1867, Code § 629, p. 505; R.S.1913, § 8242; C.S.1922, § 9195; C.S.1929, § 20-2127.

Right to maintain ejectment of pendente lite purchaser was terminated upon confirmation of mortgage foreclosure sale, but recovery could be made of rents and profits. Orr v. Broad, 52 Neb. 490, 72 N.W. 850 (1897).

25-2128 Ejectment; occupying claimants; rights.

The parties in an action for the recovery of property may avail themselves, if entitled thereto, of the relief provided for in sections 76-301 to 76-311 for occupying claimants.

Source: R.S.1867, Code § 632, p. 506; R.S.1913, § 8234; C.S.1922, § 9196; C.S.1929, § 20-2128.

To recover under occupying claimant's act, defendant must have made improvements or paid taxes while in good faith claiming title. Carter v. Brown, 35 Neb. 670, 53 N.W. 580 (1892).

Measure of recovery by occupying claimant is the amount the improvements add to value of property. Fletcher v. Brown, 35 Neb. 660, 53 N.W. 577 (1892).

25-2129 Waste; negligence in preventing; liability.

Any person whose duty it is to prevent waste, and who has not used reasonable care and diligence to prevent it, is deemed to have committed it.

Source: R.S.1867, Code § 635, p. 506; R.S.1913, § 8246; C.S.1922, § 9199; C.S.1929, § 20-2131.

25-2130 Trespass; liability; damages; when recoverable.

For willful trespass, injuring any timber, tree, or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard, or town lot, or on the public grounds of any town, or any land held by this state, for any purpose whatever, the trespasser shall pay damages at the suit of any person entitled to protect or enjoy the property aforesaid.

Source: R.S.1867, Code § 636, p. 506; R.S.1913, § 8247; C.S.1922, § 9200; C.S.1929, § 20-2132; R.S.1943, § 25-2130; Laws 2000, LB 626, § 20.

To recover multiple damages one must distinctly claim them in his petition. George Rose Sodding & Grading Co., Inc. v. City of Omaha, 190 Neb. 12, 205 N.W.2d 655 (1973).

To constitute willful trespass, act must be done knowingly or intentionally. Hallowell v. Borchers, 150 Neb. 322, 34 N.W.2d 404 (1948).

Waste defined; equity will restrain. Hayman v. Rownd, 82 Neb. 598, 118 N.W. 328 (1908).

Injunction to restrain threatened trespass is allowable. Peterson v. Hopewell, 55 Neb. 670, 76 N.W. 451 (1898).

Entry of homesteader is sufficient to support action. Culbertson Irrigating & Water Power Co. v. Olander, 51 Neb. 539, 71 N.W. 298 (1897).

25-2131 Trespass; taking timber for repair of public highways or bridges; liability.

Nothing herein contained authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge in its immediate neighborhood.

Source: R.S.1867, Code § 637, p. 506; R.S.1913, § 8248; C.S.1922, § 9201; C.S.1929, § 20-2133.

25-2132 Waste or trespass; remainderman; reversioner; rights.

The owner of an estate in remainder or reversion, may maintain an action for trespass or waste for injuries done to the inheritance, notwithstanding any intervening estate for life or years.

Source: R.S.1867, Code § 638, p. 506; R.S.1913, § 8249; C.S.1922, § 9202; C.S.1929, § 20-2134.

Lessee remaining in possession after death of life tenant becomes liable to the reversioner for reasonable value of the use and occupation of premises. Guthmann v. Vallery, 51 Neb. 824, 71 N.W. 734 (1897).

Conveyance of reversion carries rents. Eiseley v. Spooner, 23 Neb. 470, 36 N.W. 659 (1888).

25-2133 Waste or trespass; heir; rights.

An heir, whether a minor or of full age, may maintain an action for trespass or waste for injuries done in the time of his ancestors as well as in his own time, unless barred by the statute of limitations.

Source: R.S.1867, Code § 639, p. 506; R.S.1913, § 8250; C.S.1922, § 9203; C.S.1929, § 20-2135.

Action to quiet title by administrator is not a bar to like action by heir. Eayrs v. Nason, 54 Neb. 143, 74 N.W. 408 (1898).

25-2134 Waste or trespass; purchaser on execution; rights.

Where lands or tenements are sold by virtue of an execution, the purchaser at such sale may maintain his action against any person for trespass or waste occurring or existing after his purchase.

Source: R.S.1867, Code § 640, p. 506; R.S.1913, § 8251; C.S.1922, § 9204; C.S.1929, § 20-2136.

25-2135 Waste or trespass; occupant; right to use lands or timber for repairs.

Section 25-2134 is not intended to prevent the person who occupies the lands in the meantime from using them in the ordinary course of husbandry, or from using timber for the purpose of making suitable repairs thereon.

Source: R.S.1867, Code § 641, p. 507; R.S.1913, § 8252; C.S.1922, § 9205; C.S.1929, § 20-2137.

25-2136 Waste; occupant; right to use timber for repairs; limit.

If for the purpose stated in section 25-2135 the occupant employs timber vastly superior to that required for the occasion, he will be deemed to have committed waste, and will be liable accordingly.

Source: R.S.1867, Code § 642, p. 507; R.S.1913, § 8253; C.S.1922, § 9206; C.S.1929, § 20-2138.

(e) FORECLOSURE OF MORTGAGES

25-2137 Complaint for foreclosure or satisfaction; where filed.

All complaints for the foreclosure or satisfaction of mortgages shall be filed in the district court where the mortgaged premises are situated.

Source: R.S.1867, Code § 845, p. 542; R.S.1913, § 8254; C.S.1922, § 9207; C.S.1929, § 20-2139; R.S.1943, § 25-2137; Laws 2002, LB 876, § 32.

Cross References

For appointment of receiver, see sections 25-1081 to 25-1092.

Action to foreclose real estate mortgage must be brought in county where real estate is situated. Boehmer v. Heinen, 138 Neb. 376, 293 N.W. 237 (1940).

Right to bring action at law on promissory note, secured by real estate mortgage, has not been abolished. Federal Farm Mtg. Corp. v. Thiele, 137 Neb. 626, 290 N.W. 471 (1940).

It is presumed that the law of Colorado regarding place of filing mortgage foreclosure actions is same as that of Nebraska in absence of proof to contrary. National Fidelity Life Ins. Co. v. Gordon, 130 Neb. 130, 264 N.W. 155 (1936).

Foreclosure was properly brought in county where land was located. Prudential Ins. Co. v. Bliss, 122 Neb. 561, 240 N.W. 766 (1932).

One holding interest in proceeds of sale because of rights possessed in the mortgage is necessary party in foreclosure suit. Webb v. Patterson, 114 Neb. 346, 207 N.W. 522 (1926).

A judicial foreclosure is not designed to remove the original mortgage lien and create a new and independent one; purpose of foreclosure decree was not to destroy lien of mortgages but to judicially recognize them. In re Black Ranches, Inc., 362 F.2d 8 (8th Cir. 1966).

Confirmation of sale under mortgage foreclosure after death of mortgagor is voidable but not void, and is not open to collateral attack. O'Connor v. Townsend, 87 F.2d 882 (8th Cir. 1937).

Mortgagor retains legal title and substantial interest in mortgaged real estate until confirmation of sale and execution of deed, and may redeem at any time before order of confirmation becomes final. United States Nat. Bank of Omaha v. Pamp, 83 F.2d 493 (8th Cir. 1936).

25-2138 Sale of premises; decree; power of court.

Whenever a complaint is filed for the foreclosure or satisfaction of a mortgage, the court has the power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the cost of suit.

Source: R.S.1867, Code § 846, p. 542; R.S.1913, § 8255; C.S.1922, § 9208; C.S.1929, § 20-2140; R.S.1943, § 25-2138; Laws 2002, LB 876, § 33.

Cross References

For stay of order of sale, see section 25-1506.

1. Decree
2. Sale
3. Miscellaneous

1. Decree

Decree is final judgment; is reviewable before sale and confirmation. Schuyler Building & Loan Assn. v. Fulmer, 61 Neb. 68, 84 N.W. 609 (1900).

Decree in foreclosure is not personal judgment. Alling v. Nelson, 55 Neb. 161, 75 N.W. 581 (1898).

2. Sale

Court may in the decree provide for the sale of the premises in parcels or en masse as the best interests of the parties may require. Michigan Mutual Life Ins. Co. v. Richter, 58 Neb. 463, 78 N.W. 932 (1899); Kane v. Jonasen, 55 Neb. 757, 76 N.W. 441 (1898).

Order of sale, aside from decree, is unnecessary. Clark & Leonard Investment Co. v. Hamilton, 54 Neb. 95, 74 N.W. 430 (1898); Johnson v. Colby, 52 Neb. 327, 72 N.W. 313 (1897).

Personal notice of sale and confirmation is unnecessary. Link v. Connell, 48 Neb. 574, 67 N.W. 475 (1896).

A special execution may issue for sale of mortgaged premises on decree of foreclosure. Renard v. Brown, 7 Neb. 449 (1878).

3. Miscellaneous

Sale of real estate on mortgage foreclosure is not a bar to withdrawal of note after foreclosure is completed and the mortgagee may bring suit thereon to collect deficiency. Federal Farm Mtg. Corp. v. Thiele, 137 Neb. 626, 290 N.W. 471 (1940).

Defense of usury is not available to purchaser of equity of redemption. Building & Loan Assn. of Dakota v. Bilan, 59 Neb. 458, 81 N.W. 308 (1899).

Doctrine of subrogation discussed and applied. Aultman, Miller & Co. v. Bishop, 53 Neb. 545, 74 N.W. 55 (1898); Ocobock v. Baker, 52 Neb. 447, 72 N.W. 582 (1897).

Mortgagor retains legal title and substantial interest in mortgaged real estate until confirmation of sale and execution of deed, and may redeem at any time before order of confirmation becomes final. United States Nat. Bank of Omaha v. Pamp, 83 F.2d 493 (8th Cir. 1936).

25-2139 Decree; power of court.

When a complaint is filed for the satisfaction of a mortgage, the court has the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof.

Source: R.S.1867, Code § 847, p. 542; R.S.1913, § 8256; C.S.1922, § 9209; C.S.1929, § 20-2141; Laws 1933, c. 41, § 1, p. 248; C.S.Supp.,1941, § 20-2141; R.S.1943, § 25-2139; Laws 2002, LB 876, § 34.

1. Deficiency judgment
2. Other remedies

1. Deficiency judgment

The use of the word ''premises'' does not refer to deficiencies wherein chattel mortgages are involved. Schreiner v. Witte, 143 Neb. 109, 8 N.W.2d 831 (1943).

Amendment of 1933 depriving court of jurisdiction in foreclosure action to render a deficiency judgment does not apply to mortgage obligations created prior thereto, and deficiency judgment may be entered on such an obligation at any time within five years from confirmation of sale. Bartels v. Meyer, 136 Neb. 274, 285 N.W. 698 (1939).

The general saving clause preserves the right to a deficiency judgment in the foreclosure of a mortgage obligation created prior to amendment of this section abolishing deficiency judgment. Vlazny v. Dittrich, 136 Neb. 266, 285 N.W. 697 (1939); Filley v. Mancuso, 135 Neb. 403, 281 N.W. 850 (1938); First Trust Co. of Lincoln v. Eastridge Club of Lincoln, 134 Neb. 785, 279 N.W. 720 (1938); Stowers v. Stuck, 131 Neb. 409, 268 N.W. 310 (1936).

Repeal of the statute permitting recovery of a deficiency judgment did not prevent action to revive a dormant deficiency judgment. McCormack v. Murray, 133 Neb. 125, 274 N.W. 383 (1937).

Repeal of statute permitting recovery of deficiency judgment does not affect pending actions. Arnold v. Hawley, 128 Neb. 766, 260 N.W. 284 (1935).

Statute was not applicable to suit pending when it took effect. Helfrich v. Baxter, 128 Neb. 281, 258 N.W. 532 (1935).

Act of 1933 relating to deficiency judgments was not applicable to case where decree of foreclosure was obtained, property sold and sale confirmed, and application for deficiency judgment made and denied and appeal from denial taken before act took effect. First Trust Co. of Omaha v. Glendale Realty Co., 125 Neb. 283, 250 N.W. 68 (1933).

2. Other remedies

This section only operates to separate the deficiency action from the foreclosure action and requires a separate action be brought at law to collect a deficiency after foreclosure. Carman v. Gibbs, 220 Neb. 603, 371 N.W.2d 283 (1985).

Amendment abolishing deficiency judgment in foreclosure action does not apply to action at law on note, even if accompanied by ancillary remedy of attachment. Linder v. Terre Haute Brewing Co., 139 Neb. 636, 298 N.W. 545 (1941).

Amendment abolishing deficiency judgment does not apply where the mortgage was executed before the restriction was passed and was not then due nor in litigation. Federal Land Bank of Omaha v. Plumer, 139 Neb. 301, 297 N.W. 541 (1941).

The effect of 1933 amendment is to deny a deficiency judgment to the mortgagee in a foreclosure action, and to leave unaffected other remedies for the collection of the debt. Federal Farm Mtg. Corp. v. Claussen, 138 Neb. 518, 293 N.W. 424 (1940).

Amendment of 1933 does not abolish action at law on debt secured by mortgage, and after completion of foreclosure, mortgagee may withdraw note with leave of court and bring suit thereon for deficiency. Federal Farm Mtg. Corp. v. Thiele, 137 Neb. 626, 290 N.W. 471 (1940).

Recovery on note after foreclosure of mortgage had been completed is allowed where leave of the court to withdraw note is obtained. Federal Farm Mtg. Corp. v. Cramb, 137 Neb. 553, 290 N.W. 440 (1940).

25-2140 Decree; effect upon right to recover for debt.

After a complaint for foreclosure or satisfaction of a mortgage is filed, while the same is pending, and after a decree is rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.

Source: R.S.1867, Code § 848, p. 542; R.S.1913, § 8257; C.S.1922, § 9210; C.S.1929, § 20-2142; R.S.1943, § 25-2140; Laws 2002, LB 876, § 35.

1. Scope
2. Deficiency judgment
3. Action at law
4. Miscellaneous

1. Scope

Purpose of this section is to prevent the prosecution of proceedings at law to recover the debt concurrently with proceedings to foreclose mortgage, and to eliminate the possibility of two judgments being rendered against the debtor for the same debt. Federal Farm Mtg. Corp. v. Claussen, 138 Neb. 518, 293 N.W. 424 (1940).

Conditional allowance of mortgagee's claim against mortgagor's estate did not preclude foreclosure. Quesner v. Novotny, 116 Neb. 84, 215 N.W. 796 (1927).

''After a decree rendered thereon'' refers to the decree of foreclosure on the mortgage. Armstrong v. Patterson, 97 Neb. 229, 149 N.W. 408 (1914).

Filing claim against mortgagor's estate pending foreclosure does not operate as a release or discharge of mortgage. National Life Ins. Co. v. Fitzgerald, 61 Neb. 692, 85 N.W. 948 (1901).

Purpose is to avoid two actions being in progress at same time. Meehan v. First Nat. Bank of Fairfield, 44 Neb. 213, 62 N.W. 490 (1895).

2. Deficiency judgment

The general saving statute preserves right of action on claim for a deficiency judgment in suit to foreclose a mortgage not due nor in litigation at time the Legislature, without a special saving clause, passed the act of 1933 repealing the statutory provision permitting deficiency judgments. Stowers v. Stuck, 131 Neb. 409, 268 N.W. 310 (1936).

Mortgagee's petition for deficiency judgment, filed in same court where mortgage was foreclosed and sale had thereunder, is continuation of foreclosure suit, and court order authorizing prosecution thereof is not required. Scottsbluff Nat. Bank v. Pfeifer, 120 Neb. 445, 233 N.W. 255 (1930).

Application for deficiency judgment as continuation of original foreclosure suit does not require leave of court. Bennett v. Winegar, 103 Neb. 843, 174 N.W. 512 (1919).

Party is not entitled to deficiency judgment when foreclosure proceedings commenced prior thereto remain undisposed of. Wolff v. Phelps, 3 Neb. Unof. 511, 92 N.W. 143 (1902).

3. Action at law

In an action in equity for reinstatement of a mortgage where relief is denied because of laches, the court may nonetheless

render judgment on the note where such alternative relief is included in the prayer. Rutt v. Frank, 186 Neb. 842, 186 N.W.2d 911 (1971).

Burden rests on mortgagee to establish that no proceedings at law have been had to recover on the mortgage indebtedness. Bankers Life Co. v. Peterson, 178 Neb. 205, 132 N.W.2d 377 (1965).

Failure to amend this section shows legislative intent to permit suit at law for deficiency after mortgage foreclosure proceeding is completed. Federal Farm Mtg. Corp. v. Thiele, 137 Neb. 626, 290 N.W. 471 (1940).

Recovery on note is allowed after foreclosure of mortgage has been completed, where plaintiff obtains leave of the court to withdraw the note. Federal Farm Mtg. Corp. v. Cramb, 137 Neb. 553, 290 N.W. 440 (1940).

It is not necessary to obtain leave of court to commence action at law on note secured by real estate mortgage where pleadings and proof show that no action has been filed in district court of county where mortgaged premises are situated to foreclose the mortgage. National Fidelity Life Ins. Co. v. Gordon, 130 Neb. 130, 264 N.W. 155 (1936).

Granting motion to dismiss application for deficiency judgment is not authority to sue. Mann v. Burkland, 68 Neb. 269, 94 N.W. 116 (1903).

After dismissal, holder of note may sue for debt. Kendall v. Selby, 66 Neb. 60, 92 N.W. 178 (1902).

Action at law is not abated by action to enforce lien in equity. Garneau v. Kendall, 61 Neb. 396, 85 N.W. 291 (1901).

There is no inhibition against the prosecution of proceedings at law to recover a debt other than the one the mortgage was given to secure. Maxwell v. Home Fire Ins. Co., 57 Neb. 207, 77 N.W. 681 (1898).

Creditor may proceed at law without having exhausted his remedy by foreclosure. Grable v. Beatty, 56 Neb. 642, 77 N.W. 49 (1898).

Pendency of proceedings against garnishees, upon judgment for the debt, stays foreclosure. Hargreaves v. Menken, 45 Neb. 668, 63 N.W. 951 (1895).

Plaintiff must plead authority to sue at law. Brayton v. Oaks, 2 Neb. Unof. 593, 89 N.W. 646 (1902).

4. Miscellaneous

A construction lien is not a mortgage for purposes of applying this section. Tilt-Up Concrete, Inc. v. Star City/Federal, Inc., 261 Neb. 64, 621 N.W.2d 502 (2001).

25-2141 Parties defendant; joinder.

If the mortgage debt is secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the action.

Source: R.S.1867, Code § 849, p. 543; R.S.1913, § 8258; C.S.1922, § 9211; C.S.1929, § 20-2143; Laws 1933, c. 41, § 2, p. 248; C.S.Supp.,1941, § 20-2143.

After mortgage foreclosure is completed, mortgagee may sue at law for deficiency without authorization of equity court wherein foreclosure was had. Federal Farm Mtg. Corp. v. Claussen, 138 Neb. 518, 293 N.W. 424 (1940).

Amendment of 1933 did not affect right of creditor to bring suit at law on note for deficiency remaining after foreclosure of mortgage has been completed. Federal Farm Mtg. Corp. v. Thiele, 137 Neb. 626, 290 N.W. 471 (1940); Federal Farm Mtg. Corp. v. Cramb, 137 Neb. 553, 290 N.W. 440 (1940).

Parties to indemnity agreement against loss on real estate mortgage are proper, though not necessary, parties to original foreclosure proceeding. First Trust Co. of Lincoln v. Airedale Ranch & Cattle Co., 136 Neb. 521, 286 N.W. 766 (1939).

Holder of secured note transferring it without disclosing that he was agent is liable for deficiency. Thornton v. Farmers & Merchants Nat. Bank of Fairbury, 117 Neb. 355, 220 N.W. 598 (1928).

Joining sureties on note secured by mortgage as defendants in foreclosure suit was proper. United States Trust Co. v. Miller, 116 Neb. 25, 215 N.W. 462 (1927).

Vendor becomes in effect surety if mortgagee elects to hold purchaser. Merriam v. Miles, 54 Neb. 566, 74 N.W. 861 (1898).

If conveyed subject to mortgage, purchaser is not liable for deficiency. Green v. Hall, 45 Neb. 89, 63 N.W. 119 (1895).

Purchaser agreeing to pay mortgage as part consideration may be sued at law or held liable on foreclosure. Reynolds v. Dietz, 39 Neb. 180, 58 N.W. 89 (1894).

Where purchaser assumes and agrees to pay mortgage, it is immaterial in foreclosure action whether vendor had mortgageable interest in premises. Bond v. Dolby, 17 Neb. 491, 23 N.W. 351 (1885).

25-2142 Complaint for foreclosure or satisfaction; allegations.

Upon filing a complaint for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid.

Source: R.S.1867, Code § 850, p. 543; R.S.1913, § 8259; C.S.1922, § 9212; C.S.1929, § 20-2144; R.S.1943, § 25-2142; Laws 2002, LB 876, § 36.

1. Scope
2. Allegations
3. Miscellaneous

1. Scope

Requirement that petition state whether any proceedings at law have been brought is for protection of the debtor, and does not apply to purchaser of land who did not assume mortgage indebtedness. Federal Farm Mtg. Corp. v. Adams, 142 Neb. 202, 5 N.W.2d 384 (1942).

Failure to amend this section shows legislative intent to permit suit at law for deficiency after mortgage foreclosure proceeding is completed. Federal Farm Mtg. Corp. v. Thiele, 137 Neb. 626, 290 N.W. 471 (1940).

Section applies only to formal mortgages and not to mortgages or liens arising out of the equities between the parties. Luikart v. Bank of Benkelman, 132 Neb. 501, 272 N.W. 324 (1937); Bankers Life Ins. Co. v. Ohrt, 131 Neb. 858, 270 N.W. 497 (1936).

Statute does not apply to action to foreclose a contract for sale of real estate. Connecticut General Life Ins. Co. v. Leahy, 125 Neb. 644, 251 N.W. 278 (1933).

Defense is available to attaching creditor contesting priority. Fryer v. Fryer, 74 Neb. 845, 105 N.W. 712 (1905).

Intent of this section is to prevent prosecution of proceedings at law to recover indebtedness concurrently with proceedings to foreclose mortgage. Carman v. Harris, 61 Neb. 635, 85 N.W. 848 (1901).

Section applies only to formal mortgages, and not to liens arising from equities between parties. Dimick v. Grand Island Banking Co., 37 Neb. 394, 55 N.W. 1066 (1893).

Section is for benefit of mortgagor, and between lienors is not required. Chaffee v. Schestedt, 4 Neb. Unof. 740, 96 N.W. 161 (1903).

2. Allegations

Allegation that no proceedings at law have been had must be proved to entitle plaintiff to a decree of foreclosure. United Benefit Life Ins. Co. v. Holman, 177 Neb. 682, 130 N.W.2d 593 (1964).

Absence of required allegation is not ground for vacation of judgment after expiration of term. Gasper v. Mazur, 157 Neb. 857, 62 N.W.2d 117 (1954).

If plaintiff's allegation that no proceedings at law have been instituted for the recovery of the debt is denied, plaintiff is not entitled to a decree of foreclosure unless his allegation is supported by competent evidence. Jones v. Vennerberg, 133 Neb. 143, 274 N.W. 494 (1937).

Failure to insert in petition to foreclose mortgage allegations that there has been no action at law to collect the debt and that debt has not been paid, is not ground for reversal on appeal, where such allegations were read into the record of the trial with permission of the court, and were put in issue by an answer and tried to the court. Hitchens v. Alderson, 129 Neb. 573, 262 N.W. 501 (1935).

Where plaintiff in alleging in his petition that there had been no action at law to recover the debt failed to include the statutory words ''or any part thereof,'' Supreme Court would permit amendment in furtherance of justice and to conform to proof. Pitman v. Henkens, 125 Neb. 621, 251 N.W. 282 (1933).

Plaintiff must allege, and if denied, prove no proceedings at law started. McMonies v. Lindgren, 115 Neb. 207, 212 N.W. 45 (1927); Young v. Thompson, 114 Neb. 804, 210 N.W. 407 (1926); Reed v. Good, 114 Neb. 777, 209 N.W. 619 (1926).

Where plaintiff is assignee he must make prima facie proof that no action has been commenced by any holder. Lyons v. Allen, 88 Neb. 41, 128 N.W. 652 (1910).

Without such allegation in pleadings, decree will be reversed. Michigan Trust Co. v. City of Red Cloud, 69 Neb. 585, 96 N.W. 140 (1903), rehearing denied 69 Neb. 592, 98 N.W. 413 (1904).

Petition must state whether action at law has been commenced, and whether debt or any part has been paid. Bing v. Morse, 51 Neb. 842, 71 N.W. 712 (1897).

3. Miscellaneous

Conditional allowance of mortgagee's claim against mortgagor's estate did not preclude foreclosure. Quesner v. Novotny, 116 Neb. 84, 215 N.W. 796 (1927).

Ordinary rules of proving a negative apply. McLanahan v. Chamberlain, 85 Neb. 850, 124 N.W. 684 (1910).

The negative allegation plaintiff must prove if denied. Beebe v. Bahr, 84 Neb. 191, 120 N.W. 1021 (1909).

Where answer is general denial, plaintiff must prove whether or not any proceedings at law have been had for the recovery of the debt. Jones v. Burtis, 57 Neb. 604, 78 N.W. 261 (1899).

Objection that no proceedings at law have been had must be made prior to rendition of decree. Henry & Coatsworth Co. v. McCurdy, 36 Neb. 863, 55 N.W. 262 (1893).

25-2143 Prior judgment at law; effect.

If it appears that any judgment has been obtained in a suit at law for the money demanded by such complaint, or any part thereof, no proceedings shall be had in such case, unless to an execution against the property of the defendant in such judgment the sheriff or other proper officer has returned that the execution is unsatisfied in whole or in part and that the defendant has no property whereof to satisfy such execution except the mortgaged premises.

Source: R.S.1867, Code § 851, p. 543; R.S.1913, § 8260; C.S.1922, § 9213; C.S.1929, § 20-2145; R.S.1943, § 25-2143; Laws 2002, LB 876, § 37.

Whether creditor mortgagee will be required to first exhaust mortgaged property before subjecting fraudulently transferred property to satisfaction of its judgment is within discretion of court. First Nat. Bank of Omaha v. First Cadco Corp., 189 Neb. 553, 203 N.W.2d 770 (1973).

Institution of suit at law upon note and obtaining judgment thereon is not a release of the mortgage security, and does not bar foreclosure after execution on judgment has been returned unsatisfied. Federal Farm Mtg. Corp. v. Adams, 142 Neb. 202, 5 N.W.2d 384 (1942).

Failure to amend this section disclosed legislative intent to permit suit at law for deficiency after mortgage foreclosure proceeding is completed. Federal Farm Mtg. Corp. v. Thiele, 137 Neb. 626, 290 N.W. 471 (1940).

Conditional allowance of mortgagee's claim against mortgagor's estate did not preclude foreclosure. Quesner v. Novotny, 116 Neb. 84, 215 N.W. 796 (1927).

Return of execution unsatisfied did not relieve plaintiff from alleging no action at law where there are guarantors of note. Michigan Trust Co. v. City of Red Cloud, 69 Neb. 585, 96 N.W. 140 (1903), rehearing denied 69 Neb. 592, 98 N.W. 413 (1904).

Return nulla bona, when judgment transcripted to another county is sufficient. Allegations required by preceding section

are unnecessary. Montpelier Sav. Bank & Trust Co. v. Follett, 68 Neb. 416, 94 N.W. 635 (1903).

Proceedings against garnishees upon judgment for debt stays foreclosure. Hargreaves v. Menken, 45 Neb. 668, 63 N.W. 951 (1895).

Requirement is for benefit of mortgagor and between lienors is immaterial. Simmons Hardware Co. v. Brokaw, 7 Neb. 405 (1878); Chaffee v. Schestedt, 4 Neb. Unof. 740, 96 N.W. 161 (1903).

Return of sheriff nulla bona to execution in law action is sufficient to authorize court to proceed in equity. Zug v. Forgan, 3 Neb. Unof. 149, 90 N.W. 1129 (1902).

25-2144 Sale of premises; by whom made; liability and compensation of sheriff.

All sales of mortgaged premises under a decree shall be made by a sheriff or some other person authorized by the court in the county where the premises or some part of them are situated; and in all cases where the sheriff shall make such sale he shall act in his official capacity, he shall be liable on his official bond for all his acts therein, and he shall receive the same compensation as is provided by law for like services upon sales under execution.

Source: R.S.1867, Code § 852, p. 543; Laws 1875, § 1, p. 42; Laws 1899, c. 90, § 1, p. 345; R.S.1913, § 8261; C.S.1922, § 9214; C.S. 1929, § 20-2146.

1. Person designated to hold sale
2. Miscellaneous

1. Person designated to hold sale

Objection that special master is incompetent must be made against decree directly and not by motion to vacate sale. Eddy v. Kimerer, 61 Neb. 498, 85 N.W. 540 (1901).

Deputy sheriff may conduct sale. Scottish-American Mtg. Co. v. Nye, 58 Neb. 661, 79 N.W. 553 (1899).

Master commissioner need not take or file oath; may administer oath to appraisers. George v. Keniston, 57 Neb. 313, 77 N.W. 772 (1899).

One designated to hold sale cannot delegate authority; court should not confirm sale. Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co., 54 Neb. 228, 74 N.W. 583 (1898).

Decree of foreclosure is sufficient authority to officer to proceed; order of sale is unnecessary. Johnson v. Colby, 52 Neb. 327, 72 N.W. 313 (1897).

District court has power to appoint a person other than the sheriff to make sale. Omaha Loan & Trust Co. v. Bertrand, 51 Neb. 508, 70 N.W. 1120 (1897).

Foreclosure sale is regarded as a sale by the court itself. Conley v. State, 46 Neb. 187, 64 N.W. 708 (1895).

Appointment of some disinterested person to sell is in sound discretion of court. American Inv. Co. v. Nye, 40 Neb. 720, 59 N.W. 355 (1894).

Court may appoint special master commissioner. Jones v. Miller, 2 Neb. Unof. 582, 92 N.W. 201 (1902).

2. Miscellaneous

Sheriff does not receive additional compensation for services under this section. Muinch v. Hull, 181 Neb. 571, 149 N.W.2d 527 (1967).

Where notice of place of sale was given, as at east front door of county courthouse, and it was actually held inside the east front door at top of short flight of stairs, there is substantial compliance with the notice. Bowman v. Caldwell, 135 Neb. 554, 283 N.W. 194 (1939).

Sureties are liable for money received by sheriff on mortgage sale. Milligan v. Gallen, 64 Neb. 561, 90 N.W. 541 (1902).

Publication of notice of sale is under control of court and not parties. State ex rel. Elliott v. Holliday, 35 Neb. 327, 53 N.W. 142 (1892).

Section applies only to mortgage and tax foreclosures. Cochran v. Cochran, 1 Neb. Unof. 508, 95 N.W. 778 (1901).

Mortgagor retains legal title and substantial interest in mortgaged premises until confirmation of sale and execution of deed, and may redeem at any time before order of confirmation becomes final. United States Nat. Bank of Omaha v. Pamp, 83 F.2d 493 (8th Cir. 1936).

25-2145 Deed of conveyance; effect; estate conveyed.

Deed shall thereupon be executed by such sheriff, which shall vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and no other or greater; and such deeds shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against each of them and all parties to the suit in which the decree for such sale was made, and against their heirs respectively, and all persons claiming under such heirs.

Source: R.S.1867, Code § 853, p. 543; R.S.1913, § 8262; C.S.1922, § 9215; C.S.1929, § 20-2147.

Confirmation of sale vests in purchaser estate that would have been vested in mortgagee if equity of redemption had been foreclosed. Mauzy v. Elliott, 146 Neb. 865, 22 N.W.2d 142 (1946).

The purchaser at a foreclosure sale buys all the interests of all parties to the suit. George v. Pracheil, 92 Neb. 81, 137 N.W. 880 (1912).

Deed transfers every right and interest in the property of all parties to action, unless otherwise provided. Arterburn v. Beard, 86 Neb. 733, 126 N.W. 379 (1910).

Deed is subject to rights of parties not served. Kerr v. McCreary, 84 Neb. 315, 120 N.W. 1117 (1909).

Deed conveys all interest of mortgagor, and grantee need not account to junior mortgagee, not party to action, where latter is not seeking to redeem. City of Lincoln v. Lincoln St. Ry. Co., 75 Neb. 523, 106 N.W. 317 (1906).

Foreclosure sale transfers to purchaser every right, title and interest of all the parties to the suit. Hart v. Beardsley, 67 Neb. 145, 93 N.W. 423 (1903).

Mortgagor retains legal title and substantial interest in mortgaged premises until confirmation of sale and execution of deed, and may redeem at any time before order of confirmation becomes final. United States Nat. Bank of Omaha v. Pamp, 83 F.2d 493 (8th Cir. 1936).

25-2146 Sale; proceeds; how applied.

The proceeds of every sale made under a decree in equity shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus, it shall be brought into court for the use of the defendant, or of the persons entitled thereto, subject to the order of the court.

Source: R.S.1867, Code § 854, p. 543; R.S.1913, § 8263; C.S.1922, § 9216; C.S.1929, § 20-2148.

District court has jurisdiction over distribution of proceeds of mortgage foreclosure sale. Mauzy v. Elliott, 146 Neb. 865, 22 N.W.2d 142 (1946).

Where plaintiff bid in the property at foreclosure sale, he cannot apply interest coupons, not included in the decree, to reduce the surplus which he must pay into court above the amount due on his lien. DeMoulin Loan & Inv. Co. v. McLain, 107 Neb. 858, 187 N.W. 123 (1922).

Court may bring in all necessary parties to complete distribution of surplus. Montague v. Marunda, 71 Neb. 805, 99 N.W. 653 (1904).

Sheriff is custodian of proceeds until confirmation; then it is his duty to pay to parties entitled. Craw v. Abrams, 68 Neb. 546, 94 N.W. 639 (1903), affirmed on rehearing 68 Neb. 553, 97 N.W. 296 (1903).

Junior mortgagee, not party to foreclosure, may claim surplus. Milligan v. Gallen, 64 Neb. 561, 90 N.W. 541 (1902).

There should be ratable application to all notes secured by mortgage though some were outlawed, where security is insufficient. Patrick v. National Bank of Commerce, 63 Neb. 200, 88 N.W. 183 (1901).

Entire proceeds of sale are subject to order of court until paid out. Conley v. State, 46 Neb. 187, 64 N.W. 708 (1895).

Officer selling property has no authority to sell on credit unless authorized by express terms of decree or statute. Hooper v. Castetter, 45 Neb. 67, 63 N.W. 135 (1895).

25-2147 Sale; proceeds; surplus; disposition.

If such surplus, or any part thereof, shall remain in the court for the term of three months without being applied for, the court may direct the same to be put out at interest under the direction of the court for the benefit of the defendant, his representative or assigns, to be paid to them by the order of such court.

Source: R.S.1867, Code § 855, p. 543; R.S.1913, § 8264; C.S.1922, § 9217; C.S.1929, § 20-2149.

25-2148 Payment by defendant of sums due; effect.

Whenever a complaint is filed for the satisfaction or foreclosure of any mortgage, upon which there is due any interest on any portion or installment of the principal, and there are other portions or installments to become due subsequently, the complaint shall be dismissed upon the defendant's bringing into court, at any time before the decree of sale, the principal and interest due, with costs.

Source: R.S.1867, Code § 856, p. 544; R.S.1913, § 8265; C.S.1922, § 9218; C.S.1929, § 20-2150; R.S.1943, § 25-2148; Laws 2002, LB 876, § 38.

Stipulation in mortgage accelerating debt for failure to pay interest or taxes will be enforced. Crawford v. Houser, 115 Neb. 62, 211 N.W. 165 (1926).

Holder may foreclose when any installment has become due; statute begins to run on each when due. Nares v. Bell, 66 Neb. 606, 92 N.W. 571 (1903).

Deposit of money with clerk of court in vacation did not extinguish indebtedness. Commercial Investment Co. v. Peck, 53 Neb. 204, 73 N.W. 452 (1897).

25-2149 Payment by defendant of sums due; stay; decree.

If, after a decree for sale, entered against a defendant in such case, he shall bring into court the principal and interest due, with costs, the proceedings in the suit shall be stayed, but the court shall enter a decree of foreclosure and sale, to be enforced by a further order of the court, upon a subsequent default in the payment of any portion or installment of the principal, or any interest thereafter to grow due.

Source: R.S.1867, Code § 857, p. 544; R.S.1913, § 8266; C.S.1922, § 9219; C.S.1929, § 20-2151.

Section is applicable only to cases where foreclosure is for interest or part of principal. It was not intended to relieve party from forfeiture. Beisel v. Artman, 10 Neb. 181, 4 N.W. 1011 (1880).

25-2150 Reference to sheriff; sale of premises in parcels; decree; effect.

If the defendant shall not bring into court the amount due, with costs, or if for any other cause a decree shall pass for the complainant, the court may direct a reference to a sheriff to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony, and if it shall appear that the same can be sold in parcels, without injury to the parties, the decree shall direct so much of the mortgaged premises to be sold as will be sufficient to pay the amount then due on such mortgage, with costs, and such decree shall remain a security for any subsequent default.

Source: R.S.1867, Code § 858, p. 544; R.S.1913, § 8267; C.S.1922, § 9220; C.S.1929, § 20-2152.

25-2151 Default in payment of installments subsequent to decree; order of sale.

If, in the case mentioned in section 25-2150, there shall be any default subsequent to such decree in the payment of any portion or installment of the principal, or any interest due upon such mortgage, the court may, upon the complaint of the complainant, by a further order, founded upon such first decree, direct a sale of so much of the mortgaged premises to be made, under such decree, as will be sufficient to satisfy the amount so due, with the costs of such complaint and subsequent proceedings thereon, and the same proceedings may be had as often as a default shall happen.

Source: R.S.1867, Code § 859, p. 544; R.S.1913, § 8268; C.S.1922, § 9221; C.S.1929, § 20-2153; R.S.1943, § 25-2151; Laws 2002, LB 876, § 39.

25-2152 Sale of entire property; when ordered.

If in any of the foregoing cases, it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, the decree shall, in the first instance, be entered for the sale of the whole premises accordingly.

Source: R.S.1867, Code § 860, p. 544; R.S.1913, § 8269; C.S.1922, § 9222; C.S.1929, § 20-2154.

Where no such finding and decree, tracts must be appraised and sold separately. Rohrer v. Fassler, 2 Neb. Unof. 262, 96 N.W. 523 (1902).

25-2153 Sale of entire property; proceeds; disposition.

In such case the proceeds of such sale shall be applied as well to the interest, portion, or installment of the principal due as towards the whole or residue of the sum secured by such mortgage, and not due and payable at the time of such sale; and if such residue does not bear interest, then the court may direct the same to be paid with a rebate of the legal interest, for the time during which such residue shall not be due and payable; or the court may direct the balance of the proceeds of such sale, after paying the sum due, with costs, to be put out at interest, for the benefit of the complainant, to be paid to him as the installments or portions of the principal or interest may become due, and the surplus for the benefit of the defendant, his representative, or assigns, to be paid to them on the order of the court.

Source: R.S.1867, Code § 861, p. 544; R.S.1913, § 8270; C.S.1922, § 9223; C.S.1929, § 20-2155.

25-2154 Satisfaction or payment; certificate; delivery to register of deeds; duties of clerk of district court; fee of register of deeds.

In all cases of foreclosure of mortgages in the several counties in the state, it shall be the duty of the clerk of the district court, on the satisfaction or payment of the amount of the decree, to forward to the register of deeds a certificate setting forth the names of parties, plaintiff and defendant, descriptions of the premises mentioned in the decree, and the book and page where the mortgage foreclosed is recorded, for which certificate such clerk shall collect a fee of three dollars, which amount shall be taxed as part of the costs in the case, and said sum shall be paid to the register of deeds as his fee for recording the certificate.

Source: Laws 1887, c. 63, § 1, p. 564; R.S.1913, § 5614; C.S.1922, § 4933; C.S.1929, § 26-1010; R.S.1943, § 25-2154; Laws 1951, c. 106, § 1, p. 512; Laws 1959, c. 140, § 3, p. 546; Laws 1971, LB 495, § 1.

Certificate issued by clerk on own motion before satisfaction of mortgage does not cancel same in favor of one with notice of facts. Ryan v. West, 63 Neb. 894, 89 N.W. 416 (1902).

If a false certificate is recorded, it does not suspend execution of decree for foreclosure and sale. Clark & Leonard Inv. Co. v. Hamilton, 54 Neb. 95, 74 N.W. 430 (1898).

25-2155 Satisfaction or payment; certificate; recording and indexing; duties of register of deeds.

It shall be the duty of the register of deeds on receipt of the certificate mentioned in section 25-2154 to enter the same upon his numerical index, and record the same in the mortgage record of his office.

Source: Laws 1887, c. 63, § 2, p. 564; R.S.1913, § 5615; C.S.1922, § 4934; C.S.1929, § 26-1011.

(f) MANDAMUS

25-2156 Writ of mandamus; to whom issued.

The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifical-

ly enjoins as a duty resulting from an office, trust or station. Though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.

Source: R.S.1867, Code § 645, p. 507; R.S.1913, § 8271; C.S.1922, § 9224; C.S.1929, § 20-2156.

Cross References

To compel public corporations to pay judgment, see section 77-1623.

1. Scope
2. When issued

1. Scope

A duty which a private landowner would have in complying with ordinances placing restrictions on a specific use of property is not a duty that results from any ''office, trust or station''. State ex rel. City of Alma v. Furnas Cty. Farms, 257 Neb. 189, 595 N.W.2d 551 (1999).

Nothing in these sections governing mandamus indicates a legislative intent to waive sovereign immunity for mandamus actions against a state agency. Henderson v. Department of Corr. Servs., 256 Neb. 314, 589 N.W.2d 520 (1999).

Mandamus only lies to enforce the performance of a ministerial act or duty, and not to control judicial discretion. State ex rel. Wright v. Pepperl, 221 Neb. 664, 380 N.W.2d 259 (1986).

A motion for a writ of mandamus to compel the enforcement of a plea bargain agreement is not properly granted where the relator has the alternative remedy of a motion requesting the district court to enforce the agreement or dismiss the charges brought and where the relator has not entered a guilty plea or taken other action in detrimental reliance upon the agreement. State ex rel. Fortner v. Urbom, 211 Neb. 309, 318 N.W.2d 286 (1982).

A writ of mandamus may require an inferior tribunal to exercise its judgment but it may not control judicial discretion. State ex rel. Stansbery v. Schwasinger, 205 Neb. 457, 289 N.W.2d 506 (1980).

The exercise by county commissioners of their authority to acquire or accept rights-of-way or to establish and/or improve a new road is vested in the sound discretion of the commissioners and may not be compelled by mandamus. State ex rel. Stansbery v. Schwasinger, 205 Neb. 457, 289 N.W.2d 506 (1980).

Mandamus is generally not available for quasi-judicial or discretionary duties, but is available if the duty is ministerial. Singleton v. Kimball County Board of Commissioners, 203 Neb. 429, 279 N.W.2d 112 (1979).

Granting of disability pension under city ordinance in question was judicial in nature; mandamus not a proper remedy upon refusal to grant pension. Watts v. City of Omaha, 184 Neb. 41, 165 N.W.2d 104 (1969).

In absence of special provisions to the contrary, ordinary rules of pleading apply to mandamus. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Judicial discretion cannot be controlled by mandamus. State ex rel. Coulter v. McFarland, 166 Neb. 242, 88 N.W.2d 892 (1958); State ex rel. Cumming County Farm Bureau v. Tighe, 124 Neb. 578, 247 N.W. 419 (1933).

Mandamus is not a preventive remedy but is a coercive writ. State ex rel. Bates v. Morgan, 154 Neb. 234, 47 N.W.2d 512 (1951).

Mandamus is a proper remedy to enforce the performance of a ministerial act. State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N.W.2d 341 (1944).

To warrant issue of mandamus against officer to compel him to act, the duty must be imposed on him by law, it must exist at the time the writ is applied for, and it must be clear. State ex rel. Johnson v. Goble, 136 Neb. 242, 285 N.W. 569 (1939).

Writ of prohibition is abolished; mandamus lies where no adequate legal remedy. State ex rel. Parmenter v. Troup, 98 Neb. 333, 152 N.W. 748 (1915).

When duty is made plain by statute, and officer is given no discretion, performance may be compelled by mandamus. State ex rel. Pinkos v. Rice, 98 Neb. 36, 151 N.W. 925 (1915).

Mandamus cannot be used to control discretion of inferior tribunal or board. State ex rel. Davis v. Hoctor, 98 Neb. 15, 151 N.W. 923 (1915).

Writ should be issued in name of state upon relation of party seeking relief. City of Crawford v. Darrow, 87 Neb. 494, 127 N.W. 891 (1910).

Mandamus may lie to enforce but not to control judicial action. State ex rel. Reynolds v. Graves, 66 Neb. 17, 92 N.W. 144 (1902).

Mandamus cannot be used to try the title or right to possession of real or personal property. State ex rel. Jones v. Williams, 54 Neb. 154, 74 N.W. 396 (1898).

Court cannot by mandamus control action of county board in the adjustment of claims against a county. State ex rel. Wyckoff v. Merrell, 43 Neb. 575, 61 N.W. 754 (1895).

Mandamus may issue to officer of legislative branch of government. State v. Elder, 31 Neb. 169, 47 N.W. 710 (1891).

Statute of limitations applies. State ex rel. Chem. Nat. Bank v. School Dist. No. 9 of Sherman County, 30 Neb. 520, 46 N.W. 613 (1890).

Mandamus will not issue to a justice of the peace to require him to make an order after the cause has been removed to district court. State ex rel. Rudabeck v. Livsey, 27 Neb. 55, 42 N.W. 762 (1889).

2. When issued

Mandamus is an extraordinary remedy issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of law. A grant or denial of mandamus is within the trial court's judicial discretion. An accepted affiliation petition pursuant to section 79-413 et seq. creates duties imposed by law owed to the public which, if ministerial, may be enforced by writ of mandamus. State ex rel. Fick v. Miller, 255 Neb. 387, 584 N.W.2d 809 (1998).

When the purpose of a request to inspect a corporation's books is to ascertain the value of the requesting shareholder's stock, the statutory penalty of 10 percent of the value of that stock for failure to comply is not an adequate remedy at law and a writ of mandamus compelling the corporation to open its books may lie. State ex rel. Lillie v. Cosgriff Co., 240 Neb. 387, 482 N.W.2d 555 (1992).

A writ of mandamus is proper to compel the transportation of nonprofit private school children on a public school district's buses pursuant to section 79-487. State ex rel. Bouc v. School Dist. of City of Lincoln, 211 Neb. 731, 320 N.W.2d 472 (1982).

Before a peremptory writ of mandamus may issue, it must appear to the court that (1) a duty is imposed by law; (2) the duty exists at the time the writ is applied for; and (3) the duty to act is clear. State ex rel. Neb. Nurses Assn. v. State Board of Nursing, 205 Neb. 792, 290 N.W.2d 453 (1980); State ex rel. Blome v. Bridgeport Irr. Dist., 205 Neb. 97, 286 N.W.2d 426 (1979).

A writ of mandamus may be issued to compel performance of act specifically provided by law. State ex rel. Agricultural Extension Service v. Miller, 182 Neb. 285, 154 N.W.2d 469 (1967).

Mandamus will not lie where city council acted in executive or administrative capacity to make operative the provisions of a state law already existing. State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N.W.2d 683 (1945).

After the statutory period for appeal by a taxpayer has passed, one in whose favor a claim has been duly allowed by a county board may by mandamus compel the issuance of a warrant for the payment of such claim. State ex rel. Campbell v. Slavik, 144 Neb. 633, 14 N.W.2d 186 (1944).

In the enforcement of judgments against municipal corporations, mandamus is a substitute for execution, and may properly be used to enforce satisfaction of a judgment against a county. State ex rel. Warren v. Raabe, 140 Neb. 16, 299 N.W. 338 (1941).

Mandamus lies to compel issuance of certificate of registration for practice of engineering and architecture, where certificate is unreasonably and arbitrarily refused by board of examiners. Downs v. Nebraska State Board of Examiners, 139 Neb. 23, 296 N.W. 151 (1941).

Mandamus will lie to compel a public officer to perform a ministerial duty. State ex rel. Cashman v. Carmean, 138 Neb. 819, 295 N.W. 801 (1941).

Mandamus is proper remedy to enforce stockholder's right to inspect books and records of state bank, remedy by inspection and copying being inadequate. State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N.W. 118 (1930).

Mandamus will not lie to compel county court to vacate order denying jury trial to one charged with liquor offense, in view of adequate legal remedy. State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N.W. 28 (1929).

Mandamus lies to compel railroad company to furnish cars to shipper. State ex rel. Luben v. Chicago & N. W. Ry. Co., 83 Neb. 524, 120 N.W. 163 (1909).

Mandamus is proper to compel one who diverts public water to maintain bridge over canal. Nuckolls County v. Guthrie & Co., 76 Neb. 464, 107 N.W. 779 (1906).

Mandamus lies to compel surrender of records by officer to his successor. State ex rel. Coney v. Hyland, 75 Neb. 767, 107 N.W. 113 (1906).

Mandamus lies to require treasurer to deposit funds in depository bank. State ex rel. First Nat. Bank of Atkinson v. Cronin, 72 Neb. 636, 101 N.W. 325 (1904).

Mandamus lies to compel county to join in repair of county line bridge or unequivocally refuse. Iske v. State ex rel. Pankonin, 72 Neb. 278, 100 N.W. 315 (1904).

Mandamus lies to compel police authorities to prevent open violation of law. Moores v. State ex rel. Dunn, 71 Neb. 522, 99 N.W. 249 (1904).

Mandamus will lie to enforce discharge of duty by executive state officer. State ex rel. Wright v. Savage, 64 Neb. 684, 90 N.W. 898, 91 N.W. 557 (1902).

Duty imposed upon officer and not upon his successor may be enforced by mandamus after expiration of term. Kas v. State ex rel. School Dist. No. 1, Sarpy County, 63 Neb. 581, 88 N.W. 776 (1902).

Mandamus lies to compel school board to execute district's command. Krull v. State ex rel. Furgason, 59 Neb. 97, 80 N.W. 272 (1899).

Mandamus lies to reinstate pupil in school. Jackson v. State ex rel. Majors, 57 Neb. 183, 77 N.W. 662 (1898).

Mandamus is proper remedy by county to compel county officer to report fees. State ex rel. Wayne County v. Russell, 51 Neb. 774, 71 N.W. 785 (1897).

Mandamus may be used to compel erection of viaduct in metropolitan city. Chicago, B. & Q. R. R. Co. v. State ex rel. City of Omaha, 47 Neb. 549, 66 N.W. 624 (1896).

Mandamus is proper remedy to compel canvassing board to reconvene and correct canvass of returns. State ex rel. Welty v. McFadden, 46 Neb. 668, 65 N.W. 800 (1896).

Mandamus lies to compel approval of official bonds. State ex rel. Horne v. Holcomb, 46 Neb. 88, 64 N.W. 437 (1895).

Relator must trace his right through a public duty of respondent and not his private obligation. State ex rel. Gillilan v. Home St. Ry. Co., 43 Neb. 830, 62 N.W. 225 (1895).

Mandamus lies to compel county to repair bridge. Dutton v. State ex rel. Pankonin, 42 Neb. 804, 60 N.W. 1042 (1894).

Mandamus will lie to enforce duty which law enjoins when respondent in default. Strunk v. State ex rel. Lippi, 33 Neb. 322, 50 N.W. 14 (1891).

Mandamus lies to compel payment of official salaries. Von Forel v. State, 4 Neb. Unof. 843, 96 N.W. 648 (1903).

25-2157 Writ; when not issued.

The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. It may issue on the information of the party beneficially interested.

Source: R.S.1867, Code § 646, p. 507; R.S.1913, § 8272; C.S.1922, § 9225; C.S.1929, § 20-2157.

1. Adequate remedy at law
2. When not issued

1. Adequate remedy at law

For writ of mandamus to issue, there must be no other plain and adequate remedy available in the ordinary course of law. State ex rel. Fick v. Miller, 255 Neb. 387, 584 N.W.2d 809 (1998).

Mandamus is not available if there is an adequate remedy at law. Little v. Board of County Commissioners of Cherry County, 179 Neb. 655, 140 N.W.2d 1 (1966).

Where there is another adequate remedy, mandamus is not available. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

The writ of mandamus may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. State ex rel. Campbell v. Slavik, 144 Neb. 633, 14 N.W.2d 186 (1944); State ex rel. Cuming Co. Farm Bureau v. Tighe, 124 Neb. 578, 247 N.W. 419 (1933).

Writ of mandamus may not be issued in case where police officer alleges he has been illegally suspended by city council, as

he has adequate remedy at law. State ex rel. Sutton v. Towl, 127 Neb. 848, 257 N.W. 263 (1934).

Writ will not issue to review action of inferior court, or to coerce judicial discretion, where there is adequate legal remedy. State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N.W. 28 (1929).

Mandamus is not the proper remedy to correct errors in assessments for special benefits by equalization board. State ex rel. Funke v. Lancaster County, 110 Neb. 635, 194 N.W. 807 (1923).

Correct practice is to issue writ in the name of the state upon the relation of the party claiming the relief sought. City of Crawford v. Darrow, 87 Neb. 494, 127 N.W. 891 (1910).

Appeal from county board of equalization is adequate; test of adequacy stated. State ex rel. Mickey v. Drexel, 75 Neb. 751, 107 N.W. 110 (1906).

Remedy by appeal from action of county board on claim is adequate; mandamus will not be allowed. Mitchell v. County of Clay, 69 Neb. 779, 96 N.W. 673 (1903), reversed on rehearing 69 Neb. 795, 98 N.W. 662 (1904).

Mandamus to compel issuance of warrant would not issue where adequate remedy at law existed. Horton v. State ex rel. Hayden, 60 Neb. 701, 84 N.W. 87 (1900).

Where county board of equalization could grant relief, mandamus will not lie. State ex rel. Young v. Osborn, 60 Neb. 415, 83 N.W. 357 (1900).

Mandamus is not allowed where statute has provided special remedy. Nebraska Tel. Co. v. State ex rel. Yeiser, 55 Neb. 627, 76 N.W. 171 (1898).

Mandamus will not lie in first instance in Supreme Court to compel action by clerk of district court. State ex rel. Solman v. Moores, 29 Neb. 122, 45 N.W. 278 (1890).

Right of review or appeal prevents mandamus. State ex rel. Neeland v. Follmer, 4 Neb. Unof. 376, 94 N.W. 103 (1903).

Mandamus will not issue to compel vacation of order granting new trial, as appeal is adequate remedy. State ex rel. Chadron L. & B. Assn. v. Westover, 2 Neb. Unof. 768, 89 N.W. 1002 (1902).

2. When not issued

A writ of mandamus is an extraordinary remedy and may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. State ex rel. Greyhound Lines, Inc. v. City of Omaha, 227 Neb. 676, 419 N.W.2d 539 (1988).

Mandamus will not lie to compel a city to revoke a development permit it has issued. Larson v. City of Omaha, 226 Neb. 751, 415 N.W.2d 115 (1987).

The mere fact that there is another remedy at law will not prevent the issuance of a writ of mandamus unless the other remedy is adequate to afford relief upon the very subject matter involved. State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N.W.2d 341 (1944).

Judgment for debt against county is a condition precedent to issuance of writ of mandamus to make levy for its payment. State ex rel. Warren v. Raabe, 140 Neb. 16, 299 N.W. 338 (1941).

Where remedy by inspection and copying books and papers is inadequate, mandamus will lie to enforce stockholder's right to inspect books and records of state bank. State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N.W. 118 (1930).

Discretion of state board in awarding contract to lowest responsible bidder will not be controlled by mandamus. State ex rel. Neb. Building & Inv. Co. v. Board of Comrs. of State Institutions, 105 Neb. 570, 181 N.W. 530 (1921).

Mandamus will not lie to compel president pro tem of city council to name standing committees when duty is not enjoined by law. State ex rel. Bishop v. Dunn, 76 Neb. 155, 107 N.W. 236 (1906).

Mandamus does not lie to determine title to office. State ex rel. Coney v. Hyland, 75 Neb. 767, 107 N.W. 113 (1906); State ex rel. Truesdell v. Plambeck, 36 Neb. 401, 54 N.W. 667 (1893).

Mandamus is not proper to correct error of including irrelevant matter in bill of exceptions. State ex rel. Cobb v. Fawcett, 64 Neb. 496, 90 N.W. 250 (1902).

Mandamus will not lie to compel county board to construct drainage ditch, where relator is not shown to be interested. Van Horn v. State ex rel. Allen, 51 Neb. 232, 70 N.W. 941 (1897).

Mandamus lies to compel action, not to correct errors committed by court or other judicial body. McGee v. State ex rel. North American Cattle Co., 32 Neb. 149, 49 N.W. 220 (1891).

Mandamus will not lie to compel payment of dormant judgment. State ex rel. Craig v. School Dist. No. 2 of Phelps County, 25 Neb. 301, 41 N.W. 155 (1888).

Mandamus will not lie to compel building of railroad station. State ex rel. Moore v. Chicago, St. P., M. & O. R. R. Co., 19 Neb. 476, 27 N.W. 434 (1886).

25-2158 Alternative and peremptory writs.

The writ is either alternative or peremptory. The alternative writ must state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately upon the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court whence the writ issued, at a specified time and place, why he has not done so; and that he then and there return the writ, with his certificate of having done as he is commanded. The peremptory writ must be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded must be omitted.

Source: R.S.1867, Code § 647, p. 508; R.S.1913, § 8273; C.S.1922, § 9226; C.S.1929, § 20-2158.

Alternative writ should contain an order to show cause. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Two types of writs of mandamus are recognized and defined. State ex rel. Beck v. Chicago, St. P., M. & O. Ry. Co., 164 Neb. 60, 81 N.W.2d 584 (1957).

Nothing can be contained in the peremptory writ that is not embraced in the alternative writ. State ex rel. Shriver v. Karr, 64 Neb. 514, 90 N.W. 298 (1902).

Peremptory writ must conform strictly to command of alternative writ and clearly show duty to be performed. Laflin v. State ex rel. Gray, 49 Neb. 614, 68 N.W. 1022 (1896).

Alternative writ must state all facts necessary to justify order sought. State ex rel. Mitchell v. School Dist. No. 9 of York County, 8 Neb. 92 (1878).

25-2159 Peremptory writ; when allowed in first instance.

When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued, except that a peremptory mandamus in the first instance shall not be given in any case involving the delivery of irrigation water if the Director of Natural Resources as defined in section 25-1062.01 is a party.

Source: R.S.1867, Code § 648, p. 508; R.S.1913, § 8274; C.S.1922, § 9227; C.S.1929, § 20-2159; Laws 1941, c. 29, § 9, p. 137; C.S.Supp.,1941, § 20-2159; R.S.1943, § 25-2159; Laws 1957, c. 365, § 5, p. 1234; Laws 2000, LB 900, § 68.

When right to writ is clear and no excuse can be given for failure to perform duty, peremptory writ may be issued. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Peremptory writ may be issued without notice only where court can take judicial notice that a valid excuse is impossible. State ex rel. Beck v. Chicago, St. P., M. & O. Ry. Co., 164 Neb. 60, 81 N.W.2d 584 (1957).

Peremptory writ without notice should be issued only where legal right to it is clearly shown. Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N.W.2d 803 (1954).

A peremptory writ of mandamus may issue without notice only where there is no room for controversy as to the right of the applicant thereto, and where judicial notice can be taken that a valid excuse for failure to act cannot be given. State ex rel. Platte Valley Irr. Dist. v. Cochran, 139 Neb. 324, 297 N.W. 587 (1941).

Peremptory writ cannot issue without notice unless court can take judicial notice that defense is impossible. State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N.W. 1016 (1907).

Relator's right and respondent's duty must clearly appear. State ex rel. Niles v. Weston, 67 Neb. 175, 93 N.W. 182 (1903).

Peremptory writ may issue against public officer without notice but not against officer of private corporation. Horton v. State ex rel. Hayden, 60 Neb. 701, 84 N.W. 87 (1900).

Court may grant peremptory writ at chambers only when right is clear. Mayer v. State ex rel. Wilkinson, 52 Neb. 764, 73 N.W. 214 (1897).

When facts are disputed on hearing to show cause, alternative writ should issue. American Waterworks Co. v. State ex rel. O'Connor, 31 Neb. 445, 48 N.W. 64 (1891).

25-2160 Peremptory writ; motion; affidavit required; notice; order to show cause; actions involving irrigation water.

The motion for the writ must be made upon affidavit. The court may require a notice of the application to be given to the adverse party, may grant an order to show cause why it should not be allowed, or may grant the writ without notice. No peremptory writ of mandamus shall be allowed in any case involving the delivery of irrigation water if the Director of Natural Resources, as defined in section 25-1062.01, is a party unless notice by either registered or certified mail has been given, as provided therein, seventy-two hours prior to the time of hearing to the director and division supervisor in the water division created by section 61-212 in which the action is brought and to all appropriators whose rights to the delivery of water might in any manner be affected, of the time and place of the hearing. In such case, any person, natural or artificial, injured or likely to be injured by the granting of such writ, may intervene in such action at any stage of the proceedings and become a party to such litigation.

Source: R.S.1867, Code § 649, p. 508; R.S.1913, § 8275; C.S.1922, § 9228; C.S.1929, § 20-2160; Laws 1941, c. 29, § 10, p. 137; C.S.Supp.,1941, § 20-2160; R.S.1943, § 25-2160; Laws 1957, c. 242, § 20, p. 831; Laws 1957, c. 365, § 6, p. 1235; Laws 2000, LB 900, § 69.

A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate. State ex rel. Van

Cleave v. City of No. Platte, 213 Neb. 426, 329 N.W.2d 358 (1983).

To sustain an application for mandamus, motion for the writ must be made upon affidavit. Little v. Board of County Commissioners of Cherry County, 179 Neb. 655, 140 N.W.2d 1 (1966).

If no alternative writ has been granted, case may be heard on petition and response thereto. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Petition must be filed, and writ allowed by judge. State ex rel. Hansen v. Carrico, 86 Neb. 448, 125 N.W. 1110 (1910).

Action is not begun until motion and affidavit, or petition verified positively, filed. State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N.W. 1016 (1907).

Affidavit upon information and belief is insufficient but is amendable. Steidl v. State ex rel. School Dist. of the City of Crete, 63 Neb. 695, 88 N.W. 853 (1902).

Writ issues upon motion supported by affidavit. State ex rel. Otto v. Commissioners of Lancaster County, 49 Neb. 51, 68 N.W. 336 (1896).

Application must show prior demand and refusal, and facts showing legal duty of respondent. Kemerer v. State ex rel. Garber, 7 Neb. 130 (1878).

25-2161 Writ; endorsement of allowance; service; neglect to return; penalty.

The allowance of the writ must be endorsed thereon, signed by a judge of the court granting it, and the writ must be served personally upon the defendant. If the defendant duly served neglects to return the same, he shall be proceeded against, as for a contempt.

Source: R.S.1867, Code § 650, p. 508; R.S.1913, § 8276; C.S.1922, § 9229; C.S.1929, § 20-2161.

This section does not authorize judge to issue writ. Clerk of district court issues writ, authenticated by seal of the court. State ex rel. Hansen v. Carrico, 86 Neb. 448, 125 N.W. 1110 (1910).

25-2162 Alternative writ; answer.

On the return day of the alternative writ, or such further day as the court may allow, the party on whom the writ shall have been served may show cause, by answer made, in the same manner as an answer to a complaint in a civil action.

Source: R.S.1867, Code § 651, p. 508; R.S.1913, § 8277; C.S.1922, § 9230; C.S.1929, § 20-2162; R.S.1943, § 25-2162; Laws 2002, LB 876, § 40.

The alternative writ and answer thereto constitute the pleadings. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

25-2163 Peremptory writ; when issued; failure to answer, effect; pleading new matter, effect.

If no answer be made, a peremptory mandamus must be allowed against the defendant. If an answer be made containing new matter, the same shall not in any respect conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objection to its sufficiency, or may countervail it by proof, either in direct denial or by way of avoidance.

Source: R.S.1867, Code § 652, p. 508; R.S.1913, § 8278; C.S.1922, § 9231; C.S.1929, § 20-2163.

If no answer is filed to alternative writ, peremptory writ must be allowed. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Plaintiff may avail himself of any valid objection to new matter contained in the answer. State ex rel. Seth Thomas Clock Co. v. Board of County Commissioners of Cass County, 60 Neb. 566, 83 N.W. 733 (1900).

25-2164 Pleadings; trial.

No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil

action; and the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action.

Source: R.S.1867, Code § 653, p. 508; R.S.1913, § 8279; C.S.1922, § 9232; C.S.1929, § 20-2164.

1. Pleadings
2. Trial

1. Pleadings

The alternative writ and the answer constitute the pleadings. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Where no ruling was made on demurrer to return and trial was had, demurrer was held to have been waived. State ex rel. League of Municipalities v. Loup River Public Power Dist., 158 Neb. 160, 62 N.W.2d 682 (1954).

Difference between alternative and peremptory writ did not prejudice defendant. State ex rel. City of Grand Island v. Union Pacific R. R. Co., 152 Neb. 772, 42 N.W.2d 867 (1950).

In mandamus proceedings no pleading is authorized other than writ and the answer; intervention should be denied. State ex rel. Randall v. Hall, 125 Neb. 236, 249 N.W. 756 (1933).

Demurrer to alternative writ is irregular, but is treated as admission of facts alleged in writ. State ex rel. Glatfelter v. Hart, 106 Neb. 61, 182 N.W. 567 (1921).

Demurrer is proper method to assail defective petition for mandamus. State ex rel. Kelley v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914).

Demurrer is proper to test sufficiency of petition. City of Crawford v. Darrow, 87 Neb. 494, 127 N.W. 891 (1910).

Issuance of new writ to amend old is not commencement of new action. Kas v. State ex rel. School Dist. No. 1 of Sarpy County, 63 Neb. 581, 88 N.W. 776 (1902).

No pleading other than writ and the answer is allowed. State ex rel. Wayne County v. Russell, 51 Neb. 774, 71 N.W. 785 (1897).

Upon defendant's demurrer, writ only is considered. King v. State ex rel. School Dist. No. 1 of Hall County, 50 Neb. 66, 69 N.W. 307 (1896).

Material averment in application, not denied in the answer, must be taken as true. State ex rel. Marquett, Deweese & Hall v. Baushausen, 49 Neb. 558, 68 N.W. 950 (1896).

2. Trial

Mandamus is law action, and motion for new trial is necessary. State ex rel. McKee v. Porter, 90 Neb. 233, 133 N.W. 189 (1911).

Liberal rules of amendment provided by code apply to mandamus proceeding. State ex rel. Shriver v. Karr, 64 Neb. 514, 90 N.W. 298 (1902).

Jury trial is not demandable as matter of right. Mayer v. State ex rel. Wilkinson, 52 Neb. 764, 73 N.W. 214 (1897).

Facts cannot be tried on affidavits over objection. American Waterworks Co. v. State ex rel. O'Connor, 31 Neb. 445, 48 N.W. 64 (1891).

25-2165 Judgment for plaintiff; damages; peremptory writ granted; costs and attorney's fees, authorized.

If judgment be given for the plaintiff, he or she shall recover the damages which he or she shall have sustained, to be ascertained by the court or a jury, or by referees, in a civil action, and a peremptory mandamus shall also be granted to him or her without delay. In addition to damages the court may also award costs and reasonable attorney's fees. The costs and attorney's fees shall be paid by the governmental body represented by the public official or employee.

Source: R.S.1867, Code § 654, p. 509; R.S.1913, § 8280; C.S.1922, § 9233; C.S.1929, § 20-2165; R.S.1943, § 25-2165; Laws 1981, LB 120, § 1; Laws 1981, LB 273, § 30.

The right of a plaintiff to an award of attorney fees is dependent upon the plaintiff's having recovered judgment. State ex rel. PROUD v. Conley, 236 Neb. 122, 459 N.W.2d 222 (1990).

Attorney's fee is not allowable as ''damages'' where judgment is given for plaintiff hereunder. State ex rel. Charvat v. Sagl, 119 Neb. 374, 229 N.W. 118 (1930).

25-2166 Recovery of damages; effect upon right of action.

A recovery of damages by virtue of this chapter, against a party, who shall have made a return to a writ of mandamus, is a bar to any other action against the same party for the making of such return.

Source: R.S.1867, Code § 655, p. 509; R.S.1913, § 8281; C.S.1922, § 9234; C.S.1929, § 20-2166.

25-2167 Peremptory writ directed to public officials; imposition of fine; payment; effect.

Whenever a peremptory mandamus is directed to any public officer, body or board, commanding the performance of any public duty, specially enjoined by law, if it appear to the court that such officer, or any member of such body or board, has without just excuse refused or neglected to perform the duty so enjoined, the court may impose a fine not exceeding five hundred dollars upon every such officer, or member of such body or board. Such fine, when collected, shall be paid into the treasury of the county where the duty ought to have been performed; and the payment thereof is a bar to an action for any penalty incurred by such officer, or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined.

Source: R.S.1867, Code § 656, p. 509; R.S.1913, § 8282; C.S.1922, § 9235; C.S.1929, § 20-2167.

25-2168 Right of private persons to bring action.

Any private person may on his own relation sue out writs of mandamus without application to the prosecuting attorney.

Source: R.S.1867, Code § 2, p. 279; R.S.1913, § 8283; C.S.1922, § 9236; C.S.1929, § 20-2168.

Private person may on his own relation bring mandamus action. McFarland v. State, 165 Neb. 487, 86 N.W.2d 182 (1957).

Writ is issued in name of state, upon relation of party seeking relief. City of Crawford v. Darrow, 87 Neb. 494, 127 N.W. 891 (1910).

Party may bring mandamus in name of state on his relation. State ex rel. Levy v. Spicer, 36 Neb. 469, 54 N.W. 849 (1893).

25-2169 Action by private person; costs.

Private persons suing out writs of mandamus, under the provisions of sections 25-2156 to 25-2168, shall be liable for costs as in civil cases.

Source: R.S.1867, Code § 3, p. 279; R.S.1913, § 8284; C.S.1922, § 9237; C.S.1929, § 20-2169.

(g) PARTITION

25-2170 Complaint for partition; parties; allegations.

The complaint shall describe the property, and the several interests and estates of the several joint owners, or lessees thereof, if known. All tenants in common, joint tenants, or lessees of any estate in land or interest therein, or of any mineral, coal, petroleum, or gas rights, may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed.

Source: R.S.1867, Code § 802, p. 538; Laws 1899, c. 89, § 1, p. 344; R.S.1913, § 8285; C.S.1922, § 9238; C.S.1929, § 20-2170; R.S. 1943, § 25-2170; Laws 1951, c. 72, § 1(2), p. 228; Laws 2002, LB 876, § 41.

1. Right to partition
2. Procedure
3. Attorney's fees

1. Right to partition

The removal of minerals whether held in solution upon the land or resting in the soil or subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property, but it remains real estate until detached. Wheelock & Manning OO Ranches, Inc. v. Heath, 201 Neb. 835, 272 N.W.2d 768 (1978).

Once joint title in real estate is established, partition may be had as a matter of law. Yunghans v. O'Toole, 199 Neb. 317, 258 N.W.2d 810 (1977).

A life tenant who owns no other interest in the property cannot compel partition over objection of remaindermen. Dixon v. Dixon, 189 Neb. 212, 202 N.W.2d 180 (1972).

Lessee for a term of years cannot prevent partition where life tenant fails to object to partition. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

Joint tenants and tenants in common of a future interest, subject to an outstanding life estate in the whole of the premises, may bring or be compelled to suffer partition. Baskins v. Krepcik, 153 Neb. 36, 43 N.W.2d 624 (1950).

When there is outstanding estate for life vested in another to the whole of the premises for which partition is sought, a remainderman cannot maintain partition over the objection of the holder of the life estate. Bodeman v. Cary, 152 Neb. 506, 41 N.W.2d 797 (1950).

This state enacted partition statute to give parties the right to sale of property and division of proceeds where partition in kind could not be made without great prejudice to the owners. Trowbridge v. Donner, 152 Neb. 206, 40 N.W.2d 655 (1950).

Each joint tenant is entitled to partition of estate continuing during life of all tenants; on death of one of two joint tenants, survivor takes all. Arthur v. Arthur, 115 Neb. 781, 215 N.W. 117 (1927).

Life tenant and remaindermen cannot require other remaindermen to submit to partition against their will, contrary to will restricting right. Freeland v. Andersen, 114 Neb. 822, 211 N.W. 167 (1926).

Remaindermen cannot maintain partition over objection of life tenant. Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N.W. 227 (1923).

Partition is not maintainable in violation of plaintiff's agreement or of restriction imposed by grantor. Wicker v. Moore, 79 Neb. 755, 113 N.W. 148 (1907).

Only joint tenant or tenant in common may maintain action; administrator cannot. Phillips v. Dorris, 56 Neb. 293, 76 N.W. 555 (1898); Barr v. Lamaster, 48 Neb. 114, 66 N.W. 1110 (1896).

Compulsory partition is matter of right of any tenant; coreversioners may partition. Oliver v. Lansing, 50 Neb. 828, 70 N.W. 369 (1897).

2. Procedure

Petition in action for partition was not defective because of failure to allege joint tenancy where facts were alleged in detail setting out the interests of the parties. Giles v. Sheridan, 179 Neb. 257, 137 N.W.2d 828 (1965).

One of several tenants in common has an absolute right to a partition of real estate, in the absence of an agreement or other impediment to the contrary, and such action may be brought by the guardian of an incompetent person who is a tenant in common. Windle v. Kelly, 135 Neb. 143, 280 N.W. 445 (1938).

Where there is an estate for life vested in a third person in the whole of the premises of which partition is sought a remainderman cannot maintain an action in partition over the objection of the holder of the life estate. Bartels v. Seefus, 132 Neb. 841, 273 N.W. 485 (1937).

It is error to order partition, over objection of some beneficiaries, of land conveyed in trust to pay rents and profits to beneficiaries and to sell land within trustee's discretion; if trustee dies, successor should be appointed. Heiser v. Brehm, 117 Neb. 472, 221 N.W. 97 (1928).

3. Attorney's fees

Where partition proceedings are amicable and for the benefit of all parties in interest, an attorney's fee should be allowed even though there is a contest between the parties over whether property sold for fair value at partition sale. Wilcox v. Halligan, 141 Neb. 643, 4 N.W.2d 750 (1942).

25-2170.01 Who may compel partition.

Any joint owner of any real estate or of any interest therein or of any mineral, coal, petroleum, or gas rights, whether held in fee or by lease or otherwise, may compel a partition thereof in the manner provided in sections 25-2170 to 25-21,111.

Source: Laws 1951, c. 72, § 1(1), p. 228.

Partition, if well founded, is an absolute right, and a conservator need not obtain a license to so act. Cofer v. Perkins, 199 Neb. 327, 258 N.W.2d 807 (1977).

A life tenant who owns no other interest in the property cannot compel partition over objection of remaindermen. Dixon v. Dixon, 189 Neb. 212, 202 N.W.2d 180 (1972).

Action to partition mineral interests in lands was authorized by this section. Phillips v. Phillips, 170 Neb. 733, 104 N.W.2d 52 (1960).

Lessee for term of years holding an entire interest in lease has no leasehold to partition. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

25-2171 Complaint; unknown owners or interests; allegations.

If the number of shares or interests is known, but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts shall be set forth in the complaint with reasonable certainty.

Source: R.S.1867, Code § 803, p. 538; R.S.1913, § 8286; C.S.1922, § 9239; C.S.1929, § 20-2171; R.S.1943, § 25-2171; Laws 2002, LB 876, § 42.

25-2172 Parties; lienholders.

Creditors having a specific or general lien upon all or any portion of the property may or may not be made parties, at the option of the plaintiff.

Source: R.S.1867, Code § 804, p. 538; R.S.1913, § 8287; C.S.1922, § 9240; C.S.1929, § 20-2172.

Plaintiff in partition suit may at his option make holder of tax lien a party to the suit. Fairley v. Kemper, 174 Neb. 565, 118 N.W.2d 754 (1962).

Creditor having a specific or a general lien upon property being partitioned may or may not be made a party at the option of the plaintiff. Majerus v. Santo, 143 Neb. 774, 10 N.W.2d 608 (1943).

25-2173 Liens upon undivided interests; lien for costs paramount.

If the lien is upon one or more undivided interests of any of the parties, it shall, after partition or sale, remain a charge upon those particular interests or the proceeds thereof. But the due proportion of costs is a charge upon those interests paramount to all other liens.

Source: R.S.1867, Code § 805, p. 538; R.S.1913, § 8288; C.S.1922, § 9241; C.S.1929, § 20-2173.

Proceeds are not exempt as personalty against judgment lien. First Nat. Bank of Albion v. Snyder, 2 Neb. Unof. 136, 96 N.W. 285 (1901).

25-2174 Answer; contents.

The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and by supplemental pleading, if necessary, may deny the interests of any of the other defendants.

Source: R.S.1867, Code § 806, p. 538; R.S.1913, § 8289; C.S.1922, § 9242; C.S.1929, § 20-2174.

Where plaintiff bases action on legal title, defendant may set up in answer equitable defense thereto. Lynch v. Lynch, 18 Neb. 586, 26 N.W. 390 (1886).

25-2175 Repealed. Laws 2002, LB 876, § 92.

25-2176 Trial; costs.

Issues may thereupon be joined and tried between any of the contesting parties, the question of costs on such issues being regulated between the contestants agreeably to the principles applicable to other cases.

Source: R.S.1867, Code § 808, p. 538; R.S.1913, § 8291; C.S.1922, § 9244; C.S.1929, § 20-2176.

Issues may be joined and trial had between any of contesting parties to the suit. Fairley v. Kemper, 174 Neb. 565, 118 N.W.2d 754 (1962).

25-2177 Trial; proof.

Each of the parties appearing, whether as plaintiff or defendant, must exhibit his documentary proof of title, if he has any, and must file the same, or copies thereof, with the clerk.

Source: R.S.1867, Code § 809, p. 539; R.S.1913, § 8292; C.S.1922, § 9245; C.S.1929, § 20-2177.

Cross References

Abstracts of title, when used as evidence, see section 25-1292.

Method of proving claims of both plaintiffs and defendants is provided. Fairley v. Kemper, 174 Neb. 565, 118 N.W.2d 754 (1962).

In partition suit, each party must exhibit his documentary proof of title. Frankenberger v. Holm, 154 Neb. 80, 46 N.W.2d 901 (1951).

Filing documentary evidence is not jurisdictional. Kazebeer v. Nunemaker, 82 Neb. 732, 118 N.W. 646 (1908).

25-2178 Pleadings; when taken as true.

If the statements in the complaint are not denied in the answer or contradicted by the documentary proof exhibited, they shall be taken as true.

Source: R.S.1867, Code § 810, p. 539; R.S.1913, § 8293; C.S.1922, § 9246; C.S.1929, § 20-2178; R.S.1943, § 25-2178; Laws 2002, LB 876, § 43.

Uncontroverted statements in petition and answer will be taken as true. Fairley v. Kemper, 174 Neb. 565, 118 N.W.2d 754 (1962).

Court should first enter judgment confirming shares before determining whether or not partition is practicable. Burke v. Cunningham, 42 Neb. 645, 60 N.W. 903 (1894).

25-2179 Judgment.

After all the shares and interests of the parties have been settled in any of the methods aforesaid, judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly.

Source: R.S.1867, Code § 811, p. 539; R.S.1913, § 8294; C.S.1922, § 9247; C.S.1929, § 20-2179.

An affirmative judgment in favor of a cross-petitioner on a tax sale certificate can be obtained in a partition suit. Fairley v. Kemper, 174 Neb. 565, 118 N.W.2d 754 (1962).

Where partition suit is amicable and for benefit of all parties, court may allow a reasonable attorney's fee to be paid by parties in proportion to their interests. Mabry v. Mudd, 132 Neb. 610, 272 N.W. 574 (1937).

When partition has been ordered, no appeal lies until same has been effected and confirmed. Peterson v. Damoude, 98 Neb. 370, 152 N.W. 786 (1915); Peterson v. Damoude, 95 Neb. 469, 145 N.W. 847 (1914).

Judgment fixing shares is a final judgment and is res judicata of the interests of the parties. Staats v. Wilson, 76 Neb. 204, 107 N.W. 230 (1906).

25-2180 Referee or referees; appointment; duty.

Upon entering such judgment the court shall appoint a referee or referees, not exceeding three in number, to make partition into the requisite number of shares.

Source: R.S.1867, Code § 812, p. 539; Laws 1905, c. 178, § 1, p. 671; R.S.1913, § 8295; C.S.1922, § 9248; C.S.1929, § 20-2180.

Referee in partition is an officer of the court. Knouse v. Knouse, 157 Neb. 748, 61 N.W.2d 388 (1953).

Referee in partition is an officer of the court subject to its lawful orders and directions. Siekert v. Soester, 144 Neb. 321, 13 N.W.2d 139 (1944).

Referees in first instance determine practicability of partition. Burke v. Cunningham, 42 Neb. 645, 60 N.W. 903 (1894).

Court may also appoint referee to make accounting. Mills v. Miller, 3 Neb. 87 (1873).

25-2181 Report of referees.

If it appears to the referee or referees that partition cannot be made without great prejudice to the owners, they shall so report to the court.

Source: R.S.1867, Code § 814, p. 539; R.S.1913, § 8296; C.S.1922, § 9249; C.S.1929, § 20-2181.

Presumption is in favor of partition in kind; however, the character and location of the property, or the amount of interest sought to be assigned, or both, may be such that it will be presumed that partition in kind cannot be made. Nordhausen v. Christner, 215 Neb. 367, 338 N.W.2d 754 (1983).

As between partition in kind or sale of land, partition in kind is preferred. Phillips v. Phillips, 170 Neb. 733, 104 N.W.2d 52 (1960).

The effect of this section, in connection with section 25-2183, is to make uncertain whether property should be partitioned in kind or sold and the proceeds distributed, until a judicial determination of that issue is made by the court. Trowbridge v. Donner, 152 Neb. 206, 40 N.W.2d 655 (1950).

Effect of this section, together with section authorizing court to order sale if satisfied with report, is to make uncertain whether land will be physically divided or sold. Heiser v. Brehm, 117 Neb. 472, 221 N.W. 97 (1928).

Impracticability of partition does not render action adversary; attorney's fees should be allowed if amicable. Smith v. Palmer, 91 Neb. 796, 137 N.W. 843 (1912).

25-2182 Referees; special allotments; when directed.

For good and sufficient reasons appearing to the court, the referee or referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value.

Source: R.S.1867, Code § 813, p. 539; R.S.1913, § 8297; C.S.1922, § 9250; C.S.1929, § 20-2182.

The trial court is given power to direct the referee to allot particular portions of land to particular individuals, and unless so allotted the shares may be drawn by lot. Trowbridge v. Donner, 152 Neb. 206, 40 N.W.2d 655 (1950).

Court may allot particular portions to particular individuals. McClave v. McClave, 60 Neb. 464, 83 N.W. 668 (1900).

Court may award compensation or charge land where incapable of fair division. Lynch v. Lynch, 18 Neb. 586, 26 N.W. 390 (1886).

25-2183 Sale; order; place held.

If satisfied with such report the court shall cause an order to be entered directing the referee or referees to sell the premises so situated, and shall also fix the place and terms of sale. The sale may be held at any place in the county in which the action is brought, or if there is land situated in two or more counties, sale may be had in any county in which any part of the real estate is situated.

Source: R.S.1867, Code § 815, p. 539; R.S.1913, § 8298; Laws 1917, c. 142, § 1, p. 328; C.S.1922, § 9251; C.S.1929, § 20-2183; R.S. 1943, § 25-2183; Laws 1949, c. 58, § 1, p. 169.

The effect of this section, in connection with section 25-2181, is to make uncertain whether property should be partitioned in kind or sold and the proceeds distributed, until a judicial determination of that issue is made by the court. Trowbridge v. Donner, 152 Neb. 206, 40 N.W.2d 655 (1950).

25-2184 Referees; bond; conditions; further security.

Before proceeding to sell, the referee or referees shall each give security, to be fixed by the court and to be approved by the clerk of said court or the judge thereof, conditioned for the faithful discharge of his duties. At any time thereafter the court may require further and better security.

Source: R.S.1867, Code § 816, p. 539; R.S.1913, § 8299; Laws 1917, c. 141, § 1, p. 327; C.S.1922, § 9252; C.S.1929, § 20-2184.

25-2185 Sale of property; notice; procedure.

The same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sale shall be conducted in like manner, except as to place of sale.

Source: R.S.1867, Code § 817, p. 539; R.S.1913, § 8300; Laws 1917, c. 142, § 1, p. 328; C.S.1922, § 9253; C.S.1929, § 20-2185.

Cross References

Provisions for sale of property under execution, see sections 25-1527 to 25-1541.

Appraisement is unnecessary. Schick v. Whitcomb, 68 Neb. 784, 94 N.W. 1023 (1903).

25-2186 Sale of property; report of referee.

After completing said sale, the referee or referees must report their proceedings to the court, with a description of the different parcels of land sold to each purchaser, and the price bid therefor, which report shall be filed with the clerk.

Source: R.S.1867, Code § 818, p. 539; R.S.1913, § 8301; C.S.1922, § 9254; C.S.1929, § 20-2186.

Sale may be made prior to report. Schick v. Whitcomb, 68 Neb. 784, 94 N.W. 1023 (1903).

25-2187 Encumbrances; referee; appointment; report; appeal.

If deemed advisable, the court may appoint a referee to inquire into the nature and amount of encumbrances, and report accordingly. From that report an appeal lies to the court.

Source: R.S.1867, Code § 820, p. 539; R.S.1913, § 8303; C.S.1922, § 9255; C.S.1929, § 20-2187.

Referee may inquire into and report as to the nature and the amount of encumbrances. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

25-2188 Encumbrances; duty of referee; notice of hearing.

The referee shall give the parties interested at least five days' notice of the time and place when he will receive proof of the amount of such encumbrances.

Source: R.S.1867, Code § 821, p. 540; R.S.1913, § 8304; C.S.1922, § 9256; C.S.1929, § 20-2188.

25-2189 Encumbrances; evidence before referee.

In taking such proof he may receive, with other evidence, the affidavit of the parties interested.

Source: R.S.1867, Code § 822, p. 540; R.S.1913, § 8305; C.S.1922, § 9257; C.S.1929, § 20-2189.

25-2190 Encumbrances; payment with consent of owner.

If any encumbrance is ascertained to exist, the proceeds of the sale of that portion, after the payment of costs, or so much thereof as is necessary, shall, if the owner consents, be paid over to the encumbrancer.

Source: R.S.1867, Code § 823, p. 540; R.S.1913, § 8306; C.S.1922, § 9258; C.S.1929, § 20-2190.

Where there is an encumbrance on a share, proceeds of sale if owner consents may be paid over to encumbrancer. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

This section shows legislative intent to permit partition subject to outstanding encumbrance such as a life estate. Baskins v. Krepcik, 153 Neb. 36, 43 N.W.2d 624 (1950).

Where there is an estate for life vested in a third person in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of the life estate. Bartels v. Seefus, 132 Neb. 841, 273 N.W. 485 (1937).

Widow with life estate cannot compel partition, and demand the value thereof out of proceeds of partition sale, where some remaindermen object. Freeland v. Andersen, 114 Neb. 822, 211 N.W. 167 (1926).

Remaindermen cannot force partition and make life tenant take value of life estate as if it were an encumbrance. Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N.W. 227 (1923).

25-2191 Encumbrances; objection of owner to payment; procedure; notice.

If the owner objects to the payment of such encumbrance, the money shall be retained or invested by order of the court to await final action in relation to its disposition, and notice thereof shall be forthwith given to the encumbrancer, unless he has already been made a party.

Source: R.S.1867, Code § 824, p. 540; R.S.1913, § 8307; C.S.1922, § 9259; C.S.1929, § 20-2191.

Encumbrancer may be a proper but not a necessary party. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

25-2192 Issue between owner and encumbrancer; order; effect.

The court may direct an issue to be made up between the encumbrancer and the owner, which shall be decisive of their respective rights.

Source: R.S.1867, Code § 825, p. 540; R.S.1913, § 8308; C.S.1922, § 9260; C.S.1929, § 20-2192.

Court may direct issues to be made up between encumbrancer and owner of share. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

25-2193 Encumbrances; life estate or estate for years; settlement in gross; investment of proceeds.

If an estate for life or years be found to exist as an encumbrance upon any part of said property, and if the parties cannot agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the encumbered property to be invested, and the proceeds to be paid to the encumbrancer during the existence of the encumbrance.

Source: R.S.1867, Code § 826, p. 540; R.S.1913, § 8309; C.S.1922, § 9261; C.S.1929, § 20-2193.

Holder of encumbrance on life estate is entitled to protection according to terms of his contract. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

Remainderman may not maintain partition over objection of life tenant, but may do so where life tenant does not object. Baskins v. Krepcik, 153 Neb. 36, 43 N.W.2d 624 (1950).

Where there is an estate for life vested in a third person in the whole of the premises of which partition is sought, a remainderman cannot maintain an action in partition over the objection of the holder of the life estate. Bartels v. Seefus, 132 Neb. 841, 273 N.W. 485 (1937).

Life tenant and remaindermen cannot force partition against the will of other remaindermen. Freeland v. Andersen, 114 Neb. 822, 211 N.W. 167 (1926).

Remaindermen cannot maintain partition over objection of life tenant. Weddingfeld v. Weddingfeld, 109 Neb. 729, 192 N.W. 227 (1923).

25-2194 Encumbrance proceedings; not to delay distribution of other shares.

The proceedings in relation to the encumbrances shall not delay the distribution of the proceeds of other shares in respect to which no difficulties exist.

Source: R.S.1867, Code § 827, p. 540; R.S.1913, § 8310; C.S.1922, § 9262; C.S.1929, § 20-2194.

In default of owner, person holding an encumbrance may appear and act as his representative. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

25-2195 Security for refund.

The court in its discretion may require all or any of the parties, before they receive the money arising from any sale authorized in sections 25-2170 to 25-21,111, to give satisfactory security to refund such money with interest, in case it afterward appears that such parties were not entitled thereto.

Source: R.S.1867, Code § 828, p. 540; R.S.1913, § 8311; C.S.1922, § 9263; C.S.1929, § 20-2195.

25-2196 Order of conveyance; when made; purchase money security.

If the sales aforesaid are approved and confirmed, an order shall be entered directing the referee or referees, or a majority thereof, to execute conveyances pursuant to such sales. But no conveyance can be made until all the money is paid, without receiving from the purchaser a mortgage of the land so sold, or other equivalent security.

Source: R.S.1867, Code § 829, p. 540; R.S.1913, § 8312; C.S.1922, § 9264; C.S.1929, § 20-2196.

Where referee reported to court that he received money and court confirmed sale, failure to collect purchase price would not render sale void as against later purchaser in good faith. Federal Land Bank of Omaha v. Tuma, 116 Neb. 99, 216 N.W. 186 (1927).

Referees are not absolved from liability in not requiring payment of purchase money by confirmation of sale. Schick v. Whitcomb, 68 Neb. 784, 94 N.W. 1023 (1903).

25-2197 Conveyances; valid against subsequent purchasers and parties to action.

Such conveyances so executed, being recorded in the county where the premises are situated, shall be valid against all subsequent purchasers, and also against all persons interested at the time who were made parties to the proceedings in the mode pointed out by law.

Source: R.S.1867, Code § 830, p. 540; R.S.1913, § 8313; C.S.1922, § 9265; C.S.1929, § 20-2197.

Judgment fixing shares and confirming sale is final where all interested parties are before court; and parties thereto cannot question title of subsequent bona fide purchaser, in absence of fraud on face of proceedings. Federal Land Bank of Omaha v. Tuma, 116 Neb. 99, 216 N.W. 186 (1927).

25-2198 Repealed. Laws 1951, c. 73, § 1, p. 229.

25-2199 Disapproval of sale; refund.

If the sales are disapproved the money paid and the securities given must be returned to the persons respectively entitled thereto.

Source: R.S.1867, Code § 832, p. 541; R.S.1913, § 8315; C.S.1922, § 9267; C.S.1929, § 20-2199.

Money belongs to bidder until sale is confirmed, and he has right to follow it wherever he can trace it and recover it from one who had knowledge of the facts. State ex rel. Sorensen v. Farmers & Merchants State Bank of McCook, 125 Neb. 437, 250 N.W. 553 (1933).

25-21,100 Partition in kind; how made.

When partition is deemed proper the referee or referees must make out the shares by visible monuments, and may employ a competent surveyor and the necessary assistants to aid them.

Source: R.S.1867, Code § 833, p. 541; R.S.1913, § 8316; C.S.1922, § 9268; C.S.1929, § 20-21,100.

25-21,101 Partition; report of referees; form; contents.

The report of the referee or referees must be in writing signed by at least two of them where more than one has been appointed. It must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises.

Source: R.S.1867, Code § 834, p. 541; R.S.1913, § 8317; C.S.1922, § 9269; C.S.1929, § 20-21,101.

25-21,102 Shares drawn by lot, when.

Unless the shares are allotted to their respective owners by the referee or referees as hereinbefore contemplated, the clerk shall number the shares and then draw the names of the future owners by lot.

Source: R.S.1867, Code § 835, p. 541; R.S.1913, § 8318; C.S.1922, § 9270; C.S.1929, § 20-21,102.

Unless specifically directed by the trial court, the shares may be drawn by lot. Trowbridge v. Donner, 152 Neb. 206, 40 N.W.2d 655 (1950).

25-21,103 Partition in part; remaining portion; sale.

When partition can be conveniently made of part of the premises, but not of all, one portion may be partitioned and the other sold as hereinafter provided.

Source: R.S.1867, Code § 836, p. 541; R.S.1913, § 8319; C.S.1922, § 9271; C.S.1929, § 20-21,103.

25-21,104 Partition; report of referees set aside, when; rereference.

On good cause shown, the report may be set aside and the matter again referred to the same or other referee or referees.

Source: R.S.1867, Code § 837, p. 541; R.S.1913, § 8320; C.S.1922, § 9272; C.S.1929, § 20-21,104.

25-21,105 Confirmation of report of referees; judgment.

Upon report of the referee or referees being confirmed, judgment thereon shall be rendered that the partition be firm and effectual forever.

Source: R.S.1867, Code § 838, p. 541; R.S.1913, § 8321; C.S.1922, § 9273; C.S.1929, § 20-21,105.

Where summons was properly served in partition suit upon defendants who were claimed to be insane, confirmation of sale was binding, and would not be set aside against bona fide purchaser. Schleuning v. Tatro, 122 Neb. 3, 238 N.W. 741 (1931).

25-21,106 Service of process; parties bound by proceedings.

The defendants may be served in the same manner as in ordinary civil action by summons, or by publication as provided in this code, and when all the parties in interest have been duly served, any of the proceedings herein prescribed shall be binding and conclusive upon them all. If only a portion of such parties be served, they only shall be bound by such proceedings.

Source: R.S.1867, Code § 839, p. 541; Laws 1899, c. 89, § 2, p. 345; R.S.1913, § 8322; C.S.1922, § 9274; C.S.1929, § 20-21,106.

Cross References

For service of process, see Chapter 25, article 5.

A judgment in a partition action determining the title of land subject to partition is conclusive on parties to the action. Bender v. Fuchs, 179 Neb. 162, 137 N.W.2d 364 (1965).

Bona fide purchaser was protected by confirmation, even though one defendant was insane, another defendant weak-minded, and no guardian ad litem was appointed for either. Schleuning v. Tatro, 122 Neb. 3, 238 N.W. 741 (1931).

Minor heirs are bound by judgment in partition involving homestead of surviving parent, if properly served, and guardian ad litem appointed and answers. Weddle v. Specht, 97 Neb. 693, 151 N.W. 160 (1915).

Parties are bound by judgment fixing shares. Staats v. Wilson, 76 Neb. 204, 107 N.W. 230 (1906).

25-21,107 Judgment of partition; effect.

The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common.

Source: R.S.1867, Code § 840, p. 541; R.S.1913, § 8323; C.S.1922, § 9275; C.S.1929, § 20-21,107.

Party claiming title by adverse possession was bound by judgment in partition action in which he was a party. Bender v. Fuchs, 179 Neb. 162, 137 N.W.2d 364 (1965).

Where title under trust deed was paramount to that under which parties held, as tenants, partition would not lie. Heiser v. Brehm, 117 Neb. 472, 221 N.W. 97 (1928).

Judgment is conclusive though proceedings were irregular and shares were found according to unconstitutional act. Staats v. Wilson, 76 Neb. 204, 107 N.W. 230 (1906), affirmed on rehearing 76 Neb. 210, 109 N.W. 379 (1906).

25-21,108 Partition; proceedings; fees and costs; awarded, when; division.

If, in the proceedings in partition, judgment shall be entered directing partition, as provided in section 25-2179, the court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of attorney's fees to be awarded, which amount shall be taxed as costs in the proceedings. If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original complaint of the plaintiff, such attorney's fees shall be awarded entirely to the attorney for the plaintiff; otherwise, the court shall order such fees for the attorneys to be divided among such of the attorneys of record in the proceedings as have filed pleadings upon which any of the findings in the judgment of partition are based. The court shall also determine and tax as costs a reasonable fee for the referee.

Source: R.S.1867, Code § 841, p. 541; R.S.1913, § 8324; C.S.1922, § 9276; C.S.1929, § 20-21,108; R.S.1943, § 25-21,108; Laws 1955, c. 93, § 1, p. 271; Laws 2002, LB 876, § 44.

1. Award of attorney's fees
2. Division of fees
3. Miscellaneous

1. Award of attorney's fees

The shares confirmed by the judgment of the trial court were correctly pleaded by the plaintiff in the original and amended petitions; therefor, the fee of four thousand two hundred dollars awarded to plaintiff's attorney and taxed one-half to the plaintiff and one-half to the defendant was proper. Sweet v. Fairbairn, 208 Neb. 286, 303 N.W.2d 288 (1981).

Attorneys for the plaintiff in a partition action shall be entitled to all awarded fees where the shares conferred by the judgment and all encumbrances acted upon by plaintiff are accurately pleaded in the original petition. Lienemann v. Lienemann, 201 Neb. 458, 268 N.W.2d 108 (1978).

Where interests of parties in land are not in dispute, controversy over rents and claim of mortgagee to proceeds of sale does not bar allowance of attorney's fee. Lorenz v. Lorenz, 150 Neb. 20, 33 N.W.2d 162 (1948).

Where partition proceedings are for benefit of all parties in interest, an attorney's fee should be allowed even though there is a contest over whether property sold for fair value at partition sale. Wilcox v. Halligan, 141 Neb. 643, 4 N.W.2d 750 (1942).

Impracticability of partition does not of itself render proceedings adversary, so as to prevent allowance of fees. Smith v. Palmer, 91 Neb. 796, 137 N.W. 843 (1912).

Allowance of fees to defendant's counsel was erroneous. Branson v. Branson, 84 Neb. 288, 121 N.W. 109 (1909).

Attorney's fees for plaintiff should be allowed where proceedings are amicable. Johnson v. Emerick, 74 Neb. 303, 104 N.W. 169 (1905).

2. Division of fees

In a partition action fees shall be divided among the attorneys of record who shall have filed pleadings upon which any of the findings in a judgment of partition are based. Lienemann v. Lienemann, 201 Neb. 458, 268 N.W.2d 108 (1978).

Division of attorney's fees between attorneys rests in judicial discretion of trial court. Stoddard v. Montgomery, 169 Neb. 252, 98 N.W.2d 875 (1959).

3. Miscellaneous

An order fixing fees in a partition action is a final, appealable order. Evans v. Evans, 199 Neb. 480, 259 N.W.2d 925 (1977).

Attorney's fees and referee's fees are distinctly and separately treated in this section, the common denominator is that each shall be reasonable. Snook v. Snook, 184 Neb. 798, 172 N.W.2d 85 (1969).

Under former law, if proceedings were adversary, attorney's fees could not be allowed. Oliver v. Lansing, 57 Neb. 352, 77 N.W. 802 (1899).

25-21,109 Default of owner; right of encumbrancers to appear.

Any persons claiming to hold an encumbrance upon any portion of the property involved in the suit, may, in default of the owner, appear and act as his representative in any of the proceedings under sections 25-2170 to 25-21,111.

Source: R.S.1867, Code § 842, p. 542; R.S.1913, § 8325; C.S.1922, § 9277; C.S.1929, § 20-21,109.

Owner by defaulting cannot defeat the rights of an encumbrancer. Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958).

25-21,110 Holders of contingent interests; rights; joinder in action.

Persons having contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated (or the property itself, in case of partition) shall be subject to the order of the court until the right becomes fully vested.

Source: R.S.1867, Code § 843, p. 542; R.S.1913, § 8326; C.S.1922, § 9278; C.S.1929, § 20-21,110.

25-21,111 Share of absent owner; how conserved.

The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit.

Source: R.S.1867, Code § 844, p. 542; R.S.1913, § 8327; C.S.1922, § 9279; C.S.1929, § 20-21,111.

Money paid to clerk of district court by referee in partition is received in official capacity and sureties are liable. Dirks v. Juel, 59 Neb. 353, 80 N.W. 1045 (1899).

(h) ACTIONS TO QUIET TITLE

25-21,112 Scope of relief.

An action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to, or an estate in real estate against any person or persons who claim, or apparently have an adverse estate or interest therein, for the purpose of determining such estate, or interest, canceling unenforceable liens, or claims against, or which appear to be against said real estate, and quieting the title to real estate.

Source: Laws 1921, c. 130, § 1, p. 540; C.S.1922, § 5676; C.S.1929, § 76-401.

1. Scope of relief
2. Who may bring action
3. Equitable action
4. Limitations of actions
5. Adverse possession
6. Miscellaneous

1. Scope of relief

Quiet title statutes were designed to enlarge jurisdiction of courts. Action may be brought under this section which, by strict rules of equity, could not have been maintained. Allegation that legal remedy is adequate is not a defense to quiet title action brought under this section. Connealy v. Mueller, 211 Neb. 484, 319 N.W.2d 86 (1982).

A lessee of real estate may maintain an action to quiet title to his leasehold. Peterson v. Vak, 169 Neb. 441, 100 N.W.2d 44 (1959).

Special action to cancel oil and gas lease is in the nature of action to quiet title. Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N.W.2d 245 (1958).

Allegations of cross-petition in suit to quiet title were sufficient to raise issue of mutual mistake. Gettel v. Hester, 165 Neb. 573, 86 N.W.2d 613 (1957).

Where vendee has failed to perform contract for sale of real estate, vendor is entitled to have title quieted. Sofio v. Glissmann, 156 Neb. 610, 57 N.W.2d 176 (1953).

In suit hereunder to quiet title against judgments claimed to be liens against real estate, it was not improper to enjoin threatened enforcement of judgment pending determination of issues. American Savings & Loan Assn. v. Barry, 123 Neb. 523, 243 N.W. 628 (1932).

Amount must be tendered to quiet title against unpaid mortgage. Barney v. Chamberlain, 85 Neb. 785, 124 N.W. 482 (1910).

Holder of mortgage, barred by statute of limitations, cannot ask affirmative relief. Herbage v. McKee, 82 Neb. 354, 117 N.W. 706 (1908).

Decree quieting title does not bar rights not in issue. Wetherell v. Adams, 80 Neb. 589, 116 N.W. 861 (1908).

Apparent lien of judgment on homestead may be removed. Smith v. Neufeld, 57 Neb. 660, 78 N.W. 278 (1899); Corey v. Schuster, 44 Neb. 269, 62 N.W. 470 (1895).

Purpose of act was to prevent a multiplicity of suits. Foree v. Stubbs, 41 Neb. 271, 59 N.W. 798 (1894).

Plaintiff may set up two titles, and establishment of either is sufficient. Gregory v. Langdon, 11 Neb. 166, 7 N.W. 871 (1881).

Although suit could be brought in federal court by party claiming title to quiet title to real estate, the other rules governing jurisdiction of federal equity courts to such cases will apply. Barnes v. Boyd, 8 F.Supp. 584 (S. D. West Vir. 1934).

2. Who may bring action

A lessee of real estate may maintain an action to quiet title to his leasehold. Peterson v. Vak, 160 Neb. 450, 70 N.W.2d 436 (1955).

Action to quiet title may be maintained by any person whether in actual possession or not, and is tried as an equitable action. Morse v. Cochran, 131 Neb. 424, 268 N.W. 307 (1936).

Remaindermen may maintain suit to quiet title before termination of life estate. Davis v. Davis, 107 Neb. 70, 185 N.W. 442 (1921); Naiman v. Bohlmeyer, 97 Neb. 551, 150 N.W. 829 (1915).

Remainderman may maintain action to quiet title. Criswell v. Criswell, 101 Neb. 349, 163 N.W. 302 (1917).

Party seeking to quiet title must do equity. Bank of Alma v. Hamilton, 85 Neb. 441, 123 N.W. 458 (1909); Humphrey v. Hays, 85 Neb. 239, 122 N.W. 987 (1909); Kerr v. McCreary, 84 Neb. 315, 120 N.W. 1117 (1909).

Party to set aside decree affecting real estate must have interest therein. Stull v. Masilonka, 74 Neb. 309, 104 N.W. 188 (1905), rehearing denied 74 Neb. 322, 108 N.W. 166 (1906).

Action may be maintained by one either in or out of possession. Andersen v. Andersen, 69 Neb. 565, 96 N.W. 276 (1903); Lyon v. Gombert, 63 Neb. 630, 88 N.W. 774 (1902); Ross v. McManigal, 61 Neb. 90, 84 N.W. 610 (1900); Foree v. Stubbs, 41 Neb. 271, 59 N.W. 798 (1894).

Administrator cannot maintain action. Youngson v. Bond, 64 Neb. 615, 90 N.W. 556 (1902); Eayrs v. Nason, 54 Neb. 143, 74 N.W. 408 (1898).

One holding under tax deed may maintain action. Merriam v. Dovey, 25 Neb. 618, 41 N.W. 550 (1889).

Owner of leasehold estate may maintain action. McDonald v. Early, 15 Neb. 63, 17 N.W. 257 (1883).

3. Equitable action

Action to quiet title is triable by the court as an equitable action without a jury. Frank v. Smith, 138 Neb. 382, 293 N.W. 329 (1940).

Suit to quiet title is essentially an action in equity and court properly denied trial by jury. Sittler v. Wittstruck, 122 Neb. 452, 240 N.W. 562 (1932).

4. Limitations of actions

Although a remainderman has the right to bring an action to quiet title, he is not required to do so to protect his estate in remainder from claim of adverse possession by grantee of life estate. Maxwell v. Hamel, 138 Neb. 49, 292 N.W. 38 (1940).

Laches may preclude plaintiff from maintaining action. Butler v. Peterson, 79 Neb. 715, 116 N.W. 515 (1908).

Statute of limitations commenced to run against quieting title action from the time adverse claim attaches. Lyons v. Carr, 77 Neb. 883, 110 N.W. 705 (1906).

Action to remove cloud is not barred by lapse of time. Batty v. City of Hastings, 63 Neb. 26, 88 N.W. 139 (1901).

Running of statute against action for relief on account of fraud, runs from discovery of facts constituting fraud, or facts sufficient to put person on inquiry. Parker v. Kuhn, 21 Neb. 413, 32 N.W. 74 (1887).

Statute of limitations against suit to quiet title would not run against beneficiary of trust in possession until after trustee had disavowed trust. Clark v. Clark, 21 Neb. 402, 32 N.W. 157 (1887).

5. Adverse possession

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious adverse possession under claim of ownership for full period of ten years. Campbell v. Buckler, 192 Neb. 336, 220 N.W.2d 248 (1974).

Adverse occupant of real estate for more than ten years may maintain action to quiet title. Walker v. Bell, 154 Neb. 221, 47 N.W.2d 504 (1951).

Possession by widow as holder of life estate under will, will not be deemed hostile and adverse to that of remaindermen until such knowledge is clearly brought to them. Bretschneider v. Farmers Nat. Bank of Madison, 131 Neb. 495, 268 N.W. 278 (1936).

When possession of land is construed to be adverse or hostile to remainderman stated. Maurer v. Reifschneider, 89 Neb. 673, 132 N.W. 197 (1911); First Nat. Bank of Perry, Iowa v. Pilger, 78 Neb. 168, 110 N.W. 704 (1907).

Requirements to acquire ownership by adverse possession stated. Lanning v. Musser, 88 Neb. 418, 129 N.W. 1022 (1911); Andrews v. Hastings, 85 Neb. 548, 123 N.W. 1035 (1909).

Fencing and cultivating part of street was not sufficient to support claim of adverse possession. Field v. City of Lincoln, 85 Neb. 781, 124 N.W. 468 (1910).

Exclusive occupation under claim of right is ordinarily sufficient to establish adverse possession. Ryan v. City of Lincoln, 85 Neb. 539, 123 N.W. 1021 (1909).

One's adverse possession is not affected by his purchasing at tax sale. Griffith v. Smith, 27 Neb. 47, 42 N.W. 749 (1889).

6. Miscellaneous

In suit to quiet title in plaintiff, uncontradicted testimony by holder of legal title that he conveyed it to plaintiff may be sufficient to make a prima facie case in favor of plaintiff who is in possession of the land. Ellsworth Corporation v. Stratbucker, 134 Neb. 246, 278 N.W. 381 (1938).

Action must be laid in county in which land is. Johnson v. Samuelson, 82 Neb. 201, 117 N.W. 470 (1908).

25-21,113 Parties as defendants; how designated; effect of decree.

In all actions to establish or quiet title to an estate in real estate, all persons in whose favor any interest, right, title, estate in, or lien upon such real estate appears of record shall be made defendants by the names by which they are designated on the record. When it is alleged in the complaint that there are persons who claim or appear to have some interest in, right or title to, or lien upon such property, and that the ownership of, interest in, right or title to, or lien upon such property of such persons does not appear of record in or by their respective names in the county wherein such property is situated, and that the plaintiff, after diligent investigation and inquiry, is unable to ascertain and

does not know the names or whereabouts, if in this state, or the residence of such persons, there shall also be designated as defendants in such action ''all persons having or claiming any interest in'' (here inserting an accurate and definite description of the property involved) followed by the words ''real names unknown''. Judgments and decrees rendered in such actions after the defendants so impleaded and designated have been served as provided by statute, shall be conclusive against all defendants impleaded and designated by name, and also against all persons who are not in actual possession of such property, whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated.

Source: Laws 1921, c. 130, § 2, p. 541; C.S.1922, § 5677; C.S.1929, § 76-402; R.S.1943, § 25-21,113; Laws 2002, LB 876, § 45.

Parties in actual possession of land were not precluded from right to redeem from tax sale where service was had by publication. Thomas v. Flynn, 169 Neb. 458, 100 N.W.2d 37 (1959).

A decree in an action to quiet title against all persons having or claiming any interest in designated lands is conclusive against all persons not in possession and not record holders. State ex rel. Conkey v. Ryan, 136 Neb. 334, 285 N.W. 923 (1939).

Where law providing quieting title by making land defendant was complied with, it was not necessary to comply with previous law covering service on unknown heirs. Miller v. Ruzicka, 109 Neb. 152, 190 N.W. 216 (1922).

25-21,114 Persons, defined.

The word persons as used in sections 25-21,112 to 25-21,120 includes natural and artificial persons.

Source: Laws 1921, c. 130, § 3, p. 541; C.S.1922, § 5678; C.S.1929, § 76-403.

25-21,115 Adverse claims; liens of record; how pleaded.

It shall be sufficient to allege generally in the complaint that the defendants claim or appear to have some interest in, right or title to, or lien upon the real estate or a part thereof; and it is not necessary to allege the nature of any adverse claim or that the value of plaintiff's title or estate is lessened thereby. No lien of record or mortgage of record, however, shall be affected by such action unless it is particularly described, and payment or other legal reason for its cancellation, or that it is barred by limitation, is specifically alleged.

Source: Laws 1921, c. 130, § 4, p. 541; C.S.1922, § 5679; C.S.1929, § 76-404; R.S.1943, § 25-21,115; Laws 2002, LB 876, § 46.

Allegation that judgment was dormant and barred by lapse of time was sufficient. Hein v. W. T. Rawleigh Co., 167 Neb. 176, 92 N.W.2d 185 (1958).

Allegations of cross-petition in suit to quiet title were sufficient to raise issue of mutual mistake. Gettel v. Hester, 165 Neb. 573, 86 N.W.2d 613 (1957).

It is sufficient to allege title generally in plaintiff and that defendant claims some interest in the land. Wells v. Tietge, 143 Neb. 230, 9 N.W.2d 180 (1943).

Quieting title suit may be maintained even though only matter in dispute is proper location of division line between adjoining tracts. Morse v. Cochran, 131 Neb. 424, 268 N.W. 307 (1936).

25-21,116 Unenforceable liens; title quieted without offer to redeem.

When any lien or apparent lien on any real estate shall not be enforceable by reason of lapse of time, the owner of such real estate shall be entitled to have his title thereto quieted against such unenforceable lien or apparent lien without redeeming or offering to redeem therefrom; *Provided*, the owner or owners or their privies in estate of such real estate shall have been in possession of the same during the period of the statute of limitations.

Source: Laws 1921, c. 130, § 5, p. 542; C.S.1922, § 5680; C.S.1929, § 76-405.

Party must be owner and in possession of land to quiet title against lien barred by lapse of time. Hadley v. Platte Valley Cattle Co., 143 Neb. 482, 10 N.W.2d 249 (1943).

Decree quieting title to land encumbered by a mortgage may be obtained upon proper ground without alleging payment of mortgage. McLaughlin v. Nelson, 113 Neb. 308, 202 N.W. 871 (1925).

A court of equity in quieting title clouded by void judicial proceedings, should impose reasonable conditions on plaintiff. Westerfield v. Howell, 88 Neb. 463, 129 N.W. 986 (1911); McCabe v. Equitable Land Co., 88 Neb. 453, 129 N.W. 1018 (1911).

Court should require person asking equitable relief to do equity. Kerr v. McCreary, 84 Neb. 315, 120 N.W. 1117 (1909).

25-21,117 Remaindermen; reversioners; rights and benefits.

Any person or persons having an interest in remainder or reversion in real estate shall be entitled to all the rights and benefits of sections 25-21,112 to 25-21,120.

Source: Laws 1921, c. 130, § 6, p. 542; C.S.1922, § 5681; C.S.1929, § 76-406.

Although a remainderman has the right to bring an action to quiet title, he is not required to do so to protect his estate in remainder from claim of adverse possession by grantee of life estate. Maxwell v. Hamel, 138 Neb. 49, 292 N.W. 38 (1940).

Remainderman may maintain action to quiet title before termination of life estate. Davis v. Davis, 107 Neb. 70, 185 N.W. 442 (1921); Naiman v. Bohlmeyer, 97 Neb. 551, 150 N.W. 829 (1915); First Nat. Bank of Perry, Iowa v. Pilger, 78 Neb. 168, 110 N.W. 704 (1907); Foree v. Stubbs, 41 Neb. 271, 59 N.W. 798 (1894).

Rule stated as to when statute commences to run against remainderman where adverse holder is a stranger holding by independent title not in privity with life tenant. Criswell v. Criswell, 101 Neb. 349, 163 N.W. 302 (1917); which overrules Bohrer v. Davis, 94 Neb. 367, 143 N.W. 209 (1913); McFarland v. Flack, 87 Neb. 452, 127 N.W. 375 (1910); Helming v. Forrester, 87 Neb. 438, 127 N.W. 373 (1910); Hobson v. Huxtable, 79 Neb. 334, 112 N.W. 658 (1907).

Statute of limitations will not run against remainderman in favor of life tenant until knowledge of adverse holding is brought home to the owner of the remainder. Maurer v. Reifschneider, 89 Neb. 673, 132 N.W. 197 (1911).

Minor has ten years after attaining majority in which to bring suit to quiet title against surviving widow claiming title. Draper v. Clayton, 87 Neb. 443, 127 N.W. 369 (1910).

25-21,118 Service of process.

Defendants may be served as in other civil actions.

Source: Laws 1921, c. 130, § 7, p. 542; C.S.1922, § 5682; C.S.1929, § 76-407; R.S.1943, § 25-21,118; Laws 1983, LB 447, § 43.

Where affidavit for constructive service contains no venue and does not show whether notary was commissioned for the county, affidavit was fatally defective. Northouse v. Torstenson, 146 Neb. 187, 19 N.W.2d 34 (1945).

25-21,119 Costs.

If the defendant, or any one of several defendants, shall appear and disclaim all title, lien, and interest adverse to the plaintiff, such defendant shall recover costs. In other cases the costs shall abide the final decree, judgment or order in the action.

Source: Laws 1921, c. 130, § 8, p. 542; C.S.1922, § 5683; C.S.1929, § 76-408.

Where defendant denies plaintiff's title, costs follow judgment. Hallowell v. Borchers, 150 Neb. 322, 34 N.W.2d 404 (1948).

25-21,120 Trial; appeal.

The court shall try such cause in like manner as other equitable actions and shall enter therein such orders and decrees as the parties may be entitled to. Appeals from final orders may be had as in other actions.

Source: Laws 1921, c. 130, § 9, p. 542; C.S.1922, § 5684; C.S.1929, § 76-409.

A quiet title action sounds in equity. Boundary disputes cannot be determined in a quiet title action. Rather, boundary disputes are properly brought as an action in ejectment or pursuant to section 34-301. Rush Creek Land & Live Stock Co. v. Chain, 255 Neb. 347, 586 N.W.2d 284 (1998).

Since amendment of 1921, action to quiet title may be maintained by any person whether in actual possession or not, and cause is tried as an equitable action. Morse v. Cochran, 131 Neb. 424, 268 N.W. 307 (1936).

Defendant defeats action by proving no title or interest in plaintiff. Van Patten v. O'Brien, 88 Neb. 382, 129 N.W. 540 (1911).

As between rival homestead claimants, no finding of ownership can be made before patent is issued. Rupke v. Moran, 87 Neb. 316, 127 N.W. 127 (1910).

Maintenance of action by remainderman during life estate is permitted. Hobson v. Huxtable, 79 Neb. 334, 112 N.W. 658 (1907), judgment vacated on rehearing 79 Neb. 340, 116 N.W. 278 (1908).

Purpose of action is to obtain complete determination of question of title between parties. Dolen v. Black, 48 Neb. 688, 67 N.W. 760 (1896).

Plaintiff must show his interest is superior to defendant's if put in issue. McCauley v. Ohenstein, 44 Neb. 89, 62 N.W. 232 (1895).

Plaintiff should allege the nature, extent, and invalidity of defendant's title. McDonald v. Early, 15 Neb. 63, 17 N.W. 257 (1883).

In an action to quiet title, the plaintiff has the burden of proof and must recover upon the strength of his title. Vogel v. Bartels, 1 Neb. App. 1113, 510 N.W.2d 529 (1993).

(i) QUO WARRANTO

25-21,121 Quo warranto; action; against whom brought.

An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law.

Source: R.S.1867, Code § 704, p. 517; R.S.1913, § 8328; C.S.1922, § 9280; C.S.1929, § 20-21,112.

Cross References

Domestic societies, against, violations of law, see section 44-10,101.
Governor, failure to call special session of the Legislature, see section 50-126.
Reclamation districts, when granted, see section 46-528.
Secretary of State, failure to call special session of the Legislature, see section 50-126.
Supreme Court, jurisdiction, see section 24-204.

1. Scope of action
2. Against whom brought

1. Scope of action

A quo warranto action which contemplates the constitutional validity of the position and the ouster of one unconstitutionally holding the position and exercising the powers and duties thereof provides a complete remedy. Quo warranto is the proper means of testing whether a district judge's membership on the Nebraska Commission on Law Enforcement and Criminal Justice was constitutionally proper. State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).

Absent an illegal expenditure of public funds or an increase in the tax burden, the sole method of attacking the validity of a franchise is by quo warranto. Just as in a derivative action against a corporation, a stockholder is excused from making a demand upon a corporation if such would be unavailing, so, too, is one excused from making a futile demand upon a municipality. Bard v. Cox Cable of Omaha, Inc., 226 Neb. 880, 416 N.W.2d 4 (1987).

Remedy is provided to try title to public office. State ex rel. Johnson v. Hagemeister, 161 Neb. 475, 73 N.W.2d 625 (1955).

Quo warranto may be used to test legal entity of school district and status of the officers. State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N.W.2d 626 (1952).

Quo warranto is employed only to test the actual right to an office or franchise, and it can afford no relief for official misconduct or be used to test the legality of the official action of public or corporate officers. State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N.W.2d 784 (1943).

Issues of law or of fact in quo warranto are required to be joined by filing a demurrer or answer, and motion to dismiss will not lie. State ex rel. Johnson v. Consumers Public Power Dist., 142 Neb. 114, 5 N.W.2d 202 (1942).

Quo warranto is intended to prevent the exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising these powers. State ex rel. Wright v. Eastern Nebraska Public Power District, 130 Neb. 683, 266 N.W. 594 (1936); State ex rel. Wright v. Lancaster County Rural Public Power Dist., 130 Neb. 677, 266 N.W. 591 (1936); State ex rel. Gantz v. Drainage Dist. No. 1 of Merrick County, 100 Neb. 625, 160 N.W. 997 (1916).

If there is adequate remedy at law or equity, quo warranto is improper. State v. Scott, 70 Neb. 681, 97 N.W. 1021 (1904).

Quo warranto may be maintained either by a prosecuting attorney or by a private individual. State ex rel. Broatch v. Moores, 58 Neb. 285, 78 N.W. 529 (1899); State ex rel. Broatch v. Moores, 58 Neb. 285, 73 N.W. 299 (1897).

Jury is not demandable as of right in quo warranto. State ex rel. Broatch v. Moores, 56 Neb. 1, 76 N.W. 530 (1898).

Quo warranto is proper remedy to oust persons who are exercising corporate powers when corporation has no legal existence. State ex rel. Summers v. Uridil, 37 Neb. 371, 55 N.W. 1072 (1893).

Supreme Court has original jurisdiction to determine conflicting claims to a public office. State ex rel. Fair v. Frazier, 28 Neb. 438, 44 N.W. 471 (1890).

2. Against whom brought

The position of assistant professor at a state college is a public office for the purposes of quo warranto under the provisions of this section. State ex rel. Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991).

An information may be filed against any person holding office who has committed an act that works a forfeiture of that office. Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967).

This section not only prescribes who the defendants in a quo warranto action may be, but also prescribes the acts which may be the basis for any information. State ex rel. Johnson v. Conservative Savings & Loan Assn., 143 Neb. 805, 11 N.W.2d 89 (1943).

Action in quo warranto may be filed against any person unlawfully holding or exercising any public office. State ex rel. Good v. Marsh, 125 Neb. 125, 249 N.W. 295 (1933).

Privilege of foreign corporation doing business in state is revocable in quo warranto by Attorney General, in name of state, for violation of law. State ex rel. Spillman v. Central Purchasing Co., 118 Neb. 383, 225 N.W. 46 (1929).

Persons assuming to act as officers of village having no legal existence may be ousted by quo warranto. State ex rel. Banta v. Greer, 86 Neb. 88, 124 N.W. 905 (1910).

Quo warranto is proper remedy to set aside franchise irregularly granted. Clark v. Interstate Ind. Tel. Co., 72 Neb. 883, 101 N.W. 977 (1904).

Quo warranto is proper remedy to oust foreign corporation violating antitrust act. State v. Standard Oil Co., 61 Neb. 28, 84 N.W. 413 (1900).

Quo warranto may be invoked to test validity of appointment, but court cannot enjoin appointment. Fort v. Thompson, 49 Neb. 772, 69 N.W. 110 (1896).

Quo warranto is remedy to test legal existence of city, not injunction. Osborn v. Village of Oakland, 49 Neb. 340, 68 N.W. 506 (1896).

Supreme Court has original jurisdiction in quo warranto to determine rights of persons claiming the office of Governor. State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892).

Quo warranto is proper to oust corporation; company is only necessary defendant. State ex rel. Leese v. Atchison & Nebraska R. R. Co., 24 Neb. 143, 38 N.W. 43 (1888).

Quo warranto may be brought against county treasurer in Supreme Court. State ex rel. Glenn v. Stein, 13 Neb. 529, 14 N.W. 481 (1882).

State court judgment in quo warranto ousting corporation is binding as against collateral attack in federal court. Brictson Mfg. Co. v. Close, 25 F.2d 794 (8th Cir. 1928).

25-21,122 Quo warranto; action; by whom brought.

Such information may be filed by the Attorney General or by the county attorney of the proper county whenever either of such officers deems it his duty so to do, except that the county attorney shall not have authority to file such information against any state officer or a judge of the district court; *Provided, however*, that any elector of the proper county may file such information against any person unlawfully holding or exercising the functions of any public office in the state, other than state officers or judges of the district court, whenever the county attorney of the proper county shall refuse so to do within ten days after he shall have been notified in writing by any elector that any such person is disqualified by the Constitution or the laws of the State of Nebraska to hold the office in question or to exercise the functions thereof. Any person other than the county attorney who shall institute such action shall file with such information in the office of the clerk of the district court a bond signed by a duly authorized surety company or by two resident freeholders of the county in which the action is filed, the amount of which bond shall be not less than five hundred dollars and be fixed by, and the sufficiency of the sureties thereon approved by the clerk. The bond shall be conditioned that the plaintiff shall prosecute the action without delay and that he shall pay the costs of such suit including a reasonable attorney fee to the person against whom such information is filed should the action be unsuccessful. The amount of such attorney fee shall be fixed by the court and taxed as costs in the action.

Source: R.S.1867, Code § 705, p. 517; R.S.1913, § 8329; Laws 1921, c. 126, § 1, p. 535; C.S.1922, § 9281; C.S.1929, § 20-21,113.

Upon refusal of county attorney, any elector of county may file quo warranto information against county officer. Stasch v. Weber, 188 Neb. 710, 199 N.W.2d 391 (1972).

This section provides who may bring an action in quo warranto. Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967).

Where action is by relator in his own right against incumbent, relator is not required to give bond. State ex rel. Brogan v. Boehner, 174 Neb. 689, 119 N.W.2d 147 (1963).

Private person may file information when county attorney and Attorney General refuse to do so. State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N.W.2d 626 (1952).

When the right of two or more persons to separate offices depends upon the same questions of law and fact, they may properly join as relators in an action in nature of quo warranto, to try the title to such offices. Thompson v. James, 125 Neb. 350, 250 N.W. 237 (1933).

Privilege of foreign corporation doing business in state is revocable in quo warranto by Attorney General. State ex rel. Spillman v. Central Purchasing Co., 118 Neb. 383, 225 N.W. 46 (1929).

Quo warranto may be brought by taxpayer with consent of county attorney against village trustees. State ex rel. Banta v. Greer, 86 Neb. 88, 124 N.W. 905 (1910).

Attorney General, not county attorney, should bring quo warranto, if filed in Supreme Court. State ex rel. Crosby v. Cones, 15 Neb. 444, 19 N.W. 682 (1884).

In contest of office, individual must show right to office. County attorney brings action in county; Attorney General, if state at large is interested. State ex rel. Glenn v. Stein, 13 Neb. 529, 14 N.W. 481 (1882).

Ouster of foreign corporation in quo warranto by Attorney General in state court upheld. Brictson Mfg. Co. v. Close, 25 F.2d 794 (8th Cir. 1928).

25-21,123 Duty of Attorney General or county attorney to bring quo warranto action; when.

The Attorney General or the county attorney of the proper county must file such information when directed to do so by the Governor, the Legislative Assembly, or the district court.

Source: R.S.1867, Code § 706, p. 517; R.S.1913, § 8330; Laws 1921, c. 126, § 2, p. 536; C.S.1922, § 9282; C.S.1929, § 20-21,114.

25-21,124 Information; contents.

Such information shall consist of a plain statement of the facts which constitute the grounds of the proceeding, addressed to the court, which shall stand for an original complaint.

Source: R.S.1867, Code § 707, p. 517; R.S.1913, § 8331; C.S.1922, § 9283; C.S.1929, § 20-21,115; R.S.1943, § 25-21,124; Laws 2002, LB 876, § 47.

Quo warranto lies against one who is in possession or user of an office, or who has been admitted thereto. State ex rel. Good v. Marsh, 125 Neb. 125, 249 N.W. 295 (1933).

Petition sustained against claim of stating two separate and distinct causes of action. Duffy v. State ex rel. Edson, 60 Neb. 812, 84 N.W. 264 (1900).

25-21,125 Summons.

Such statement shall be filed in the clerk's office, and summons issued and served in the same manner as hereinbefore provided for the commencement of actions in the district court.

Source: R.S.1867, Code § 708, p. 517; R.S.1913, § 8332; C.S.1922, § 9284; C.S.1929, § 20-21,116.

Cross References

For issuance and service of summons, see Chapter 25, article 5.

Defendant is required to answer in the usual way contemplated by code of civil procedure. State ex rel. Johnson v. Consumers Public Power Dist., 142 Neb. 114, 5 N.W.2d 202 (1942).

25-21,126 Answer.

The defendant shall appear and answer such information in the usual way, and issue being joined it shall be tried in the ordinary manner.

Source: R.S.1867, Code § 709, p. 518; R.S.1913, § 8333; C.S.1922, § 9285; C.S.1929, § 20-21,117.

Defendant is required to answer the charges made against him in the information. State ex rel. Johnson v. Conservative Savings & Loan Assn., 143 Neb. 805, 11 N.W.2d 89 (1943).

Defendant must show precisely under what authority he holds office. State ex rel. Sabin v. Tillma, 32 Neb. 789, 49 N.W. 806 (1891).

25-21,127 Action by claimant against incumbent of office; information; trial.

When the defendant is holding an office to which another is claiming the right, the information should set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties.

Source: R.S.1867, Code § 710, p. 518; R.S.1913, § 8334; C.S.1922, § 9286; C.S.1929, § 20-21,118.

When the defendant is holding an office claimed by another, the trial court must determine the rights of the contesting parties. Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967).

If by Attorney General, respondent must prove right to office. State ex rel. Blessing v. Davis, 64 Neb. 499, 90 N.W. 232 (1902).

Where individual is relator, he must prove right to office. State ex rel. Birkhauser v. Moores, 52 Neb. 634, 72 N.W. 1056 (1897).

Quo warranto will lie where it is claimed that person is ineligible to hold office. State ex rel. Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892).

25-21,128 Action by claimant against incumbent of office; judgment for plaintiff; effect.

If judgment is rendered in favor of such claimant, he shall proceed to exercise the functions of the office, after he has qualified as required by law.

Source: R.S.1867, Code § 711, p. 518; R.S.1913, § 8335; C.S.1922, § 9287; C.S.1929, § 20-21,119.

Officer may qualify after judgment where failure to do so earlier was not own fault. State ex rel. Barton v. Frantz, 55 Neb. 167, 75 N.W. 546 (1898).

If relator is found entitled to hold over, must then requalify. State ex rel Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739 (1891), 51 N.W. 602 (1892).

25-21,129 Action by claimant against incumbent of office; judgment for plaintiff; delivery of books and papers.

The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office.

Source: R.S.1867, Code § 712, p. 518; R.S.1913, § 8336; C.S.1922, § 9288; C.S.1929, § 20-21,120.

25-21,130 Action by claimant against incumbent of office; judgment for plaintiff; suit for damages by claimant.

When judgment has been rendered in favor of the claimant, the claimant may at any time within one year after the entry of the judgment bring suit against the defendant and recover the damages the claimant has sustained by reason of the act of the defendant.

Source: R.S.1867, Code § 713, p. 518; R.S.1913, § 8337; C.S.1922, § 9289; C.S.1929, § 20-21,121; R.S.1943, § 25-21,130; Laws 2000, LB 921, § 20.

25-21,131 Action against several claimants of office or franchise.

When several persons claim to be entitled to the same office or franchise, an information may be filed against all or any portion thereof, in order to try their respective rights thereto.

Source: R.S.1867, Code § 714, p. 518; R.S.1913, § 8338; C.S.1922, § 9290; C.S.1929, § 20-21,122.

25-21,132 Ouster, judgment of; costs.

If the defendant is found guilty of unlawfully holding or exercising any office, franchise or privilege, or if a corporation is found to have violated the law by which it holds its existence, or in any other manner to have done acts which

amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted, and altogether excluded from such office, franchise or privilege, and also that he pay the costs of the proceedings.

Source: R.S.1867, Code § 715, p. 518; R.S.1913, § 8339; C.S.1922, § 9291; C.S.1929, § 20-21,123.

Right to do business in state may be revoked in quo warranto by Attorney General against foreign corporations. State ex rel. Spillman v. Central Purchasing Co., 118 Neb. 383, 225 N.W. 46 (1929).

Corporation formed by licensed physician to make contracts for services of members is not subject to ouster. State Electro-Medical Institute v. State, 74 Neb. 40, 103 N.W. 1078 (1905).

Supersedeas is discretionary, and denial is not reviewable. Gandy v. State, 10 Neb. 243, 4 N.W. 1019 (1880).

Ouster of foreign corporation in quo warranto by Attorney General in state court upheld as against collateral attack by corporation in federal court. Brictson Mfg. Co. v. Close, 25 F.2d 794 (8th Cir. 1928).

25-21,133 Partial ouster, judgment of.

If the defendant is found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges.

Source: R.S.1867, Code § 716, p. 518; R.S.1913, § 8340; C.S.1922, § 9292; C.S.1929, § 20-21,124.

25-21,134 Quo warranto; in whose name brought; costs.

When an information is upon the relation of a private individual, it shall be so stated in the complaint and proceedings, and such individual shall be responsible for costs in case they are not adjudged against the defendant. In other cases the title of the cause shall be the same as in a criminal prosecution, and the payment of costs shall be regulated by the same rule.

Source: R.S.1867, Code § 717, p. 518; R.S.1913, § 8341; C.S.1922, § 9293; C.S.1929, § 20-21,125; R.S.1943, § 25-21,134; Laws 2002, LB 876, § 48.

25-21,135 Judgment against pretended corporation; costs.

In case judgment is rendered against a pretended, but not real, corporation, the costs may be collected from any person who has been acting as an officer or proprietor of such pretended corporation.

Source: R.S.1867, Code § 718, p. 518; R.S.1913, § 8342; C.S.1922, § 9294; C.S.1929, § 20-21,126.

25-21,136 Dissolved corporation; trustees; appointment.

If a corporation is ousted and dissolved by the proceedings herein authorized, the court shall appoint three disinterested persons as trustees of the creditors and stockholders.

Source: R.S.1867, Code § 719, p. 519; R.S.1913, § 8343; C.S.1922, § 9295; C.S.1929, § 20-21,127.

Court ousting foreign corporation may appoint trustees for its creditors and stockholders. State ex rel. Spillman v. Brictson Mfg. Co., 114 Neb. 341, 207 N.W. 664 (1926), affirming 113 Neb. 781, 205 N.W. 246 (1925).

State court judgment ousting foreign corporation and appointing trustees for its property in Nebraska upheld as against collateral attack in federal court. Brictson Mfg. Co. v. Close, 25 F.2d 794 (8th Cir. 1928).

25-21,137 Dissolved corporation; trustees; bond.

Such trustees shall enter into bond, in such a penalty and with such security as the court may approve, conditioned for the faithful discharge of their trust.

Source: R.S.1867, Code § 720, p. 519; R.S.1913, § 8344; C.S.1922, § 9296; C.S.1929, § 20-21,128.

25-21,138 Dissolved corporation; trustees; bond, action upon.

Suit may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties.

Source: R.S.1867, Code § 721, p. 519; R.S.1913, § 8345; C.S.1922, § 9297; C.S.1929, § 20-21,129.

25-21,139 Dissolved corporation; trustees; duties.

The trustees shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled.

Source: R.S.1867, Code § 722, p. 519; R.S.1913, § 8346; C.S.1922, § 9298; C.S.1929, § 20-21,130.

Surplus property of ousted foreign corporation should be returned to its proper officers or representatives, not to stockholders. State ex rel. Spillman v. Brictson Mfg. Co., 114 Neb. 341, 207 N.W. 664 (1926).

Bankruptcy court, in summary proceeding to recover bankrupt corporation's assets from trustees appointed in state court to liquidate corporation and distribute its assets, acquired no jurisdiction, where, at time of bankruptcy, receiver of corporation was holding its assets pursuant to court order. Marcell v. Engebretson, 74 F.2d 93 (8th Cir. 1934).

25-21,140 Dissolved corporation; books, papers, effects; delivery to trustees; enforcement.

The court shall, upon an application for that purpose, order any officer of such corporation, or any other person having possession of any of the effects, books, or papers of the corporation in any wise necessary for the settlement of its affairs, to deliver up the same to the trustees.

Source: R.S.1867, Code § 723, p. 519; R.S.1913, § 8347; C.S.1922, § 9299; C.S.1929, § 20-21,131.

25-21,141 Dissolved corporation; trustees; inventory.

As soon as practicable after their appointment, the trustees shall make and file in the office of the clerk of the court, an inventory of all the effects, rights and credits which come to their possession or knowledge, the truth of which inventory shall be sworn to.

Source: R.S.1867, Code § 724, p. 519; R.S.1913, § 8348; C.S.1922, § 9300; C.S.1929, § 20-21,132.

25-21,142 Dissolved corporation; trustees; corporate claims and property; duty to sue; liability.

They shall sue for and recover the debts and property of the corporation, and shall be responsible to the creditors and stockholders, respectively, to the extent of the effects which come to their hands, in the same manner as though they were the executors of a deceased person.

Source: R.S.1867, Code § 725, p. 519; R.S.1913, § 8349; C.S.1922, § 9301; C.S.1929, § 20-21,133.

25-21,143 Ouster of corporation; liability of officers for misconduct.

When judgment of ouster is rendered against a corporation on account of the misconduct of the directors or officers thereof, such officers shall be jointly and severally liable to an action by anyone injured thereby.

Source: R.S.1867, Code § 726, p. 519; R.S.1913, § 8350; C.S.1922, § 9302; C.S.1929, § 20-21,134.

25-21,144 Quo warranto; disobedience of court order; liability; penalty.

Any person who, without good reason, refuses to obey any order of the court as provided in sections 25-21,121 to 25-21,148 shall be deemed guilty of a contempt of court, and shall be fined in any sum not exceeding five thousand dollars, and imprisoned in the county jail until he comply with said order, and shall be further liable for the damages resulting to any person on account of his refusal to obey such order.

Source: R.S.1867, Code § 727, p. 519; R.S.1913, § 8351; C.S.1922, § 9303; C.S.1929, § 20-21,135.

25-21,145 Quo warranto; letters patent; annulment; grounds.

An action of quo warranto may be instituted in the manner contemplated in sections 25-21,121 to 25-21,148, for the purpose of annulling or vacating any letters patent granted by the proper authorities of this state, where there is reason to believe that the same were obtained by fraud, or through mistake or ignorance of a material fact, or when the patentee, or those claiming under him, have done or omitted an act in violation of the terms and conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same.

Source: R.S.1867, Code § 728, p. 519; R.S.1913, § 8352; C.S.1922, § 9304; C.S.1929, § 20-21,136.

25-21,146 Action by claimant against incumbent of office; condition precedent.

When any citizen of this state shall claim any office which is usurped, invaded or unlawfully held and exercised by another, the person so claiming such office shall have the right to file in the district court an information in the nature of a quo warranto, upon his own relation, and with or without the consent of the prosecuting attorney, and such person shall have the right to prosecute said information to final judgment; *Provided*, he shall have first applied to the prosecuting attorney to file the information, and the prosecuting attorney shall have refused or neglected to file the same.

Source: R.S.1867, Code § 1, p. 279; R.S.1913, § 8353; C.S.1922, § 9305; C.S.1929, § 20-21,137.

1. Scope of action
2. Condition precedent
3. Miscellaneous

1. Scope of action

A person claiming an office that has been usurped or invaded by another may maintain an action in quo warranto. State ex rel. Brogan v. Boehner, 174 Neb. 689, 119 N.W.2d 147 (1963).

Quo warranto to try title to office will lie, even though validity of election and existence of office are drawn in question. Thompson v. James, 125 Neb. 350, 250 N.W. 237 (1933).

Teacher claiming to have been wrongfully dismissed may bring quo warranto to test right of successor to take his place,

and force dismissal. Eason v. Majors, 111 Neb. 288, 196 N.W. 133 (1923).

Quo warranto applies only to claimants of office, and is not proper action to test constitutionality of law creating office. State v. Scott, 70 Neb. 681, 97 N.W. 1021 (1904).

Quo warranto should be brought in Supreme Court by Attorney General, in district court by county attorney, and by individual where officer refuses. State ex rel. Fair v. Frazier, 28 Neb. 438, 44 N.W. 471 (1890).

2. Condition precedent

In a suit under this section, consent of Attorney General or county attorney is not required. Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967).

Individual relator must allege refusal of county attorney in information. Harpham v. State ex rel. Cruse, 63 Neb. 396, 88 N.W. 489 (1901).

Consent is evidenced by county attorney prosecuting action filed in relator's name. Duffy v. State ex rel. Edson, 60 Neb. 812, 84 N.W. 264 (1900).

3. Miscellaneous

Private relator in statutory quo warranto contesting an election with knowledge of election irregularities may not be entitled to relief for that reason in certain circumstances. State ex rel. Genz v. Thomas, 185 Neb. 637, 177 N.W.2d 607 (1970).

Relator must show better title than respondent. State ex rel. Thayer v. Boyd, 34 Neb. 435, 51 N.W. 964 (1892).

Information that does not show relator's title is demurrable. State ex rel. Cooper v. Hamilton, 29 Neb. 198, 45 N.W. 279 (1890).

25-21,147 Public officers; malfeasance; ouster.

Any county attorney or prosecuting officer, sheriff, mayor, police officer, or police commissioner, or other officer, who shall willfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom.

Source: Laws 1907, c. 87, § 1, p. 306; R.S.1913, § 8354; C.S.1922, § 9306; C.S.1929, § 20-21,138; R.S.1943, § 25-21,147; Laws 1972, LB 1032, § 143.

To willfully fail, neglect, or refuse to enforce a law involves more than oversight or carelessness or voluntary neglect. State ex rel. Thompson v. Donahue, 91 Neb. 311, 135 N.W. 1030 (1912).

25-21,148 Public officers; malfeasance; action in Supreme Court; suspension of defendant; temporary appointment.

The Attorney General of the State of Nebraska or a special attorney designated by the Governor, when directed by the Governor, shall institute and prosecute quo warranto proceedings in the Supreme Court against any such county attorney or prosecuting officer, sheriff, police officer or police commissioner, mayor or other officer, who holds his office by a vote of the people. During the pendency of such proceedings such officer may by the Governor be suspended from performing the duties of his office, and temporary appointment may be made by the Governor for the performance of the duties of such office. If the court shall find that such suspended officer has willfully failed or refused to enforce any law which it is his duty as such officer to perform, then the court shall render judgment of ouster against such officer and the office shall thereby become vacant.

Source: Laws 1907, c. 87, § 2, p. 306; R.S.1913, § 8355; C.S.1922, § 9307; Laws 1923, c. 116, § 1, p. 277; C.S.1929, § 20-21,139; R.S.1943, § 25-21,148; Laws 1965, c. 118, § 2, p. 451; Laws 1972, LB 1032, § 44.

(j) DECLARATORY JUDGMENTS

25-21,149 Declaratory judgments; courts of record; jurisdiction.

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations

shall have the force and effect of a final judgment or decree. Any action or proceeding seeking a declaratory judgment that any tax, penalty, or part thereof is unconstitutional shall be brought in the tax year in which the tax or penalty was levied or assessed.

Source: Laws 1929, c. 75, § 1, p. 257; C.S.1929, § 20-21,140; R.S.1943, § 25-21,149; Laws 1949, c. 59, § 1, p. 170; Laws 1991, LB 829, § 4.

Cross References

Rules and regulations, declaratory judgment, see section 84-911.
Submitting controversy, see sections 25-903 to 25-905.

1. Scope
2. Effect
3. Jurisdiction

1. Scope

A declaratory judgment action is to declare the rights, status, or other legal relations between the parties. Bentley v. School Dist. No. 025, of Custer County, 255 Neb. 404, 586 N.W.2d 306 (1998).

A liability insurer is not permitted to seek, in a direct action under this section, a declaration of noncoverage that is binding in a later action as to a potential claimant against the insured. Medical Protective Co. v. Schrein, 255 Neb. 24, 582 N.W.2d 286 (1998).

Where an exclusive statutory remedy is provided, the Uniform Declaratory Judgments Act does not provide an additional remedy. Boettcher v. Balka, 252 Neb. 547, 567 N.W.2d 95 (1997).

A declaratory judgment is available to test the constitutionality of a tax statute. Jones v. State, 248 Neb. 158, 532 N.W.2d 636 (1995).

The state has not waived its sovereign immunity in declaratory judgment actions, and such actions filed against officers of the state which seek to compel affirmative action on the part of the officials are within the scope of immunity. County of Lancaster v. State, 247 Neb. 723, 529 N.W.2d 791 (1995).

A declaratory judgment action should not be entertained when it is initiated by a prospective tort defendant. Ryder Truck Rental v. Rollins, 246 Neb. 250, 518 N.W.2d 124 (1994).

Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity. Concerned Citizens v. Department of Environ. Contr., 244 Neb. 152, 505 N.W.2d 654 (1993).

A declaratory judgment action, pursuant to this section, is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute. State ex rel. Spire v. Northwestern Bell Tel. Co., 233 Neb. 262, 445 N.W.2d 284 (1989).

The use and determination of a demurrer in actions arising under the Uniform Declaratory Judgments Act are controlled by the same principles as apply in other cases. S.I.D. No. 272 of Douglas County v. Marquardt, 233 Neb. 39, 443 N.W.2d 877 (1989).

The Uniform Declaratory Judgments Act is available when a present actual controversy exists and all interested persons are parties to the proceedings, and then only when a justiciable issue exists for resolution. Koenig v. Southeast Community College, 231 Neb. 923, 438 N.W.2d 791 (1989); Miller v. Stolinski, 149 Neb. 679, 32 N.W.2d 199 (1948).

For purposes of determining whether a litigant is entitled to declaratory relief, existence of a controversy depends not only on the circumstances existing at the commencement of the action but also the circumstances when the judgment is granted. Mullendore v. Nuernberger, 230 Neb. 921, 434 N.W.2d 511 (1989).

Unwed father allowed to use declaratory judgment to determine paternity. White v. Mertens, 225 Neb. 241, 404 N.W.2d 410 (1987).

A declaratory judgment is an appropriate method to challenge constitutionality of a tax statute. Mullendore v. School Dist. No. 1 of Lancaster County, 223 Neb. 28, 388 N.W.2d 93 (1986).

Declaratory action could not be used to contest school reorganization election once the election had been held. Eriksen v. Ray, 212 Neb. 8, 321 N.W.2d 59 (1982).

A declaratory judgment action may not be used by an insurance company to determine its obligation to pay when the insured is not yet obligated to pay, and until such time, no actual controversy exists. Allstate Ins. Co. v. Novak, 210 Neb. 184, 313 N.W.2d 636 (1981).

The use of a declaratory judgment remedy as provided by this section is proper in this state to determine the rights and obligations of the insured and the insurance company under an uninsured motorist clause following the rendition of a final judgment against the uninsured motorist. Herrera v. American Standard Ins. Co., 203 Neb. 477, 279 N.W.2d 140 (1979).

Where rights of all parties cannot be determined in a conversion action, action under sections 25-21,149 to 25-21,164 is proper when requisite precedent conditions are met. Berigan Bros. v. Growers Cattle Credit Corp., 182 Neb. 656, 156 N.W.2d 794 (1968).

Action to determine who was liable on automobile insurance policies was properly brought under this act. Truck Ins. Exchange v. State Farm Mut. Auto. Ins. Co., 182 Neb. 330, 154 N.W.2d 524 (1967).

Validity of city ordinance could be determined in declaratory judgment proceedings. Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 131 N.W.2d 609 (1964).

Declaratory judgment proceeding was proper to determine question as to constitutional validity of statutes. Meyerkorth v. State, 173 Neb. 889, 115 N.W.2d 585 (1962); Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N.W.2d 397 (1961); State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N.W.2d 502 (1949); Thorin v. Burke, 146 Neb. 94, 18 N.W.2d 664 (1945).

Declaratory judgment action brought by Attorney General was proper to determine constitutionality of legislative act. State ex rel. Meyer v. Story, 173 Neb. 741, 114 N.W.2d 769 (1962).

Act is available to a public power district to secure a declaration as to reasonableness of rates. York County Rural P. P. Dist. v. O'Connor, 172 Neb. 602, 111 N.W.2d 376 (1961).

An action for a declaratory judgment will not be entertained when an equally serviceable remedy has been provided. Scudder v. County of Buffalo, 170 Neb. 293, 102 N.W.2d 447 (1960).

Original action in Supreme Court for declaratory judgment as to constitutionality of tax on building and loan stock could be maintained. Anderson v. Herrington, 169 Neb. 391, 99 N.W.2d 621 (1959).

Party seeking relief must have a legally protectible interest or right in the controversy. Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N.W.2d 464 (1956).

Declaratory judgment is appropriate to determine the validity, construction, or interpretation of a statute when there is a justiciable controversy. Armstrong v. Board of Supervisors of Kearney County, 153 Neb. 858, 46 N.W.2d 602 (1951).

Uniform Declaratory Judgment Act and Reclamation Act are not in conflict. Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

A declaratory judgment action will not be entertained if there is pending other litigation in which the rights of the parties can be determined. Strawn v. County of Sarpy, 146 Neb. 783, 21 N.W.2d 597 (1946).

Court is without power to declare the law unless the Uniform Declaratory Judgments Act is complied with. Wightman v. City of Wayne, 144 Neb. 871, 15 N.W.2d 78 (1944).

Under the Declaratory Judgments Act, an equity court has the power to determine the parentage of a child. Carlson v. Bartels, 143 Neb. 680, 10 N.W.2d 671 (1943).

Action to determine validity of delinquent tax law was properly brought under Declaratory Judgments Act. Tukey v. Douglas County, 133 Neb. 732, 277 N.W. 57 (1938).

State of Nebraska and executive departments thereof may seek relief under Declaratory Judgments Act in an original action in Supreme Court. State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N.W. 555 (1937).

Action to determine rights of office holder whose office had been abolished by constitutional amendment was brought under Declaratory Judgments Act. Swanson v. State, 132 Neb. 82, 271 N.W. 264 (1937).

Declaratory judgment sought under this statute to determine how liquor license fees should be distributed. School District of Omaha v. Gass, 131 Neb. 312, 267 N.W. 528 (1936).

Court may refuse to render declaratory judgment where, if rendered or entered, it would not terminate the controversy giving rise to the proceeding. Arlington Oil Co. v. Hall, 130 Neb. 674, 266 N.W. 583 (1936).

Court should, under most circumstances, dismiss action for declaratory judgment where all parties whose rights are affected have not been impleaded in action. Updike Inv. Co. v. Employers Liability Assurance Corporation, 128 Neb. 295, 258 N.W. 470 (1935).

Taxpayer having actual and justiciable controversy with taxing authorities as to his status as affected by tax statute is entitled to have questions determined under Declaratory Judgments Act. Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934).

Proceedings for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law for the character of action in hand. Stewart v. Herten, 125 Neb. 210, 249 N.W. 552 (1933).

Declaratory Judgments Act applies only to actions where there is an actual controversy and justiciable issues presented, and cannot be used to decide moot questions. Banning v. Marsh, 124 Neb. 207, 245 N.W. 775 (1932).

Declaratory Judgments Act applies only to actions involving actual controversy and justiciable issues, and therefore is not void as conferring non-judicial powers. Lynn v. Kearney County, 121 Neb. 122, 236 N.W. 192 (1931).

Nebraska's Uniform Declaratory Judgments Act does not waive the state's sovereign immunity, and a plaintiff who seeks declaratory relief against the state must find authorization for such remedy outside the confines of that act. Pratt v. Clarke, 8 Neb. App. 199, 590 N.W.2d 426 (1999).

Declaratory Judgments Act is applicable to questions involving state taxation. Mid-Continent Airlines v. Nebraska State Board of Equalization and Assessment, 105 F.Supp. 188 (D. Neb. 1952).

2. Effect

An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. The test is whether, in the absence of the prayer for declaratory judgment, the issues presented should properly be disposed of in an equitable as opposed to a legal action. Boyles v. Hausmann, 246 Neb. 181, 517 N.W.2d 610 (1994).

An action for declaratory judgment under this section is sui generis; whether such an action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. Donaldson v. Farm Bureau Life Ins. Co., 232 Neb. 140, 440 N.W.2d 187 (1989); Boren v. State Farm Mut. Auto. Ins. Co., 225 Neb. 503, 406 N.W.2d 640 (1987).

An action for declaratory judgment determines the rights of the parties in a justiciable controversy and is binding on any further adjudication between the parties as the rights so declared. Russell v. First York Sav. Co., 218 Neb. 112, 352 N.W.2d 871 (1984).

If an action for declaratory judgment under this section involves a question of fact, the parties are entitled to a jury trial. MFA Ins. Companies v. Mendenhall, 205 Neb. 430, 288 N.W.2d 270 (1980).

Constitutionality of Installment Sales Act of 1963 was tested under Declaratory Judgments Act. Stanton v. Mattson, 175 Neb. 767, 123 N.W.2d 844 (1963).

Where defendant prayed for entry of declaratory judgment, it was precluded on appeal from contending that such relief was improper. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961).

Under Declaratory Judgments Act, it was proper to submit question of ownership of automobile to a jury. Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N.W.2d 623 (1951).

Declarations made by court in declaratory judgment proceeding have the force and effect of a final judgment or decree. Morrell v. Towle, 141 Neb. 370, 3 N.W.2d 655 (1942).

Declaratory judgment law is not a substitute for a new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in court. Phelps County v. City of Holdrege, 133 Neb. 139, 274 N.W. 483 (1937).

Declaratory judgment confirming validity of a trust agreement and directing trustee to pay trust funds to parties entitled thereto is final and binding on the parties to the proceeding, their privies and successors in interest. In re Reynolds Estate, 131 Neb. 557, 268 N.W. 480 (1936).

3. Jurisdiction

The Nebraska Workers' Compensation Court is a ''court of record'' and, as such, has the authority to enter a declaratory judgment pursuant to the Uniform Declaratory Judgments Act. Bituminous Casualty Corp. v. Deyle, 234 Neb. 537, 451 N.W.2d 910 (1990).

The district court has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract. First Nat. Bank of Omaha v. Omaha Nat. Bank, 191 Neb. 249, 214 N.W.2d 483 (1974).

Courts of record are empowered to render declaratory judgments. Haynes v. Anderson, 163 Neb. 50, 77 N.W.2d 674 (1956).

County court may render declaratory judgment. Rohn v. Kelley, 156 Neb. 463, 56 N.W.2d 711 (1953).

Court does not lack jurisdiction to render declaratory judgment merely because construction or validity of a penal statute is necessary to a decision. Dill v. Hamilton, 137 Neb. 723, 291 N.W. 62 (1940).

25-21,150 Rights of claimants; determination.

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are

affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Source: Laws 1929, c. 75, § 2, p. 257; C.S.1929, § 20-21,141.

1. Scope
2. Miscellaneous

1. Scope

A declaratory judgment action is the proper judicial proceeding to determine a party's rights and obligations under a particular statute. Ameritas Life Ins. Corp. v. Balka, 257 Neb. 878, 601 N.W.2d 508 (1999).

Preliminary correspondence and unsigned insurance policy form did not constitute a contract within the meaning of this section. Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd., 229 Neb. 740, 428 N.W.2d 895 (1988).

Declaratory judgment proceeding permissible to determine rights and benefits under Firemen's Pension Act. Hooper v. City of Lincoln, 183 Neb. 591, 163 N.W.2d 117 (1968).

This section authorizes courts of record to construe wills. Father Flanagan's Boys' Home v. Graybill, 178 Neb. 79, 132 N.W.2d 304 (1964).

Action to construe a deed to city was properly brought under Declaratory Judgments Act. City of Gering v. Jones, 175 Neb. 626, 122 N.W.2d 503 (1963).

Separation agreement between husband and wife was within terms of Declaratory Judgments Act. Dorland v. Dorland, 175 Neb. 233, 121 N.W.2d 28 (1963).

Tax-exempt status of property was properly determined in declaratory judgment proceeding. County of Douglas v. OEA Senior Citizens, Inc., 172 Neb. 696, 111 N.W.2d 719 (1961).

An insurance contract comes within the purview of the act. Gottula v. Standard Reliance Ins. Co., 165 Neb. 1, 84 N.W.2d 179 (1957).

Action seeking the construction of a will is authorized. Phillips v. Phillips, 163 Neb. 282, 79 N.W.2d 420 (1956).

Unincorporated trade association could not maintain action on behalf of members whose rights were affected. Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N.W.2d 464 (1956).

Individual plaintiff must have a legally protectible interest or right. Schroder v. City of Lincoln, 155 Neb. 599, 52 N.W.2d 808 (1952).

Question of coverage under policy of insurance was properly determinable. Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N.W.2d 623 (1951).

Declaratory judgment action will lie to determine rights over the disposition of public funds of a city operating under a home rule charter. Noble v. City of Lincoln, 153 Neb. 79, 43 N.W.2d 572 (1950).

Proceedings for a declaratory judgment extend to the validity of a statute where there is a justiciable, determinable controversy between parties in respect to rights thereunder. Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

Declaratory judgment proceeding may properly be brought to test validity of city ordinance. Webber v. City of Scottsbluff, 141 Neb. 363, 3 N.W.2d 635 (1942).

Validity of tax on air-flight equipment could be challenged in declaratory judgment proceeding. Mid-Continent Airlines v. Nebraska State Board of Equalization and Assessment, 105 F.Supp. 188 (D. Neb. 1952).

2. Miscellaneous

A plaintiff in a declaratory judgment action challenging the validity of a statute must prove that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenged statute. Mullendore v. Nuernberger, 230 Neb. 921, 434 N.W.2d 511 (1989).

To obtain declaratory relief, a plaintiff has the burden to prove the existence of a justiciable controversy and an interest in the subject matter of the action. Mullendore v. Nuernberger, 230 Neb. 921, 434 N.W.2d 511 (1989).

Plaintiffs are not required to violate a penal statute as a condition of having it construed or its validity determined, but may seek declaratory judgment. Dill v. Hamilton, 137 Neb. 723, 291 N.W. 62 (1940).

Word ''person'' includes the State of Nebraska and its executive departments. State ex rel. Smrha v. General American Life Ins. Co., 132 Neb. 520, 272 N.W. 555 (1937).

Court may refuse to render declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceeding. In re Reynolds Estate, 131 Neb. 557, 268 N.W. 480 (1936); Smithberger v. Banning, 130 Neb. 354, 265 N.W. 10 (1936).

25-21,151 Construction of contract; before or after breach.

A contract may be construed either before or after there has been a breach thereof.

Source: Laws 1929, c. 75, § 3, p. 257; C.S.1929, § 20-21,142.

A contract may be construed under Declaratory Judgments Act either before or after there has been a breach thereof. Dorland v. Dorland, 175 Neb. 233, 121 N.W.2d 28 (1963).

Action is authorized after breach of contract of insurance. Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N.W.2d 623 (1951).

25-21,152 Fiduciary or interested person; action to declare rights.

Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or the estate of a decedent, an infant, person with a mental disorder, or insolvent, may have a declaration of rights or legal relation in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Source: Laws 1929, c. 75, § 4, p. 257; C.S.1929, § 20-21,143; R.S.1943, § 25-21,152; Laws 1986, LB 1177, § 6.

This section authorizes courts of record to construe wills. Father Flanagan's Boys' Home v. Graybill, 178 Neb. 79, 132 N.W.2d 304 (1964).

Administrator of estate could bring action to determine validity of devise and bequest under will. Hipsley v Hipsley, 162 Neb. 518, 76 N.W.2d 462 (1956).

A declaratory judgment may be had in probate proceedings. Rohn v. Kelley, 156 Neb. 463, 56 N.W.2d 711 (1953).

Declaratory judgment proceeding was proper to determine interest of parties in cattle. Graham v. Beauchamp, 154 Neb. 889, 50 N.W.2d 104 (1951).

25-21,153 Sections; not limiting or restrictive.

The enumeration in sections 25-21,150, 25-21,151 and 25-21,152 does not limit or restrict the exercise of the general powers conferred in section 25-21,149, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Source: Laws 1929, c. 75, § 5, p. 258; C.S.1929, § 20-21,144.

Coverage under public liability policy could be determined. Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N.W.2d 623 (1951).

Affirmative relief against items of state taxation is authorized. Mid-Continent Airlines v. Nebraska State Board of Equalization and Assessment, 105 F.Supp. 188 (D. Neb. 1952).

25-21,154 Declaratory judgments; when refused.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Source: Laws 1929, c. 75, § 6, p. 258; C.S.1929, § 20-21,145.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd., 229 Neb. 740, 428 N.W.2d 895 (1988); Arlington Oil Co. v. Hall, 130 Neb. 674, 266 N.W. 583 (1936); Smithberger v. Banning, 130 Neb. 354, 265 N.W. 10 (1936).

Where eminent domain proceeding was pending in which question of abandonment and its effect could be determined, action for declaratory judgment on claimed abandonment should have been dismissed. Zarybnicky v. County of Gage, 196 Neb. 210, 241 N.W.2d 834 (1976).

Discretionary power is conferred. Haynes v. Anderson, 163 Neb. 50, 77 N.W.2d 674 (1956).

One of the purposes of the act is to terminate the controversy that gave rise to the proceedings. Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N.W.2d 619 (1956).

Court will not render declaratory judgment where necessary parties have not been joined. Redick v. Peony Park, 151 Neb. 442, 37 N.W.2d 801 (1949).

Statute authorizing declaratory judgment is applicable only when all interested persons are made parties to the proceeding. Ben B. Wood Realty Co. v. Wood, 132 Neb. 817, 273 N.W. 493 (1937); Southern Nebraska Power Co. v. Village of Deshler, 130 Neb. 133, 264 N.W. 462 (1936).

Declaratory Judgments Act is applicable only where there is a present actual controversy and where justiciable issues are presented. Dobson v. Ocean Accident & Gaurantee Corp., 124 Neb. 652, 247 N.W. 789 (1933).

25-21,155 Declaratory judgments; review.

All orders, judgments and decrees under sections 25-21,149 to 25-21,164 may be reviewed as other orders, judgments and decrees.

Source: Laws 1929, c. 75, § 7, p. 258; C.S.1929, § 20-21,146.

Determinations of factual issues in a declaratory judgment action will not be disturbed on appeal unless they are clearly wrong. Beatrice Nat. Bank v. Southeast Neb. Co-op, 230 Neb. 671, 432 N.W.2d 842 (1988).

Declaratory judgment decrees may be reviewed in the Supreme Court as are other decrees. OB-GYN v. Blue Cross, 219 Neb. 199, 361 N.W.2d 550 (1985).

Examination of reviewing court will be confined to questions determined by trial court. Lickert v. City of Omaha, 144 Neb. 75, 12 N.W.2d 644 (1944).

25-21,156 Pleadings; complaint; orders to show cause.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by complaint to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

Source: Laws 1929, c. 75, § 8, p. 258; C.S.1929, § 20-21,147; R.S.1943, § 25-21,156; Laws 2002, LB 876, § 49.

The trial court has the power to retain jurisdiction in order to grant further relief for the amounts of percentage rent as they may be determined each year until the expiration of the lease which was the subject of the declaratory judgment action. S.N. Mart, Ltd. v. Maurices Inc., 234 Neb. 343, 451 N.W.2d 259 (1990).

Judgment for amount due under contract may be obtained in a declaratory judgment action. Richardson v. Waterite Co., 169 Neb. 263, 99 N.W.2d 265 (1959).

Injunction against enforcing of city ordinance was properly refused. McNeil v. City of Omaha, 160 Neb. 301, 70 N.W.2d 83 (1955).

Injunctive relief deemed unnecessary. Omaha Nat. Bank v. Heintze, 159 Neb. 520, 67 N.W.2d 753 (1954).

Further relief may be granted to carry into effect declaratory judgment. Noble v. City of Lincoln, 158 Neb. 457, 63 N.W.2d 475 (1954).

25-21,157 Trial; issues of fact; how conducted.

When a proceeding under sections 25-21,149 to 25-21,164 involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Source: Laws 1929, c. 75, § 9, p. 258; C.S.1929, § 20-21,148.

In a declaratory judgment action involving the determination of issues of fact, such issues may be tried and determined as in other civil actions. Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha, 226 Neb. 50, 409 N.W.2d 574 (1987).

Fact questions in a declaratory judgment action may be tried and determined as in other civil actions. OB-GYN v. Blue Cross, 219 Neb. 199, 361 N.W.2d 550 (1985).

Where a decision appealed from involves, at the outset, questions of fact, the parties are entitled to a jury trial, notwithstanding the fact that the action may have involved both questions of fact and of law. Hemenway v. MFA Life Ins. Co., 211 Neb. 193, 318 N.W.2d 70 (1982).

In a declaratory judgment action, issues of fact may be tried and determined as in other civil actions, and if the action would otherwise be an action at law and is tried to the court without a jury the trial court's findings have the effect of a jury verdict. Larutan Corp. v. Magnolia Homes Manuf. Co., 190 Neb. 425, 209 N.W.2d 177 (1973).

Where jury waived, judgment of trial court will not be set aside unless clearly wrong. Belek v. Travelers Ind. Co., 187 Neb. 470, 191 N.W.2d 819 (1971).

Issues of fact may be tried and determined as in other civil actions. American Standard Ins. Co. v. Tournor, 186 Neb. 585, 185 N.W.2d 267 (1971); United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961); State Farm Mutual Auto. Ins. Co. v. Kersey, 171 Neb. 212, 106 N.W.2d 31 (1960).

An issue of fact may be submitted for determination by a jury. Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N.W.2d 623 (1951).

25-21,158 Costs.

In any proceeding under sections 25-21,149 to 25-21,164 the court may make such award of costs as may seem equitable and just.

Source: Laws 1929, c. 75, § 10, p. 258; C.S.1929, § 20-21,149.

Where petition for declaratory judgment was denied for lack of necessary parties, all costs were taxed to plaintiff. Phillips v. Phillips, 163 Neb. 282, 79 N.W.2d 420 (1956).

25-21,159 Parties; municipalities; Attorney General.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard. If a statute is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Source: Laws 1929, c. 75, § 11, p. 258; C.S.1929, § 20-21,150; R.S.1943, § 25-21,159; Laws 1998, LB 234, § 7.

1. Necessary parties
2. Miscellaneous

1. Necessary parties

The participation of a statutorily mandated necessary party in a declaratory judgment action involving the validity of a city ordinance is a jurisdictional requirement, and the failure to include such party requires vacation of a district court's judgment in the action. Dunn v. Daub, 259 Neb. 559, 611 N.W.2d 97 (2000).

A party is not permitted to first obtain a judgment and then apply the requirements of this section in order to determine who is a necessary party to an action. Taylor Oil Co., Inc. v. Retikis, 254 Neb. 275, 575 N.W.2d 870 (1998).

Judgment creditors or persons injured in automobile accidents are interested parties in declaratory judgment action between insured and insurance company as to validity of policy; thus, declaratory judgment was not available, and subsequent granting of motion for summary judgment based on res judicata effect of original declaratory judgment order was error. Krohn v. Gardner, 238 Neb. 460, 471 N.W.2d 391 (1991).

In a taxpayer's action, potentially all of the taxpayers and citizens are parties; but the fact that all taxpayers may be potential parties does not mean that they are indispensable parties. There is no requirement that all taxpayers who might be affected in some manner by the result of the litigation be made parties to the action. Christensen v. City of Tekamah, 230 Neb. 576, 432 N.W.2d 798 (1988).

The statute authorizing a declaratory judgment action is applicable only where all interested persons are made parties to the proceeding. Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd., 229 Neb. 740, 428 N.W.2d 895 (1988).

''Indispensable party'' to a suit is defined as one who must have such an interest in the controversy as to preclude a final decree without affecting such party's interests. Shepoka v. Knopik, 197 Neb. 651, 250 N.W.2d 619 (1977).

All necessary persons must be parties to action at time court enters declaratory judgment. Baker v. A. C. Nelson Co., 185 Neb. 128, 174 N.W.2d 197 (1970).

Action should be dismissed without prejudice when there is an absence of necessary parties. Marsh v. Marsh, 173 Neb. 282, 113 N.W.2d 323 (1962).

Joinder of all necessary parties defendant is required. Haynes v. Anderson, 163 Neb. 50, 77 N.W.2d 674 (1956).

State was not a necessary party to suit to enjoin tax. Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N.W.2d 382 (1955).

In controversy between store operator and city over validity of ordinance, other store owners were not necessary parties. City of Omaha v. Lewis & Smith Drug Co., Inc., 156 Neb. 650, 57 N.W.2d 269 (1953).

Whenever all necessary parties have not been impleaded, action should be dismissed. Stahl v. Allchin, 155 Neb. 412, 52 N.W.2d 251 (1952).

Duty is imposed upon plaintiff of joining all persons who have or claim any interest which would be affected by the judgment. Redick v. Peony Park, 151 Neb. 442, 37 N.W.2d 801 (1949).

2. Miscellaneous

This section applies only to actions for declaratory relief. State v. Kelley, 249 Neb. 99, 541 N.W.2d 645 (1996).

The requirement that the Attorney General be served with a copy of the proceeding when the constitutionality of an ordinance is raised is a prerequisite to the exercise of the district court's jurisdiction. Absent compliance with this section, a district court may not exercise its jurisdiction. DeCoste v. City of Wahoo, 248 Neb. 463, 534 N.W.2d 760 (1995).

Petition seeking declaration that residency requirement for dissolution of marriage was unconstitutional dismissed upon demurrer of Attorney General. Ashley v. Ashley, 191 Neb. 824, 217 N.W.2d 926 (1974).

Where constitutionality of statute is involved, Attorney General should be served with copies of the proceedings. Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N.W.2d 397 (1961).

Requisites for maintenance of declaratory judgment proceedings are stated. Graham v. Beauchamp, 154 Neb. 889, 50 N.W.2d 104 (1951).

25-21,160 Sections, how construed.

Sections 25-21,149 to 25-21,164 are declared to be remedial; their purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and are to be liberally construed and administered.

Source: Laws 1929, c. 75, § 12, p. 259; C.S.1929, § 20-21,151.

The Attorney General may bring an action for a declaratory judgment challenging the constitutionality of a statute which the Tax Commissioner proposes to implement and enforce. State ex rel. Meyer v. Peters, 188 Neb. 817, 199 N.W.2d 738 (1972).

Requirements for declaratory relief met. Slosburg v. City of Omaha, 183 Neb. 839, 165 N.W.2d 90 (1969).

Act is to be liberally construed and administered. Berigan Bros. v. Growers Cattle Credit Corp., 182 Neb. 656, 156 N.W.2d 794 (1968).

Act has application both substantively and adjectively. Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N.W.2d 623 (1951).

25-21,161 Person, defined.

The word person wherever used in the Uniform Declaratory Judgments Act shall be construed to mean any person, partnership, limited liability company, joint-stock company, unincorporated association, society, or municipal or other corporation of any character whatsoever.

Source: Laws 1929, c. 75, § 13, p. 259; C.S.1929, § 20-21,152; R.S.1943, § 25-21,161; Laws 1993, LB 121, § 173.

The term ''person'' as used in this section is broad enough to include the state or any subdivision thereof. Hoiengs v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994).

An unincorporated association is included within the statutory definition of a person. Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N.W.2d 464 (1956).

25-21,162 Validity of sections.

Sections 25-21,149 to 25-21,164, except sections 25-21,149 and 25-21,150, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of sections 25-21,149 to 25-21,164 invalid or inoperative.

Source: Laws 1929, c. 75, § 14, p. 259; C.S.1929, § 20-21,153.

25-21,163 Interpretation and construction of sections to effectuate uniformity.

Sections 25-21,149 to 25-21,164 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Source: Laws 1929, c. 75, § 15, p. 259; C.S.1929, § 20-21,154.

25-21,164 Act, how cited.

Sections 25-21,149 to 25-21,164 may be cited as the ''Uniform Declaratory Judgments Act''.

Source: Laws 1929, c. 75, § 16, p. 259; C.S.1929, § 20-21,155.

(k) STATUTES AND ADMINISTRATIVE ORDERS, ACTIONS TO ENFORCE, WHEN ACTION TO ENJOIN ENFORCEMENT COMMENCED IN FEDERAL COURT

25-21,165 By whom brought; jurisdiction.

Whenever a suit praying for an interlocutory injunction shall have been begun in the United States District Court in any Division in the State of Nebraska to restrain any official or officials of the State of Nebraska from enforcing or administering any statute of the State of Nebraska, or from enforcing or administering any administrative order of any department, bureau or commission of this state, or to set aside or enjoin such statute or administrative order, any defendant in such suit or the Attorney General of the State of Nebraska may bring an action to enforce said statute or order in the district court of the county of the State of Nebraska in which the State Capitol of said state is located at any time before the hearing or application for said interlocutory injunction in the suit in the United States District Court, District of Nebraska, in the proper Division thereof; and jurisdiction is hereby conferred on the district court of the county of the State of Nebraska in which its State Capitol is located to entertain such suit with the powers hereinafter granted.

Source: Laws 1929, c. 79, § 1, p. 268; C.S.1929, § 20-21,156.

25-21,166 Certification to federal court; stay of proceedings.

The district court of the county in Nebraska in which said State Capitol is located shall, when such suit is brought, grant a stay of proceedings to any state officer or officers under such statute or order, pending the determination of such suit by the courts of the State of Nebraska. The district court of the county in Nebraska in which its State Capitol is located shall upon the institution of said suit, certify forthwith to the United States District Court, District of Nebraska, to its proper Division in which such action heretofore has been brought, the fact that such suit has been begun in the district court of the county in the state where the State Capitol is located.

Source: Laws 1929, c. 79, § 2, p. 269; C.S.1929, § 20-21,157.

25-21,167 Expedited trial and appeal; advancement.

The district court of Lancaster County shall speedily determine the action, and an appeal may be taken to the Court of Appeals within thirty days after the entry of the judgment. Trial in the appellate court shall in all ways be expedited, set for an early hearing, and advanced as other causes which involve the public welfare and convenience are advanced.

Source: Laws 1929, c. 79, § 3, p. 269; C.S.1929, § 20-21,158; R.S.1943, § 25-21,167; Laws 1991, LB 732, § 67; Laws 1992, LB 360, § 6; Laws 2000, LB 921, § 21.

(l) CONSERVATORSHIP FOR MISSING PERSONS

25-21,168 Repealed. Laws 1974, LB 354, § 316.

25-21,169 Repealed. Laws 1974, LB 354, § 316.

25-21,170 Repealed. Laws 1974, LB 354, § 316.

25-21,171 Repealed. Laws 1974, LB 354, § 316.

25-21,172 Repealed. Laws 1974, LB 354, § 316.

25-21,173 Repealed. Laws 1974, LB 354, § 316.

25-21,174 Repealed. Laws 1974, LB 354, § 316.

25-21,175 Repealed. Laws 1974, LB 354, § 316.

25-21,176 Repealed. Laws 1974, LB 354, § 316.

25-21,177 Repealed. Laws 1974, LB 354, § 316.

25-21,178 Repealed. Laws 1974, LB 354, § 316.

25-21,179 Repealed. Laws 1974, LB 354, § 316.

(m) PRODUCT LIABILITY

25-21,180 Terms, defined.

As used in sections 25-224 and 25-21,180 to 25-21,182, unless the context otherwise requires: Product liability action shall mean any action brought against a manufacturer, seller, or lessor of a product, regardless of the substan-

tive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, assembly, testing, packaging, or labeling of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or intended use of any product, or the failure to provide proper instructions for the use of any product.

Source: Laws 1978, LB 665, § 1; Laws 1998, LB 234, § 8.

In defining a product liability action as an action brought for or on account of personal injury, death, or property damage caused by a product, this section refers only to physical harm, not to economic loss. National Crane Corp. v. Ohio Steel Tube Co., 213 Neb. 782, 332 N.W.2d 39 (1983).

25-21,181 Action based on strict liability in tort; brought against seller or lessor; when.

No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective.

Source: Laws 1978, LB 665, § 3.

25-21,182 Product liability action; based upon negligent or defective design, testing, or labeling; defense.

In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of the art as used in this section shall be defined as the best technology reasonably available at the time.

Source: Laws 1978, LB 665, § 4.

(n) VEHICULAR PURSUIT LIABILITY TO THIRD PARTIES

25-21,183 Transferred to section 13-911.

(o) CERTAIN CASES INVOLVING NEGLIGENCE

25-21,184 Railroad company; actions by employees against; negligence; assumption of risk.

In any action brought against a railroad or street railroad company to recover damages for personal injury to any employee, whether such injury results in death or not, the employee shall not be held to have assumed any of the risks of his employment in any case where the railroad company or its agents, servants or employees have been guilty of negligence.

Source: Laws 1913, c. 98, § 1, p. 252; R.S.1913, § 7891; C.S.1922, § 8833; C.S.1929, § 20-1150; R.S.1943, § 25-1150; R.S.1943, (1979), § 25-1150.

Section is not applicable in action under federal employer's liability act; in such case federal law as to assumption of risk is controlling. Preble v. Union Stock Yards Co., 110 Neb. 383, 193 N.W. 910 (1923).

25-21,185 Actions accruing before February 8, 1992, for injuries to person or property; contributory negligence; comparative negligence.

In all actions accruing before February 8, 1992, brought to recover damages for injuries to a person or to property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff, and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

Source: Laws 1913, c. 124, § 1, p. 311; R.S.1913, § 7892; C.S.1922, § 8834; C.S.1929, § 20-1151; R.S.1943, § 25-1151; Laws 1978, LB 665, § 6; R.S.1943, (1979), § 25-1151; Laws 1992, LB 262, § 9.

1. Slight negligence of plaintiff
2. Gross negligence of defendant
3. Comparison
4. Miscellaneous

1. Slight negligence of plaintiff

Negligence of plaintiff must be compared with that of defendant to determine whether negligence is slight or gross. Brackman v. Brackman, 169 Neb. 650, 100 N.W.2d 774 (1960).

Where plaintiff's negligence was more than slight in comparison with the negligence of the defendant, directed verdict was proper. Kirchner v. Gast, 169 Neb. 404, 100 N.W.2d 65 (1959); Rogers v. Sheperd, 159 Neb. 292, 66 N.W.2d 815 (1954); Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N.W.2d 412 (1946); Western Contracting Corp. v. Odle, 331 F.2d 38 (8th Cir. 1964).

Slight negligence does not defeat recovery if by comparison the negligence of defendant is gross. Fairchild v. Sorenson, 165 Neb. 667, 87 N.W.2d 235 (1957).

Failure to use due care after becoming aware of an obstacle is more than slight negligence. Allen v. Kavanaugh, 160 Neb. 645, 71 N.W.2d 119 (1955).

Instruction given under this statute was erroneous which directed jury that the amount that might be deducted on account of contributory negligence of plaintiff must necessarily not be any large percent of the total damages. Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N.W.2d 609 (1950).

Where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject. Hartford Fire Ins. Co. v. County of Red Willow, 149 Neb. 10, 30 N.W.2d 51 (1947).

Failure of jewelry salesman to inform hotel of contents of sample case containing jewelry or value thereof constituted contributory negligence of such degree as to bar recovery. Roger Wurmser, Inc. v. Interstate Hotel Co., 148 Neb. 660, 28 N.W.2d 405 (1947).

Failure to instruct on the comparative negligence rule when the evidence discloses the contributory negligence of the plaintiff exceeds slight negligence is not prejudicial error. Shiman Bros. & Co. v. Nebraska National Hotel Co., 146 Neb. 47, 18 N.W.2d 551 (1945).

When the plaintiff's negligence is more than slight as compared with that of the defendant, and is clearly the proximate cause of the accident, the court should direct a verdict for the defendant. Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N.W.2d 559 (1945).

One who suddenly moves from place of safety into the path of a moving vehicle, after seeing it approach, is guilty of more than slight negligence. Hughes v. Omaha & C. B. St. Ry. Co., 143 Neb. 47, 8 N.W.2d 509 (1943).

Where pedestrian was struck by defendant's truck, evidence of intoxication of pedestrian was not of itself contributory negligence but was circumstance to be considered by jury in determining whether intoxication contributed to injury. Nichols v. Havlat, 142 Neb. 534, 7 N.W.2d 84 (1942).

One injured while momentarily standing in a highway is not, because of that fact, guilty of contributory negligence as a matter of law. Grantham v. Watson Brothers Transportation Co., 142 Neb. 362, 6 N.W.2d 372 (1942).

Anyone who voluntarily walks about in total darkness in a strange place, where no special circumstances require him to proceed, does so at his own risk and is guilty of more than slight negligence as a matter of law. Wetink v. Traphagen, 138 Neb. 41, 291 N.W. 884 (1940).

Where evidence shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, it is proper for trial court to instruct jury to return verdict for defendant. Whittaker v. Hanifin, 138 Neb. 18, 291 N.W. 723 (1940); Doan v. Hoppe, 132 Neb. 641, 272 N.W. 763 (1937).

Where a pedestrian suddenly steps from a place of safety into the path of a street car, his contributory negligence is more than slight as a matter of law. Travinsky v. Omaha & C. B. St. Ry. Co., 137 Neb. 168, 288 N.W. 512 (1939).

Where an automobile driver parks his car parallel to the curb, gets out of his car on the left hand side, and is struck by another automobile while standing beside his car in a city street, he is not guilty of more than slight negligence as a matter of law. Brenning v. Remington, 136 Neb. 883, 287 N.W. 776 (1939).

Where view at railroad crossing is obstructed, motorist who attempts to cross and fails to look or listen is guilty of such contributory negligence as will defeat recovery. Mundt v. Chicago, R. I. & P. R. R. Co., 136 Neb. 478, 286 N.W. 691 (1939).

Where the driver of an automobile disregards a stop sign and drives out upon an arterial highway without stopping and collides with another automobile, he is guilty of more than slight negligence as a matter of law. Ritter v. Hering, 135 Neb. 1, 280 N.W. 231 (1938).

One entering a darkened room on own premises where a trapdoor is liable to be open, without ascertaining whether the door is open or shut, is guilty of more than slight negligence as a matter of law. Gardner v. Metropolitan Utilities Dist., 134 Neb. 163, 278 N.W. 137 (1938).

If evidence clearly shows that plaintiff is guilty of more than slight negligence which will defeat a recovery, it is proper to sustain motion for instructed verdict for defendant. McDonald v. Omaha & C. B. St. Ry. Co., 128 Neb. 17, 257 N.W. 489 (1934).

Notwithstanding wording of statute, court may pass on sufficiency of evidence of contributory negligence as bar to recovery. Pinches v. Village of Dickens, 127 Neb. 239, 254 N.W. 877 (1934).

Instruction permitting recovery unless plaintiff's intestate was guilty of gross negligence was erroneous. McDonald v. Wright, 125 Neb. 871, 252 N.W. 411 (1934).

Comparative negligence rule precludes recovery by one who approaches railway crossing without precaution. Stanley v. Chicago, R. I. & P. Ry. Co., 113 Neb. 280, 202 N.W. 864 (1925).

Where both parties are negligent in some degree, it is error to omit the word ''slight'' in describing the contributory negligence that shall bar the plaintiff from recovery. McMullen v. Nash Sales Co., 112 Neb. 371, 199 N.W. 721 (1924).

Slight negligence of plaintiffs is no longer a defense but goes only in mitigation of damages. Holley v. Omaha & C. B. St. Ry. Co., 110 Neb. 541, 193 N.W. 710 (1923).

Where there is some evidence of contributory negligence, failure to give instruction on comparative negligence is error. Mares v. Chaloupka, 110 Neb. 199, 192 N.W. 397 (1923).

Where shown beyond reasonable dispute that plaintiff's negligence was more than slight in comparison with defendant's, action should be dismissed or verdict directed. Haffke v. Missouri Pac. R. R. Corp., 110 Neb. 125, 193 N.W. 257 (1923); Seiffert v. Hines, 108 Neb. 62, 187 N.W. 108 (1922); Frey v. Omaha & C. B. St. Ry. Co., 106 Neb. 333, 183 N.W. 567 (1921); Dodds v. Omaha & C. B. St. Ry. Co., 104 Neb. 692, 178 N.W. 258 (1920); Jensen v. Chicago, St. P., M. & O. R. Co., 12 F.2d 413 (8th Cir. 1926); Gordon Fireproof Warehouse & Van Co. v. Hines, 272 F. 604 (8th Cir. 1921); Marshall v. Hines, 271 F. 165 (8th Cir. 1921).

Contributory negligence of plaintiff was more than slight as a matter of law and barred recovery. Sandberg v. Peter Kiewit Sons Co., 364 F.2d 206 (8th Cir. 1966).

Negligence of one party is to be compared with that of another, and is not to be evaluated standing alone. United States v. Bohachevsky, 324 F.2d 120 (8th Cir. 1963).

Negligence of contractor's employee was slight in comparison to negligence of railroad. Union Pac. Ry. Co. v. Blank, 167 F.2d 291 (8th Cir. 1948).

Court must dismiss case where plaintiff's negligence is more than slight as compared with defendant's. Rogers v. Chicago, R. I. & P. Ry. Co., 39 F.2d 601 (8th Cir. 1930).

2. Gross negligence of defendant

Whether or not an act or omission constitutes gross negligence is ascertainable by comparison with negligence of opposing party. Pierson v. Jensen, 150 Neb. 86, 33 N.W.2d 462 (1948).

Omission to explain that plaintiff's contributory negligence, however slight, will defeat recovery in case defendant's negligence falls short of being gross in comparison, was reversible error. Mitchell v. Missouri Pac. R. R. Corp., 114 Neb. 72, 206 N.W. 12 (1925).

There is no error in not instructing on comparative negligence, where defendant's negligence is not established. Lady v. Douglass, 105 Neb. 489, 181 N.W. 173 (1920).

3. Comparison

In awarding damages under the provisions of this section, it is the jury's responsibility to comparatively measure the amount of negligence on defendant's part to the contributory negligence, if any, on plaintiff's part by considering all the evidence presented on the issue. Sanwick v. Jenson, 244 Neb. 607, 508 N.W.2d 267 (1993).

Questions of contributory negligence shall be for the jury. Sierks v. Delk, 222 Neb. 360, 383 N.W.2d 778 (1986).

If the evidence shows that plaintiff's conduct may be negligent and a proximate cause of the accident, the issue of contributory negligence must be submitted to the jury. Davis v. Phillips, 215 Neb. 184, 337 N.W.2d 754 (1983).

In determining questions of slight and gross negligence, the process of comparison should measure the disparity between the quantum of the total negligence of defendant and the total negligence of the plaintiff. C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N.W.2d 272 (1977).

The words slight and gross as employed herein are comparative terms, and the negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. Niemeyer v. Tichota, 190 Neb. 775, 212 N.W.2d 557 (1973).

The meaning of gross negligence under the comparative negligence rule is contrasted with its meaning under the guest passenger statute. Johnson v. Roueche, 188 Neb. 716, 199 N.W.2d 1 (1972).

Under facts in the case, instruction concerning the comparative negligence statute was required. Sober v. Smith, 179 Neb. 74, 136 N.W.2d 372 (1965).

Evidence was sufficient to take case to the jury under comparative negligence statute. Robins v. Sandoz, 177 Neb. 894, 131 N.W.2d 648 (1964).

Requirements of instruction on comparative negligence rule stated. Darnell v. Panhandle Coop Assn., 175 Neb. 40, 120 N.W.2d 278 (1963).

Instruction on comparative negligence was free from prejudicial error. Hiner v. Nelson, 174 Neb. 725, 119 N.W.2d 288 (1963).

Failure to give instruction on comparative negligence was prejudicial error. Carlson v. Chambers, 173 Neb. 166, 112 N.W.2d 729 (1962); Baty v. Wolff, 162 Neb. 1, 74 N.W.2d 913 (1956).

Instructions given properly stated the rule of comparative negligence. Pearson v. Schuler, 172 Neb. 353, 109 N.W.2d 537 (1961).

Statutory test is not based upon absolute degrees of negligence, but rather upon the relative degrees of negligence between the parties. Sayers v. Witte, 171 Neb. 750, 107 N.W.2d 676 (1961); Bezdek v. Patrick, 167 Neb. 754, 94 N.W.2d 482 (1959); Continental Can Co. v. Horton, 250 F.2d 637 (8th Cir. 1957).

Omission of element from instruction for making comparison was erroneous. Ripp v. Riesland, 170 Neb. 631, 104 N.W.2d 246 (1960).

Even though defendant is guilty of negligence as a matter of law, the amount of damages to be awarded is subject to the provisions of the comparative negligence act. Bezdek v. Patrick, 170 Neb. 522, 103 N.W.2d 318 (1960).

Unless reasonable minds cannot differ, trial court should leave duty of making comparison of negligence to the jury. O'Neill v. Henke, 167 Neb. 631, 94 N.W.2d 322 (1959); Zimmer v. Brandon, 134 Neb. 311, 278 N.W. 502 (1938); Casey v. Ford Motor Co., 108 Neb. 352, 187 N.W. 922 (1922).

Failure to submit instruction on comparative negligence was not prejudicial to plaintiff. Owen v. Moore, 166 Neb. 239, 88 N.W.2d 768 (1958).

Intent of statute is that the negligence of the parties shall be compared one with the other. Andelt v. County of Seward, 157 Neb. 527, 60 N.W.2d 604 (1953).

Where plaintiff did not make prima facie case under guest statute, comparison of degrees of negligence was unnecessary. Bishop v. Schofield, 156 Neb. 830, 58 N.W.2d 207 (1953).

In making comparison, there is no burden of proof on either party. Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N.W.2d 250 (1952).

Plaintiff may recover only if his negligence is slight in comparison with that of the defendant which is gross. Krepcik v. Interstate Transit Lines, 152 Neb. 39, 40 N.W.2d 252 (1949).

Negligence of parties is to be compared one with the other in determining slight and gross negligence. Roby v. Auker, 151 Neb. 421, 37 N.W.2d 799 (1949).

Even though defendant may be guilty of negligence as a matter of law, question of comparison of negligence where plaintiff is guilty of some negligence should be left to jury. Blanchard v. Lawson, 148 Neb. 299, 27 N.W.2d 217 (1947).

The fact that plaintiff became so absorbed in his work as to detract him from a perilous position is not a defense to a charge of contributory negligence, but is a fact for consideration by the jury. Thomison v. Buehler, 147 Neb. 811, 25 N.W.2d 391 (1946).

Where there was a conflict in the evidence as to whether or not plaintiff was in pedestrian lane with green light in her favor, or was proceeding diagonally across street, contributory negligence of plaintiff and the degree or quality thereof was for the jury, and instruction on comparative negligence was proper. Hammond v. Morris, 147 Neb. 600, 24 N.W.2d 633 (1946).

Question of negligence and the degree of quality thereof, where motor vehicle being backed collided with pedestrian, was for jury. Chew v. Coffin, 144 Neb. 170, 12 N.W.2d 839 (1944).

When an action under guest statute is based on gross negligence, the comparative negligence statute is applicable. Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943).

All questions of negligence are for the jury. Lewis v. Rapid Transit Lines, 126 Neb. 158, 252 N.W. 804 (1934).

Instruction that plaintiff's damages should be reduced in proportion that her contributory negligence bore to the whole amount of damages was erroneous. Sgroi v. Yellow Cab & Baggage Co., 124 Neb. 525, 247 N.W. 355 (1933).

Where both plaintiff and defendants are shown by evidence to have been negligent, court should instruct jury on comparative negligence of parties. Tempel v. Proffitt, 122 Neb. 249, 240 N.W. 285 (1932).

Failure to keep proper lookout was under circumstances of case for the jury. Giles v. Welsh, 122 Neb. 164, 239 N.W. 813 (1931).

Contributory negligence of one injured in collision between automobiles was for jury. Wortman v. Zimmerman, 119 Neb. 682, 230 N.W. 588 (1930).

Where there is evidence of negligence and contributory negligence, court must give instruction as to comparative negligence rule. Lieb v. Omaha & C. B. St. Ry. Co., 119 Neb. 222, 228 N.W. 364 (1929).

Unless evidence of defendant's negligence is legally insufficient or contributory negligence so clearly shown as to require verdict for plaintiff to be set aside, question is for the jury. Day v. Metropolitan Utilities Dist., 115 Neb. 711, 214 N.W. 647 (1927).

Where negligence by both parties is shown, it is error to instruct that plaintiff is not barred from recovery unless his negligence was gross in comparison with defendants. Gibson v. Kelkenny, 112 Neb. 524, 199 N.W. 838 (1924).

Unless plaintiff's negligence is more than slight, or defendant's negligence not gross in comparison, case should be submitted to jury. Traphagen v. Lincoln Traction Co., 110 Neb. 855, 195 N.W. 472 (1923); Baker v. Omaha & C. B. St. Ry. Co., 110 Neb. 246, 193 N.W. 341 (1923); Francis v. Lincoln Traction Co., 106 Neb. 243, 183 N.W. 293 (1921); Robison v. Troy Laundry Co., 105 Neb. 267, 180 N.W. 43 (1920).

Instruction that contributory negligence of plaintiff, if proved, would entitle defendant to verdict, was erroneous because it ignores comparative negligence rule. Davenport v. Intermountain R. L. & P. Co., 108 Neb. 387, 187 N.W. 905 (1922).

Where contributory negligence is shown, it is error to instruct jury to return verdict for plaintiff if they find defendant's negligence was proximate cause, without telling jury under what conditions plaintiff's negligence would defeat recovery. Bauer & Johnson Co. v. National Roofing Co., 107 Neb. 831, 187 N.W. 59 (1922); Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N.W. 158 (1920).

The doctrine of contributory negligence or comparative fault, contained in this section, is a defense separate and distinct from that of assumption of risk and while assumption of risk may act as a complete defense, comparative fault may simply go to mitigate damages. McPherson v. Sunset Speedway, Inc., 594 F.2d 711 (8th Cir. 1979).

Comparative negligence statute is applicable to automobile rear-end collision cases. McQueen v. Navajo Freight Lines, Inc., 293 F.2d 590 (8th Cir. 1961).

Comparative negligence statute was not applicable to a guest passenger in automobile. Luther v. Maple, 250 F.2d 916 (8th Cir. 1958).

Under comparative negligence statute, test is not based on absolute degrees of negligence but upon a comparative test of relative degrees of negligence between the parties. Continental Can Co. v. Horton, 250 F.2d 637 (8th Cir. 1957).

Where both parties are negligent, question of comparative negligence was matter for jury. Brunk v Chicago, B. & Q. R. R. Co., 207 F.2d 354 (8th Cir. 1953).

The criterion is extent of plaintiff's negligence in comparison with defendant's negligence. Union Pac. R. R. Co. v. Denver-Chicago Trucking Co., 202 F.2d 31 (8th Cir. 1953).

4. Miscellaneous

The trial court erred in failing to reduce plaintiff's recovery in an amount proportional to the amount of its agent's negligence, where the agent was negligent as a matter of law but not to a degree sufficient to bar the suit. City of LaVista v. Andersen, 240 Neb. 3, 480 N.W.2d 185 (1992).

To entitle defendant to summary judgment on the issue of contributory negligence, defendant has the burden of proving, under the facts viewed most favorably to the plaintiff, that (1) plaintiff's contributory negligence was more than slight as a matter of law or (2) defendant's negligence was not gross in comparison to plaintiff's negligence as a matter of law. John v. OO (Infinity) S Development Co., 234 Neb. 190, 450 N.W.2d 199 (1990).

A defendant may plead contributory negligence by alleging in his answer that the plaintiff's injuries were the direct and proximate result of his own negligence. Bashus v. Turner, 218 Neb. 17, 352 N.W.2d 161 (1984).

In all actions brought to recover damages for injuries to a person or his property, all questions of negligence and contributory negligence shall be for the jury. Krug v. Laughlin, 208 Neb. 367, 303 N.W.2d 311 (1981).

When, under the law and facts, the submission of the issue of comparative negligence is appropriate determination of the amount of damages is a jury question. Nickal v. Phinney, 207 Neb. 281, 298 N.W.2d 360 (1980).

Ordinarily the questions of negligence, contributory negligence, and assumption of risk are for the jury, but where the facts adduced with respect to those questions are such that reasonable minds can draw but one conclusion therefrom, a directed verdict is proper. Garcia v. Howard, 200 Neb. 57, 262 N.W.2d 190 (1978).

Rule that contributory negligence of more than certain percent will bar recovery not contemplated by statute nor would such a rule further administration of justice. Burney v. Ehlers, 185 Neb. 51, 173 N.W.2d 398 (1970).

On remand of case for trial on issue of damages only, contributory negligence should be considered only in mitigation of damages. Scofield v. Haskell, 180 Neb. 324, 142 N.W.2d 597 (1966).

Rendition of special verdict on degree of negligence required dismissal of action. Carlson v. Hanson, 166 Neb. 96, 88 N.W.2d 140 (1958).

An instruction, in language of an opinion of the Supreme Court construing statute, approved in numerous cases for many years, will not be held reversible error unless prejudicial. Patterson v. Kerr, 127 Neb. 73, 254 N.W. 704 (1934).

Degree of negligence comprehended by comparative negligence statute is not ordinarily applicable in actions involving motorists' guest statute. Sheehy v. Abboud, 126 Neb. 554, 253 N.W. 683 (1934).

If there is any testimony to support verdict in favor of party having the burden of proof it is error to direct verdict against him. LaFleur v. Poesch, 126 Neb. 263, 252 N.W. 902 (1934).

Statute merely changed legal effect of contributory negligence; burden of proof is placed on defendant. Schrage v. Miller, 123 Neb. 266, 242 N.W. 649 (1932).

Instruction approximately in words of statute was not materially erroneous for failure to further explain slight and gross negligence. Kelso v. Seward County, 117 Neb. 136, 219 N.W. 843 (1928).

A requested instruction was properly rejected as inconsistent with comparative negligence where it would instruct that one joint tort-feasor is entitled to contribution from others equally liable under the Federal Employers' Liability Act according to their share of the fault in causing the injury. Brassette v. Burlington Northern Inc., 687 F.2d 153 (8th Cir. 1982).

Application of Nebraska comparative negligence statute would be inappropriate in a strict liability case. Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976).

Conflicting evidence, set out, concerning collision at private farm railroad crossing presented issue to be resolved by jury. Kloewer v. Burlington Northern, Inc., 512 F.2d 300 (8th Cir. 1975).

It was a question for the jury whether passenger in automobile was guilty of contributory negligence in crossing accident case. Chicago, B. & Q. R.R. Co. v. Beninger, 373 F.2d 854 (8th Cir. 1967).

Where reasonable minds might differ as to existence of contributory negligence, question should be submitted to jury. Surface v. Safeway Stores, 169 F.2d 937 (8th Cir. 1948).

25-21,185.01 Repealed. Laws 1992, LB 262, § 12.

25-21,185.02 Repealed. Laws 1992, LB 262, § 12.

25-21,185.03 Repealed. Laws 1992, LB 262, § 12.

25-21,185.04 Repealed. Laws 1992, LB 262, § 12.

25-21,185.05 Repealed. Laws 1992, LB 262, § 12.

25-21,185.06 Repealed. Laws 1992, LB 262, § 12.

25-21,185.07 Civil actions to which contributory negligence is a defense; sections applicable.

Sections 25-21,185.07 to 25-21,185.12 shall apply to all civil actions to which contributory negligence may be, pursuant to law, a defense that accrue on or after February 8, 1992, for damages arising out of injury to or death of a person or harm to property regardless of the theory of liability. Actions accruing prior to February 8, 1992, shall be governed by the laws in effect immediately prior to such date. Nothing in sections 25-21,185.07 to 25-21,185.12 shall be construed to limit wrongful death claims brought pursuant to sections 30-809 and 30-810, but such claims shall be subject to sections 25-21,185.07 to 25-21,185.12.

Source: Laws 1992, LB 262, § 1.

25-21,185.08 Civil actions to which contributory negligence is a defense; terms, defined.

For purposes of sections 25-21,185.07 to 25-21,185.12:

(1) Claimant shall mean any person who brings or maintains an action described in section 25-21,185.07. If an action is brought through or on behalf of an estate, claimant shall mean the claimant's decedent. If an action is brought through or on behalf of a minor, claimant shall mean the minor;

(2) Economic damages shall mean monetary losses, including, but not limited to, medical expenses, loss of earnings and earning capacity, funeral costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute

domestic services, loss of employment, and loss of business or employment opportunities; and

(3) Noneconomic damages shall mean subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation, but shall not include economic damages.

Source: Laws 1992, LB 262, § 2.

25-21,185.09 Civil actions to which contributory negligence is a defense; effect on recovery.

Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence.

Source: Laws 1992, LB 262, § 3.

It is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with this section. The Nebraska Supreme Court has consistently understood the plain meaning of the word ''instructed'' in this section to require formal jury instructions. The verdict form is not a substitute for a proper instruction. The Nebraska Legislature has chosen to require that the jury be fully and openly informed before making its determinations with respect to contributory negligence and the attendant allocation of negligence. Russell v. Stricker, 262 Neb. 853, 635 N.W.2d 734 (2001).

Failure to instruct a jury with respect to the effects of its allocation of negligence in accordance with this section is prejudicial error. Moreover, a verdict form is not a substitute for a proper instruction. Pleiss v. Barnes, 260 Neb. 770, 619 N.W.2d 825 (2000).

This section requires the jury to be instructed regarding the effect of the allocation of negligence. Failing to instruct the jury as to the effect of the allocation of negligence is plain error. Fiscel v. Beach, 254 Neb. 678, 578 N.W.2d 52 (1998).

In those cases where the cause of action accrued on or after February 8, 1992, and in which contributory negligence is a defense, it is prejudicial error for the trial court to not properly instruct a jury on the effects of its allocation of negligence in accordance with this section. Wheeler v. Bagley, 254 Neb. 232, 575 N.W.2d 616 (1998).

The fact that plaintiff's negligence may have been more than slight as a matter of law under the prior slight-gross contributory negligence standard does not automatically equate with negligence that equals or exceeds defendant's under this section. Where reasonable minds may draw different conclusions and inferences regarding the negligence of plaintiff and the negligence of defendant such that plaintiff's negligence could be found to be less than 50 percent of the total negligence of all persons against whom recovery is sought, the apportionment of fault must be submitted to the jury. Traphagan v. Mid-America Traffic Marking, 251 Neb. 143, 555 N.W.2d 778 (1996).

Where reasonable minds may draw different conclusions and inferences regarding the negligence of the parties, the apportionment of negligence is for the finder of fact. The purpose of the comparative negligence law is to allow triers of fact to compare relative negligence and to apportion damages on that basis. The determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial. Stinson v. City of Lincoln, 9 Neb. App. 642, 617 N.W.2d 456 (2000).

A determination that a plaintiff's negligence was more than slight as a matter of law under the slight/gross standard does not automatically translate into a finding that the same plaintiff's right to recovery would be barred under this section. Dutton v. Travis, 4 Neb. App. 875, 551 N.W.2d 759 (1996).

25-21,185.10 Civil actions to which contributory negligence is a defense; multiple defendants; joint and several liability; when; allocation of liability.

In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.

In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's

percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

Source: Laws 1992, LB 262, § 4.

Under the plain language of this section, there must be multiple defendants in a case before the allocation provisions of this section will operate. Because the provisions of this section affect only the apportionment of damages between multiple defendants after liability has been established, the proper time-frame to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact. Maxwell v. Montey, 262 Neb. 160, 631 N.W.2d 455 (2001).

This section provides for allocation of damages among negligent tort-feasors only and does not provide for such allocation due to the acts of intentional tort-feasors. Brandon ex rel. Estate of Brandon v. County of Richardson, 261 Neb. 636, 624 N.W.2d 604 (2001).

Under tort law, where joint tort-feasors do not act as part of a common enterprise or plan, this section alters the common law by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's proportionate liability in an action involving more than one defendant. Genetti v. Caterpillar, Inc., 261 Neb. 98, 621 N.W.2d 529 (2001).

The term ''defendant'' in this section includes a third-party defendant brought into an action pursuant to section 25-331. Slaymaker v. Breyer, 258 Neb. 942, 607 N.W.2d 506 (2000); Lackman v. Rousselle, 257 Neb. 87, 596 N.W.2d 15 (1999).

In order for defendants to be jointly and severally liable based on a joint enterprise theory, the plaintiff must prove, among other things, that the defendants shared a common pecuniary interest. Bahrs v. R M B R Wheels, Inc., 6 Neb. App. 354, 574 N.W.2d 524 (1998).

25-21,185.11 Civil actions to which contributory negligence is a defense; release, covenant not to sue, or similar agreement; effect.

(1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

(2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but the person's negligence, if any, shall be considered in accordance with section 25-21,185.09.

Source: Laws 1992, LB 262, § 5.

25-21,185.12 Civil actions to which contributory negligence is a defense; assumption of risk, defined; affirmative defense.

Assumption of risk is an affirmative defense. Assumption of risk shall mean that (1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger.

Source: Laws 1992, LB 262, § 6.

Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. Pleiss v. Barnes, 260 Neb. 770, 619 N.W.2d 825 (2000).

(p) MISCELLANEOUS

25-21,186 Emergency care at scene of emergency; persons relieved of civil liability, when.

No person who renders emergency care at the scene of an accident or other emergency gratuitously, shall be held liable for any civil damages as a result of any act or omission by such person in rendering the emergency care or as a

result of any act or failure to act to provide or arrange for medical treatment or care for the injured person.

Source: Laws 1961, c. 110, § 1, p. 349; Laws 1971, LB 458, § 1; R.S.1943, (1979), § 25-1152.

This section does not apply to a police officer responding to the scene of an automobile accident because his conduct was not gratuitous. Drake v. Drake, 260 Neb. 530, 618 N.W.2d 650 (2000).

25-21,187 Contract or agreement; indemnity provision; against public policy; unenforceable; when; construction project; violation of safety practice; liability.

(1) In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. This subsection shall not apply to construction bonds or insurance contracts or agreements.

(2) No professional architect, professional engineer, or professional land surveyor who is retained to perform professional services on a construction project and no employee of a professional architect, professional engineer, or professional land surveyor who is assisting or representing the professional architect, professional engineer, or professional land surveyor in the performance of professional services on a construction project shall be liable in tort for any case of personal injury to or death of any employee working on a construction project arising out of and in the course of employment on the construction project and occurring as a result of a violation of a safety practice by any third party unless the responsibility for supervision of safety practices has been assumed by contract or by other conduct. This subsection shall not be construed to establish, diminish, or abrogate any duty, standard of care, or liability of any person or individual except as expressly provided in this subsection.

Source: Laws 1979, LB 288, § 1; R.S.1943, (1979), § 25-1153; Laws 1987, LB 492, § 1.

25-21,188 Alienation of affections; criminal conversation; actions barred.

No cause of action for (1) alienation of affections or (2) criminal conversation shall be allowed to commence after January 9, 1986.

Source: Laws 1986, LB 877, § 1.

The tort of intentional infliction of emotional distress is unavailable when it is predicated on conduct which leads to the dissolution of marriage, as such actions are barred by statute. Speer v. Dealy, 242 Neb. 542, 495 N.W.2d 911 (1993).

25-21,188.01 Check or instrument; wrongful refusal to endorse; liability; attorney's fees; awarded when.

Any payee, endorser, or endorsee on a check or instrument issued in payment for property subject to a lien under Chapter 52, article 2, 5, 7, 9, 11, 12, or 14, or Chapter 54, article 2, or farm products subject to a security interest under article 9, Uniform Commercial Code, or Chapter 52, article 13, who wrongfully

refuses to endorse such check or instrument to any other payee, endorser, or endorsee on such check or instrument who is a superior lienholder, superior secured party, or other person legally entitled to such check or instrument shall be liable to any payee, endorser, or endorsee entitled to such endorsement on such check or instrument for damages. A court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that any payee, endorser, or endorsee on a check or other instrument wrongfully refused to endorse such check or instrument in payment for property subject to a lien or farm products subject to a security interest or that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If a court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney's fees and costs.

Source: Laws 1988, LB 987, § 6; Laws 1999, LB 550, § 4.

25-21,188.02 Volunteer in free clinic or other facility; immunity; when.

(1) A person credentialed under the Uniform Credentialing Act to practice as a physician, osteopathic physician, pharmacist, dentist, physician assistant, nurse, or physical therapist who, without the expectation or receipt of monetary or other compensation either directly or indirectly, provides professional services, of a kind which are eligible for reimbursement under the medical assistance program established pursuant to the Medical Assistance Act, as a volunteer in a free clinic or other facility operated by a not-for-profit organization as defined in section 25-21,190, by an agency of the state, or by any political subdivision shall be immune from civil liability for any act or omission which results in damage or injury unless such damage or injury was caused by the willful or wanton act or omission of such practitioner.

(2) The individual immunity granted by subsection (1) of this section shall not extend to any act or omission of such practitioner which results in damage or injury if:

(a) The free clinic or other facility is operated by a licensed hospital;

(b) The practitioner has been disciplined by the professional board having oversight over that practitioner in the previous five years at the time of the act or omission causing injury; or

(c) The damage or injury is caused by such practitioner (i) during the operation of any motor vehicle, airplane, or boat or (ii) while impaired by alcohol or any controlled substance enumerated in section 28-405.

Source: Laws 2003, LB 146, § 7; Laws 2006, LB 1248, § 50; Laws 2007, LB463, § 1115.

Cross References

Medical Assistance Act, see section 68-901.
Uniform Credentialing Act, see section 38-101.

(q) FOOD DONATIONS

25-21,189 Food; donations; limitations on liability.

(1) For purposes of this section:

(a) Food shall mean articles used for food or drink for humans or animals and articles used for components of any such article; and

(b) Raw agricultural product shall mean any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.

(2) Notwithstanding any other provisions of the law of this state, any person who makes a good faith donation to a charitable or nonprofit organization of prepared or perishable food or raw agricultural products which appear to be fit for human consumption when donated shall not be liable for damages in any civil action for any injury or death because of the condition of such food unless the injury or death is a direct result of the gross negligence, recklessness, or intentional misconduct of the donor.

(3) Notwithstanding any other provisions of the law of this state, a charitable or nonprofit organization which in good faith receives and distributes, without charge, food which the organization reasonably determines to be fit for human consumption when distributed shall not be liable for damages in any civil action based on the doctrine of strict liability in tort for any injury or death because of the condition of such food.

(4) This section shall apply to all good faith donations of perishable food or raw agricultural products which are not readily marketable because of appearance, freshness, grade, surplus supply, or other conditions.

Source: Laws 1981, LB 38, § 1; R.S.1943, (1981), § 81-217.29; Laws 1987, LB 201, § 1; Laws 1989, LB 17, § 1.

Cross References

Penalty for resale of donated foods, see section 28-1483.

(r) NOT-FOR-PROFIT ORGANIZATIONS

25-21,190 Not-for-profit organization, defined.

As used in sections 25-21,190 to 25-21,193, unless the context otherwise requires, not-for-profit organization shall mean any not-for-profit entity which is exempt from federal income taxation pursuant to section 501(a) of the Internal Revenue Code and listed as an exempt organization in section 501(c)(2), (3), (4), (5), (6), (7), (8), (11), or (19) of the Internal Revenue Code and which is engaged in one or more activities within this state in furtherance of a purpose for which it is organized.

Source: Laws 1987, LB 67, § 1; Laws 1988, LB 912, § 1; Laws 1995, LB 574, § 39.

25-21,191 Not-for-profit organization; director, officer, or trustee; immunity from civil liability.

(1) On or after August 30, 1987, any person who serves as a director, officer, or trustee of a not-for-profit organization and who is not compensated for his or her services as a director, officer, or trustee on a salary or a prorated equivalent basis shall be immune from civil liability for any act or omission which results in damage or injury if such person was acting within the scope of his or her official functions and duties as a director, officer, or trustee unless such damage or injury was caused by the willful or wanton act or omission of such director, officer, or trustee.

(2) Nothing in this section shall be construed to establish, diminish, or abrogate any duties that a director, officer, or trustee of a not-for-profit organization has to the not-for-profit organization for which the director, officer, or trustee serves.

(3) For purposes of this section, a director, officer, or trustee shall not be considered compensated solely by reason of the payment of his or her actual expenses incurred in attending meetings or in executing such office, the receipt of meals at meetings, or the receipt of gifts not exceeding a total value of one hundred dollars in any twelve consecutive months.

Source: Laws 1987, LB 67, § 2.

25-21,192 Not-for-profit organization; limitation on immunity.

The individual immunity granted by section 25-21,191 shall not extend to any act or omission of such director, officer, or trustee which results in damage or injury (1) caused by such director, officer, or trustee during the operation of any motor vehicle, airplane, or boat or (2) caused by such director, officer, or trustee while impaired by alcohol or any controlled substance enumerated in section 28-405.

Source: Laws 1987, LB 67, § 3.

25-21,193 Not-for-profit organization; sections, how construed.

Except as provided in section 25-21,191, sections 25-21,190 to 25-21,193 shall not be construed to establish, diminish, or abrogate any duty that a director, officer, or trustee of a not-for-profit organization has to any individual or organization.

Source: Laws 1987, LB 67, § 4.

(s) SHOPLIFTING

25-21,194 Shoplifting; civil action authorized; conditions; limitations.

(1)(a) Any person who commits the crime of theft by shoplifting as provided in section 28-511.01 or whose conduct is described by section 28-511.01 or (b) the parents of a minor who commits the crime of theft by shoplifting as provided in section 28-511.01 or whose conduct is described by section 28-511.01 shall be liable to the owner of the merchandise in a civil action for:

(i) Actual property damage or loss sustained as a direct result of the incident of shoplifting, which may include, but shall not be limited to, full retail value, cost of repair, or cost of replacement of the merchandise;

(ii) Costs of maintaining the action; and

(iii) Reasonable attorney's fees if such owner has retained the services of an attorney in maintaining the action and the action is not in the Small Claims Court.

(2) A conviction under any statute or ordinance shall not be a condition precedent to maintaining an action under this section.

(3) Recovery under this section may be had in addition to, and shall not be limited by, any other provision of law which limits the liability of the parents for tortious conduct of a minor. The liability of the parents and the minor shall be joint and several.

(4) This section shall not prohibit or limit any other cause of action which the owner of merchandise may have against a person who unlawfully or wrongfully takes merchandise from the owner's store or retail establishment.

(5) Judgments, but not claims, arising under this section may be assigned.

(6) The fact that an owner of merchandise may commence an action under this section shall not limit the right of such owner to demand, in writing, that any person who is liable for damages and costs under this section remit such damages and costs prior to the commencement of an action.

(7) This section shall only apply to causes of action which accrue after August 30, 1987.

(8) For purposes of this section, minor shall mean any individual under seventeen years of age.

(9) Notwithstanding any other provision of this section, no parent shall be liable to the owner of merchandise in a civil action unless such minor is living with such parent at the time the conduct described by section 28-511.01 is committed.

Source: Laws 1987, LB 536, § 1.

(t) NONPROFIT SPORTS PROGRAMS

25-21,195 Repealed. Laws 1990, LB 594, § 1.

25-21,196 Repealed. Laws 1990, LB 594, § 1.

25-21,197 Repealed. Laws 1990, LB 594, § 1.

25-21,198 Repealed. Laws 1990, LB 594, § 1.

25-21,199 Repealed. Laws 1990, LB 594, § 1.

(u) SURROGATE PARENTHOOD CONTRACTS

25-21,200 Contract; void and unenforceable; definition.

(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.

(2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.

Source: Laws 1988, LB 674, § 1.

(v) ACTIONS IN WHICH THE STATE OR A STATE AGENCY IS A PARTY

25-21,201 Actions against state; jurisdiction; enumeration of claims.

The several district courts of the judicial districts of the state shall have jurisdiction to hear and determine (1) all claims or petitions for relief that may be presented to the Legislature and which may be by any law or by any rule or resolution of the Legislature referred to such courts for adjudication, (2) all setoffs, counterclaims, and claims for damages, liquidated or unliquidated, on the part of the state against any person making a claim against the state or

against the person in whose favor such claim arose, (3) all cases in which the State of Nebraska has a lien or any other interest, apparent or real, upon or in any real estate in the state and in which any party may desire to have the lien or interest of the state fixed and determined or foreclosed and cut off, and permission is hereby given to any party to join the state as a party in any such actions or proceedings in such courts involving real estate in or upon which the state has, appears to have, or claims any interest or lien, and (4) all cases in which the State of Nebraska or the Board of Educational Lands and Funds of the State of Nebraska is the owner of or has or claims any interest in any bonds or other obligations of any drainage district, irrigation district, municipal corporation, other political or governmental subdivision of the State of Nebraska and in which any party may desire to have the ownership of or interest in such bonds or other obligations determined, the validity thereof adjudicated, or any rights and liabilities arising therefrom fixed and determined, and permission is hereby given to any party to join the State of Nebraska as a party in any such actions or proceedings in such courts involving the ownership or interest of the state or the Board of Educational Lands and Funds in such bonds or other obligations.

Source: Laws 1877, § 1, p. 19; R.S.1913, § 1177; C.S.1922, § 1100; C.S.1929, § 27-319; Laws 1937, c. 61, § 1, p. 239; Laws 1941, c. 49, § 1, p. 239; C.S.Supp.,1941, § 27-319; R.S.1943, § 24-319; Laws 1967, c. 137, § 1, p. 423; Laws 1988, LB 864, § 1; R.S.Supp.,1988, § 24-319.

Cross References

Actions involving the state, attorney's fees and other expenses, see sections 25-1802 to 25-1807.
For limitation of actions, see section 25-218.
State Claims Board, see section 81-8,220.
State Contract Claims Act, see section 81-8,302.
State Miscellaneous Claims Act, see section 81-8,294.
State Tort Claims Act, see section 81-8,235.

1. Permission to sue

This section covers all the claims and demands on which the state may be sued. Gentry v. State, 174 Neb. 515, 118 N.W.2d 643 (1962).

A special act of Legislature, waiving sovereignty of state and creating liability of state in favor of an individual, contravenes Article III, section 18, of the Constitution. Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938).

Suit to foreclose mortgage involving realty to which state has legal title cannot be maintained without state's consent. Northwestern Mutual Life Ins. Co. v. Nordhues, 129 Neb. 379, 261 N.W. 687 (1935).

Legislative permission may be given to sue state for private property damaged for public use. Gledhill v. State, 123 Neb. 726, 243 N.W. 909 (1932).

Recovery cannot be had for damages caused by negligence of officer, agent or employee of state, without express provision therefor by law, even though suit is authorized by Legislature. Shear v. State, 117 Neb. 865, 223 N.W. 130 (1929).

Action growing out of contract originally authorized by legislative enactment and disallowed by auditor may be brought against state without permission of Legislature. Peterson v. State, 113 Neb. 546, 203 N.W. 1002 (1925).

State has waived its immunity only in cases expressly provided by statute. State ex rel. Davis v. Mortensen, 69 Neb. 376, 95 N.W. 831 (1903).

2. Jurisdiction

Where statutes provide an exclusive remedy against state and a particular forum for a judicial trial, one branch of Legislature alone cannot extend jurisdiction to another forum. Scotts Bluff County v. State, 133 Neb. 508, 276 N.W. 185 (1937).

District court of Lancaster County is given jurisdiction to try appeals upon claims disallowed by Auditor of Public Accounts. Lyman-Richey Sand & Gravel Co. v. State, 123 Neb. 674, 243 N.W. 891 (1932), 83 A.L.R. 1301 (1932).

Action growing out of contract, after claim has been presented to and disallowed wholly or in part by Auditor of Public Accounts, must be brought in district court of Lancaster County, and resolution of only one branch of Legislature cannot vest any other court with jurisdiction. McNeel v. State, 120 Neb. 674, 234 N.W. 786 (1931).

District court has no original jurisdiction and appeal must be taken in statutory manner from order of Auditor of Public Accounts or Secretary of State in allowing or disallowing claim. Pickus v. State, 115 Neb. 869, 215 N.W. 129 (1927); State v. Lancaster County Bank, 8 Neb. 218 (1879); State v. Stout, 7 Neb. 89 (1878).

3. Procedure

This section must be read together with sections 77-2407 and 77-2408 and Neb. Const., Art. VIII, section 9, in order to properly present a valid appeal to the district court from a denial of a contract claim against the state. VisionQuest, Inc. v. State, 222 Neb. 228, 383 N.W.2d 22 (1986).

Making an administrative agency a party defendant in an appeal under the provisions of § 60-420 or § 84-917(2) is not an action against the state within the meaning of this and following sections so as to require service of summons on the Governor and Attorney General. Leach v. Dept. of Motor Vehicles, 213 Neb. 103, 327 N.W.2d 615 (1982).

State was a necessary party to action to quiet title to land acquired for highway purposes. Rumbel v. Ress, 166 Neb. 839, 91 N.W.2d 36 (1958).

Board of Educational Lands and Funds was properly made party defendant under this section. County of Garden v. Schaaf, 145 Neb. 676, 17 N.W.2d 874 (1945).

State may be made a party defendant to suit to quiet title to real estate. Reavis v. State, 140 Neb. 442, 300 N.W. 344 (1941).

Where Legislature failed to provide method by which summons could be served on state in workman's compensation case, state was not subject to suit. Anstine v. State, 137 Neb. 148, 288 N.W. 525 (1939).

State's constitutional immunity from suit cannot be waived by voluntary general appearance by Attorney General. McShane v. Murray, 106 Neb. 512, 184 N.W. 147 (1921); O'Connor v. Slaker, 22 F.2d 147 (8th Cir. 1927).

Limitation does not run on claim against state until legislative leave has been given to sue. Commonwealth Power Co. v. State, 104 Neb. 439, 177 N.W. 745 (1920); Lancaster County v. State, 74 Neb. 211, 104 N.W. 187 (1905), affirmed on rehearing 74 Neb. 215, 107 N.W. 388 (1906).

Legislature may waive the running of the statute of limitations and it cannot be set up as a defense. Lancaster County v. State, 97 Neb. 95, 149 N.W. 331 (1914).

4. Miscellaneous

State's immunity from suit without its consent is unaffected by declaratory judgments statute. Offutt Housing Co. v. County of Sarpy, 160 Neb. 320, 70 N.W.2d 382 (1955).

Statutes authorizing suits against the state are to be strictly construed. Frye v. Sibbitt, 145 Neb. 600, 17 N.W.2d 617 (1945).

In authorized suit on claim against the state, case should be determined upon equitable principles based upon justice and right. Commonwealth Power Co. v. State, 104 Neb. 439, 177 N.W. 745 (1920).

Mandamus does not lie to compel state to perform contracts. State ex rel. Davis v. Mortensen, 69 Neb. 376, 95 N.W. 831 (1903).

25-21,202 Actions against state; complaint; contents.

The claimant shall, in all cases, file a complaint setting forth (1) the facts out of which the claim originally arose; (2) the action of the Legislature, or of any department of the government thereon, if any such has been had; (3) what person or persons is the owner or are the owners thereof, or in anywise interested therein; (4) that no assignment or transfer of the same, or any part thereof, or interest therein, has been made, except as stated in the complaint; and (5) that the claimant is justly entitled to the amount claimed therein from the state after allowance of all just credits and setoffs.

Source: Laws 1877, § 2, p. 20; R.S.1913, § 1178; C.S.1922, § 1101; C.S.1929, § 27-320; R.S.1943, § 24-320; R.S.1943, (1985), § 24-320; Laws 2002, LB 876, § 50.

25-21,203 Actions against state; summons; venue.

When action is brought under section 25-21,201, summons shall be served upon the state in the manner provided for service of a summons in section 25-510.02. An action brought under subdivision (4) of section 25-21,201 may be brought in Lancaster County, Nebraska, or in any county in which the drainage district, irrigation district, municipal corporation, or other political or governmental subdivision whose bonds or other obligations are involved is situated either in whole or in part.

Source: Laws 1877, § 3, p. 20; R.S.1913, § 1179; C.S.1922, § 1102; C.S.1929, § 27-321; Laws 1937, c. 61, § 2, p. 240; Laws 1941, c. 49, § 2, p. 240; C.S.Supp.,1941, § 27-321; R.S.1943, § 24-321; Laws 1963, c. 130, § 1, p. 497; Laws 1983, LB 447, § 13; Laws 1988, LB 864, § 2; R.S.Supp.,1988, § 24-321; Laws 1997, LB 165, § 2.

Suit brought against State Engineer by name was not sufficient to make the state a party to the action. Rumbel v. Ress, 166 Neb. 839, 91 N.W.2d 36 (1958).

Board of Educational Lands and Funds served with process in accordance with this section. County of Garden v. Schaaf, 145 Neb. 676, 17 N.W.2d 874 (1945).

25-21,204 Actions against state; judgment.

The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony justice may require.

Source: Laws 1877, § 4, p. 20; R.S.1913, § 1180; C.S.1922, § 1103; C.S.1929, § 27-322; R.S.1943, § 24-322; R.S.1943, (1985), § 24-322.

Statute forbids court from construing doubtful contract provision so that it operates oppressively against one of the parties. In re Appeal of the Roadmix Construction Corp., 143 Neb. 425, 9 N.W.2d 741 (1943); Lyman-Richey Sand & Gravel Co. v. State, 123 Neb. 674, 243 N.W. 891 (1932).

Where state built a cheap, temporary and inadequate bridge, thereby damaging plaintiff's property, justice and right required payment of compensation therefor. Gledhill v. State, 123 Neb. 726, 243 N.W. 909 (1932).

''Justice and right'' is construed in reference to damages caused by a bridge constructed by state and county jointly. Nine Mile Irr. Dist. v. State, 118 Neb. 522, 225 N.W. 679 (1929).

In case where legislative authority is given to sue state for property damages, court may, where ''justice and right'' require it, include interest in a judgment rendered against the state. City of Chadron v. State, 115 Neb. 650, 214 N.W. 297 (1927), rehearing denied 115 Neb. 657, 215 N.W. 137 (1927).

Under principle of ''justice and right,'' state is not liable for loss of cattle through negligence of individual members of state surveying party. Benda v. State, 109 Neb. 132, 190 N.W. 211 (1922).

In authorized suit on claim against state, court should render judgment upon testimony as right and justice may require. Commonwealth Power Co. v. State, 104 Neb. 439, 177 N.W. 745 (1920).

It is the duty of the court to brush aside technical defenses, and lapse of time should not be permitted to defeat just claim. Lancaster County v. State, 97 Neb. 95, 149 N.W. 331 (1914).

25-21,205 Actions against state; adjudicated claims; certified statement to Legislature; when transmitted.

On the first day of each regular session of the Legislature, the clerks of the several district courts shall transmit a full and complete statement of all claims adjudicated in the courts during the previous year, certified by the clerk and signed by the judge of such court, showing the claimant, the amounts claimed, and the judgment rendered for or against the claimant.

Source: Laws 1877, § 5, p. 20; R.S.1913, § 1181; C.S.1922, § 1104; C.S.1929, § 27-323; R.S.1943, § 24-323; R.S.1943, (1985), § 24-323; Laws 1990, LB 822, § 18.

25-21,206 Actions against state; where brought; procedure; transfer of actions.

The state may be sued in the district court of Lancaster County in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state. The complaint in such a case shall be as provided in section 25-21,202, summons shall issue and be served in the same manner as provided in section 25-21,203. The rules of pleading and practice in regard to other civil actions in the district court shall be observed in all actions by or against the state, as far as applicable except as otherwise provided in sections 25-21,201 to 25-21,218. If an action is commenced in a county other than as specified in this section or section 25-21,203, the court in which the action has been commenced shall have jurisdiction over such action, but upon timely motion by a defendant, the court shall transfer the action to the proper court in the county in which the action should or might have been commenced as provided in this section or section 25-21,203. The court in the county to which the action is transferred, in its discretion, may order the plaintiff to pay to the defendant all reasonable expenses, including attorney's fees of the defendant or defendants, incurred because of the improper venue or in proceedings to transfer such action.

Source: Laws 1877, § 6, p. 21; R.S.1913, § 1182; C.S.1922, § 1105; C.S.1929, § 27-324; R.S.1943, § 24-324; Laws 1971, LB 576, § 1; R.S.1943, (1985), § 24-324; Laws 2002, LB 876, § 51.

Where statutes provide an exclusive remedy against state and a particular forum for a judicial trial, one branch of Legislature alone cannot extend jurisdiction to another forum. Scotts Bluff County v. State, 133 Neb. 508, 276 N.W. 185 (1937).

Action against state based on contract must be brought in Lancaster County district court, and resolution of only one branch of Legislature cannot vest any other court with jurisdiction. McNeel v. State, 120 Neb. 674, 234 N.W. 786 (1931).

Allowance or disallowance of claim by Auditor of Public Accounts and Secretary of State may be reviewed by appeal to district court, pursuant to statutory requirements. Pickus v. State, 115 Neb. 869, 215 N.W. 129 (1927).

State may be sued in district court of county where Capital is located in matters founded on or growing out of contract, or founded on law. Peterson v. State, 113 Neb. 546, 203 N.W. 1002 (1925).

25-21,207 Actions by state; counterclaims.

In any civil action instituted by the state, except in actions for the collection of revenue, for school or other trust funds, or against defaulting officers and their sureties or insurance providers as specified in section 11-201, the defendant may, as matter of defense, plead any setoff, counterclaim, or cross-demand that he or she may have arising to him or her in his or her own right, and upon which an action could be maintained by him or her against the state.

Source: Laws 1877, § 7, p. 21; R.S.1913, § 1183; C.S.1922, § 1106; C.S.1929, § 27-325; R.S.1943, § 24-325; R.S.1943, (1985), § 24-325; Laws 2004, LB 884, § 14.

In action by state against gasoline dealer to recover excise taxes, dealer may not counterclaim for taxes alleged to have been collected under void law, since the action is for the collection of revenue. State v. Smith, 135 Neb. 423, 281 N.W. 851 (1938).

Attorney General has no general authority to appear in suits against state in federal court and waive state's immunity from suit. O'Connor v. Slaker, 22 F.2d 147 (8th Cir. 1927).

25-21,208 Actions to which state is a party; priority of trial; power to compel attendance of witnesses.

Civil actions to which the state is a party shall, on motion of counsel on behalf of the state, have priority of trial over other civil actions; and the several district courts having jurisdiction to try actions to which the state is a party shall have power to compel attendance of witnesses, as is now had by such courts in other civil actions, and on payment of fees and mileage at the rate provided in section 81-1176 for state employees by the party desiring their attendance, may compel the attendance of witnesses from any county within the state.

Source: Laws 1877, § 8, p. 21; R.S.1913, § 1184; C.S.1922, § 1107; C.S.1929, § 27-326; R.S.1943, § 24-326; Laws 1981, LB 204, § 33; R.S.1943, (1985), § 24-326.

25-21,209 Claims against state; fraud in statement or proof; penalty.

Any person who corruptly practices, or attempts to practice, any fraud against the state in the proof, statement, establishment, or allowance of any claim or cause of action or any part thereof, in the matter out of which the same arose, shall ipso facto forfeit the same to the state; and it shall be the duty of the court in such case to find specifically that fraud was practiced, or attempted to be practiced, and to render judgment of forfeiture, and that the claimant be forever barred from prosecuting the same against the state, and for costs.

Source: Laws 1877, § 9, p. 21; R.S.1913, § 1185; C.S.1922, § 1108; C.S.1929, § 27-327; R.S.1943, § 24-327; R.S.1943, (1985), § 24-327.

Fraud was not practiced upon state in workmen's compensation case. Dietz v. State, 157 Neb. 324, 59 N.W.2d 587 (1953).

25-21,210 Actions to which state is a party; fees; how paid and taxed.

The fees of the sheriff, the clerk, or other officers, or of witnesses, in claims or suits to which the state is a party, shall be the same, and be paid and taxed in the same manner as in other civil actions in the district courts.

Source: Laws 1877, § 10, p. 22; R.S.1913, § 1186; C.S.1922, § 1109; C.S.1929, § 27-328; R.S.1943, § 24-328; R.S.1943, (1985), § 24-328.

Cross References

Payment of docket fee in civil cases, see section 33-106.

25-21,211 Judgment against state; certify to Director of Administrative Services; payment; insufficient funds.

The court by which any judgment is rendered against the state shall certify such judgment to the Director of Administrative Services, who shall pay the same from any special fund or appropriation applicable to such judgment, and if no special fund or appropriation has been provided or made, then from any appropriations made to the department or institution, relating to which the cause of action arose. A certificate of the Director of Administrative Services, or of the chief officer of such department or institution, that the current appropriations will not permit payment of such judgment without great public inconvenience, shall operate as a stay of such judgment until the adjournment of the next regular session of the Legislature. When such stay is claimed or taken, interest shall run on such judgment from the date on which the court certified the judgment to the Director of Administrative Services at the rate set in section 45-103.

Source: Laws 1877, § 12, p. 22; R.S.1913, § 1188; C.S.1922, § 1110; C.S.1929, § 27-329; R.S.1943, § 24-329; Laws 1979, LB 3, § 1; R.S.1943, (1985), § 24-329; Laws 2004, LB 692, § 1.

25-21,212 Judgment against claimant; transmitted to other counties; how collected.

In any action in which a judgment is rendered in any sum, or for costs, against the claimant, the clerk of the court in which such judgment is rendered shall make and transmit a certified copy thereof on application of the Attorney General, or other counsel on behalf of the state, to the clerk of the district court of any county within the state, and the same shall thereupon be filed and docketed in such court and become and be a judgment thereof; and all judgments against the claimant or plaintiff shall be collected by execution as other judgments in the district courts.

Source: Laws 1877, § 13, p. 23; R.S.1913, § 1189; C.S.1922, § 1111; C.S.1929, § 27-330; R.S.1943, § 24-330; R.S.1943, (1985), § 24-330.

25-21,213 Appeals; procedure; notice of appeal by state; effect.

Appeals from the several district courts to the Court of Appeals or to the Supreme Court in cases concerning constitutional issues, as in other civil cases, may be taken by either party within the same limitations of time as in other civil actions. No appeal or supersedeas bond shall be required of the state, and

the filing of notice signed by the Governor, chief officer of the proper department, Attorney General, or counsel for the state of intention to take such proceedings shall operate as a supersedeas of such judgment until the time that final judgment in the Court of Appeals or Supreme Court is rendered in the cause, but the same shall not so operate longer than six months unless proceedings in error or appeal are taken, and in case of the affirmance of such judgment or failure on the part of the state to take proceedings in error or appeal, after notice thereof, interest shall run and be computed on such judgment from its date.

Source: Laws 1877, § 14, p. 23; R.S.1913, § 1190; C.S.1922, § 1112; C.S.1929, § 27-331; R.S.1943, § 24-331; R.S.1943, (1985), § 24-331; Laws 1991, LB 732, § 68.

25-21,214 Judgment; payment; effect.

Payment and receipt of the amount due on any judgment rendered in any action brought under the provisions of sections 25-21,201 to 25-21,215 shall be a full discharge of the state in such matter, and any final judgment shall forever bar further controversy upon the subject matter thereof.

Source: Laws 1877, § 15, p. 23; R.S.1913, § 1191; C.S.1922, § 1113; C.S.1929, § 27-332; R.S.1943, § 24-332; R.S.1943, (1985), § 24-332.

25-21,215 Change of venue; costs.

Change of venue may be taken from the district court of the county in which the action is brought, as in other civil cases; and in every such case, all expenses of such trial which would be chargeable to the county in which the suit originated, had the cause been tried therein, as determined by the district judge of the county to which said cause has been transferred, shall be a charge upon the county in which the suit was commenced.

Source: Laws 1877, § 17, p. 24; R.S.1913, § 1192; C.S.1922, § 1114; C.S.1929, § 27-333; Laws 1935, c. 43, § 2, p. 162; C.S.Supp.,1941, § 27-333; R.S.1943, § 24-333; R.S.1943, (1985), § 24-333.

25-21,216 Bonds for costs, appeal, supersedeas, injunction, attachment; state or its agencies not required to give.

No bond for costs, appeal, supersedeas, injunction, or attachment shall be required of the State of Nebraska, or of any state officer, state board, state commission, head of any state department, agent or employee of the state, the Director of Banking and Finance as receiver of insolvent state banks, or any receiver appointed on the application of the State of Nebraska, in any proceedings or court action in which said state, officer, board, commission, head of department, agent, or employee is a party litigant in its or his official capacity.

Source: Laws 1930, Spec. Sess., c. 8, § 1, p. 39; C.S.1929, § 20-2231; R.S.1943, § 24-334; Laws 1955, c. 80, § 1, p. 236; R.S.1943, (1985), § 24-334.

State is not required to furnish bond upon granting to it of temporary injunction. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

Section is applicable to state officers sued in their official capacity. Power Oil Co. v. Cochran, 138 Neb. 827, 295 N.W. 805 (1941).

State or a department thereof, need not give bond on appeal in condemnation proceedings. Peterson v. Department of Roads and Irrigation, 137 Neb. 354, 289 N.W. 370 (1939).

State need not execute appeal bond hereunder. State v. Odd Fellows Hall Assn., 123 Neb. 440, 243 N.W. 616 (1932).

25-21,217 Judgment against state agency; liability of state.

If judgment for costs or damages are rendered against any such litigant and such litigant fails, refuses, or neglects to pay the judgment within three months after the date of entry of the judgment, then the State of Nebraska shall be liable for the payment of the judgment and shall pay the same.

Source: Laws 1930, Spec. Sess., c. 8, § 2, p. 39; C.S.1929, § 20-2232; R.S.1943, § 24-335; R.S.1943, (1985), § 24-335; Laws 2000, LB 921, § 22.

25-21,218 Bonds or insurance of Director of Banking and Finance as receiver of insolvent banks; premium; payment by state.

The State of Nebraska shall pay all premiums on bonds or equivalent commercial insurance policies that the Director of Banking and Finance may be required to give as receiver of insolvent state banks.

Source: Laws 1930, Spec. Sess., c. 8, § 3, p. 39; C.S.1929, § 20-2233; R.S.1943, § 24-336; R.S.1943, (1985), § 24-336; Laws 2004, LB 884, § 15.

(w) FORCIBLE ENTRY AND DETAINER

25-21,219 Forcible entry and detainer; jurisdiction; exception.

The district and county courts shall have jurisdiction over complaints of unlawful and forcible entry into lands and tenements and the detention of the same and of complaints against those who, having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same. If the court finds that an unlawful and forcible entry has been made and that the same lands or tenements are held by force or that the same, after a lawful entry, are held unlawfully, the court shall cause the party complaining to have restitution thereof. The court or the jury, as the situation warrants, shall inquire into the matters between the two litigants such as the amount of rent owing the plaintiff and the amount of damage caused by the defendant to the premises while they were occupied by him or her and render a judgment or verdict accordingly. This section shall not apply to actions for possession of any premises subject to the provisions of the Uniform Residential Landlord and Tenant Act.

Source: Laws 1929, c. 82, § 117, p. 309; C.S.1929, § 22-1201; R.S.1943, § 26-1,118; Laws 1965, c. 129, § 1, p. 468; R.R.S.1943, § 26-1,118; Laws 1972, LB 1032, § 68; Laws 1974, LB 293, § 48; Laws 1984, LB 13, § 27; Laws 1984, LB 1113, § 1; R.S.1943, (1985), § 24-568.

Cross References

Uniform Residential Landlord and Tenant Act, see section 76-1401.

A district court's jurisdiction over forcible entry and detainer actions arises out of legislative grant, and it is inherently limited by that grant. Cummins Mgmt. v. Gilroy, 266 Neb. 635, 667 N.W.2d 538 (2003).

A forcible entry and detainer action does not try the question of title, but only the immediate right of possession. Cummins Mgmt. v. Gilroy, 266 Neb. 635, 667 N.W.2d 538 (2003).

Because of the limited scope of a forcible entry and detainer action, when a district court hears such an action, it sits as a special statutory tribunal to summarily decide the issues authorized by the statute, and not as a court of general jurisdiction with the power to hear and determine other issues. Cummins Mgmt. v. Gilroy, 266 Neb. 635, 667 N.W.2d 538 (2003).

If the resolution of a forcible entry and detainer action requires a district court to determine a title dispute, it must dismiss the case for lack of jurisdiction. Cummins Mgmt. v. Gilroy, 266 Neb. 635, 667 N.W.2d 538 (2003).

The general rules of interpretation applying to forcible entry and detainer actions under this section also apply to actions brought under the Uniform Residential Landlord and Tenant Act. Brennan v. Brennan, 214 Neb. 125, 332 N.W.2d 696 (1983).

The forcible entry and detainer statutes and the general stipulations for forfeiture in a lease are considered in equity for securing the rent, and not for forfeiting the lease, when the tenant acts in good faith and pays promptly on demand. McCombs Realty v. Western Auto Supply Co., 10 Neb. App. 962, 641 N.W.2d 77 (2002).

25-21,220 Forcible entry and detainer; against whom proceedings may be had; provisions not exclusive.

Proceedings under sections 25-21,219 to 25-21,235 may be had:

(1) In all cases against tenants holding over their terms, and a tenant shall be deemed to be holding over his or her term whenever the tenant has failed, neglected, or refused to pay the rent or any part thereof when the rent became due;

(2) In all cases of sales of real estate or executions, orders, or other judicial process when the judgment debtor was in possession at the time of the entry of the judgment or decree by virtue of which such sale was made;

(3) In all cases of sale by executors or administrators or guardians and on partition if any of the parties to the partition were in possession at the commencement of the suit after such sales so made on execution or otherwise have been examined by the proper court and the sales adjudged legal; and

(4) In all cases when the defendant is a settler or occupier of lands or tenements, without color of title, and to which the complainant has the right of possession.

This section shall not be construed as limiting the provisions of section 25-21,219.

Source: Laws 1929, c. 82, § 118, p. 309; C.S.1929, § 22-1202; R.S.1943, § 26-1,119; Laws 1972, LB 1032, § 69; R.S.1943, (1985), § 24-569; Laws 2000, LB 921, § 23.

An action in forcible entry and detainer will lie against a lessee not in actual physical possession, and pendency of equitable action in district court will not preclude it. Moritz v. S & H Shopping Centers, Inc., 197 Neb. 206, 247 N.W.2d 454 (1976).

25-21,221 Forcible entry and detainer; notice to leave premises; when and how served.

It shall be the duty of the party, desiring to commence an action under sections 25-21,219 to 25-21,235, to notify the adverse party to leave the premises for the possession of which the action is about to be brought. This notice shall be served at least three days before commencing the action by leaving a written copy with such adverse party, or at his usual place of abode, if he cannot be found. Where the defendant or his usual place of abode cannot be found in the county where the premises are located, such notice may be served by leaving such notice at or posting it on the detained premises.

Source: Laws 1929, c. 82, § 120, p. 310; C.S.1929, § 22-1204; Laws 1943, c. 48, § 2, p. 199; R.S.1943, § 26-1,121; Laws 1972, LB 1032, § 71; R.S.1943, (1985), § 24-571.

The 3-day notice or ''notice to quit'' is necessary to obtaining an order of restitution in a forcible entry and detainer action. I. P. Homeowners v. Morrow, 12 Neb. App. 119, 668 N.W.2d 515 (2003).

25-21,222 Forcible entry and detainer; complaint; contents.

The summons shall not issue until the plaintiff shall have filed his complaint in writing which shall particularly describe the premises so entered upon or

detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceable or lawful entry of the described premises. The complaint shall be copied into and made a part of the record.

Source: Laws 1929, c. 82, § 121, p. 310; C.S.1929, § 22-1205; R.S.1943, § 26-1,122; Laws 1972, LB 1032, § 72; R.S.1943, (1985), § 24-572.

25-21,223 Forcible entry and detainer; summons; service; trial date.

The summons shall be issued and directed with a copy of the complaint attached to the summons, shall state the cause of the complaint, the time and place of trial of the action for possession, and the answer day for other causes of action, and shall notify the defendant that if he or she fails to appear, judgment shall be entered against him or her. The summons may be served and returned as provided in sections 25-505.01 to 25-516.01, except that the summons shall be served within three days, excluding nonjudicial days, from the date of its issuance and shall be returnable within five days, excluding nonjudicial days, from the date of its issuance. If service cannot be made with reasonable diligence under such sections, service may be made by any person by leaving a copy of the summons at the detained premises and mailing a copy by first-class mail to the defendant's last-known address. The person making the service shall file with the court an affidavit stating with particularity the manner in which he or she made the service and, if service was not made as provided in sections 25-505.01 to 25-516.01, the reasons why service under such sections was unsuccessful. Trial of the action for possession shall be held not less than ten nor more than fourteen days after the date of issuance of the summons.

Source: Laws 1929, c. 82, § 122, p. 310; C.S.1929, § 22-1206; R.S.1943, § 26-1,123; Laws 1972, LB 1032, § 73; Laws 1989, LB 230, § 1; R.S.Supp.,1989, § 24-573; Laws 2002, LB 876, § 52; Laws 2003, LB 760, § 5; Laws 2004, LB 1207, § 10.

25-21,224 Forcible entry and detainer; failure of defendant to appear; effect.

If the defendant does not appear in response to the summons, and it shall have been properly served, the court shall try the cause as though he were present.

Source: Laws 1929, c. 82, § 123, p. 310; C.S.1929, § 22-1207; R.S.1943, § 26-1,124; Laws 1972, LB 1032, § 74; R.S.1943, (1985), § 24-574.

25-21,225 Forcible entry and detainer; continuance for more than seven days; undertaking required.

No continuance shall be granted for a longer period than seven days, unless upon cause shown to the court of the existence of extraordinary causes and then not unless the defendant applying therefor shall give an undertaking to the adverse party, with good and sufficient surety to be approved by the court, conditioned for the payment of any rents that have or may accrue, and any

additional damages that may be sustained by such adverse party by reason of the continuance, if judgment be rendered against the defendant.

Source: Laws 1929, c. 82, § 124, p. 311; C.S.1929, § 22-1208; R.S.1943, § 26-1,125; Laws 1972, LB 1032, § 75; R.S.1943, (1985), § 24-575.

25-21,226 Forcible entry and detainer; trial without jury; judgment; restitution; costs.

If the suit is not continued or the place of trial changed, or if neither party demands a jury, the court shall try the cause. If, after hearing the evidence, the court shall conclude that the complaint is not true, the court shall enter judgment against the plaintiff for costs. If the court shall find that the complaint is true, judgment shall be entered against the defendant and in favor of the plaintiff for restitution of the premises and costs of suit. If the court shall find that the complaint is true in part, judgment shall be entered for the restitution of such part only, and the costs shall be taxed as the court shall deem just and equitable.

Source: Laws 1929, c. 82, § 125, p. 311; C.S.1929, § 22-1209; R.S.1943, § 26-1,126; Laws 1972, LB 1032, § 76; R.S.1943, (1985), § 24-576.

25-21,227 Forcible entry and detainer; trial by jury; verdict.

If a jury is demanded by either party, the proceedings shall be in all respects as in other cases. If the jury shall find that the complaint is true, they shall render a general verdict of guilty against the defendant; if not true, then a general verdict of not guilty; if true in part, then a verdict setting forth the facts they find true.

Source: Laws 1929, c. 82, § 126, p. 311; C.S.1929, § 22-1210; R.S.1943, § 26-1,127; Laws 1972, LB 1032, § 77; R.S.1943, (1985), § 24-577.

A forcible entry and detainer action is a civil suit subject to the normal rules of a civil proceeding, including the power of the court to sustain a motion for a directed verdict in favor of either party at the close of all evidence. Otto v. Hongsermeier Farms, 217 Neb. 45, 348 N.W.2d 422 (1984).

25-21,228 Forcible entry and detainer; verdict; entry; judgment.

The court shall enter the verdict upon the docket, and shall render such judgment in the action as if the facts authorizing the finding of such verdict had been found to be true by the court.

Source: Laws 1929, c. 82, § 127, p. 311; C.S.1929, § 22-1211; R.S.1943, § 26-1,128; Laws 1972, LB 1032, § 78; R.S.1943, (1985), § 24-578.

25-21,229 Forcible entry and detainer; exceptions.

Exceptions to the opinion of the judge of the court, in cases under sections 25-21,219 to 25-21,235, upon questions of law and evidence, may be taken by either party, whether tried by a jury or otherwise.

Source: Laws 1929, c. 82, § 128, p. 311; C.S.1929, § 22-1212; R.S.1943, § 26-1,129; Laws 1972, LB 1032, § 79; R.S.1943, (1985), § 24-579.

25-21,230 Forcible entry and detainer; restitution; writ of execution; form.

If a judgment of restitution is entered, the court shall, at the request of the plaintiff or the plaintiff's attorney, issue a writ of execution thereon which shall be in the following form as nearly as practicable:

The State of Nebraska, ... County, ss.

To any Constable or Sheriff of ..... County:

Whereas, in a certain action for the forcible entry and detention, (or the forcible detention, as the case may be) of the following described premises, to wit: ....., lately tried before this court, wherein ..... was plaintiff, and ..... was defendant, judgment was entered on the ..... day of ..... A.D. ....., you therefor are hereby commanded to cause the defendant to be forthwith removed from the premises, and the plaintiff to have restitution of the same; also that you levy of the goods and chattels of the defendant, and make the costs aforesaid, and all accruing costs; and of this writ make legal service and due return. Witness my hand this ..... day of ..... A.D. ....., Clerk of the (County or District) Court.

Source: Laws 1929, c. 82, § 129, p. 312; C.S.1929, § 22-1213; R.S.1943, § 26-1,130; Laws 1972, LB 1032, § 80; R.S.1943, (1985), § 24-580; Laws 2000, LB 921, § 24; Laws 2004, LB 1207, § 11.

25-21,231 Forcible entry and detainer; writ of execution; service; writ of error stays proceedings.

The officer shall, within ten days after receiving the writ, execute the same by restoring the plaintiff to the possession of the premises, and shall levy and collect the costs, and make return as upon other executions. If the officer shall receive a notice from the court that the proceedings have been stayed by an allowance of a writ of error, he shall immediately delay all further proceedings upon the execution; and if the premises have been restored to the plaintiff, he shall immediately place the defendant in the possession thereof, and return the writ, with his proceedings and costs taxed thereon.

Source: Laws 1929, c. 82, § 130, p. 312; C.S.1929, § 22-1214; R.S.1943, § 26-1,131; Laws 1972, LB 1032, § 81; R.S.1943, (1985), § 24-581.

25-21,232 Forcible entry and detainer; judgment; future action not barred.

Judgments obtained under sections 25-21,219 to 25-21,235 shall not be a bar to any future action brought by either party.

Source: Laws 1929, c. 82, § 119, p. 310; C.S.1929, § 22-1203; R.S.1943, § 26-1,120; Laws 1972, LB 1032, § 70; R.S.1943, (1985), § 24-570; Laws 2004, LB 1207, § 12.

Forcible entry and detainer does not try the question of title, but only the immediate right of possession. An action of forcible entry and detainer is res judicata only as to the immediate right. Hogan v. Pelton, 210 Neb. 530, 315 N.W.2d 644 (1982).

25-21,233 Forcible entry and detainer; appeal; procedure.

Any party against whom judgment has been entered in an action of forcible entry and detention, or forcible detention only, of real property, may appeal as provided for in a civil action.

Source: Laws 1929, c. 82, § 131, p. 312; C.S.1929, § 22-1215; R.S.1943, § 26-1,132; Laws 1972, LB 1032, § 82; Laws 1981, LB 42, § 13; R.S.1943, (1985), § 24-582; Laws 2004, LB 1207, § 13.

25-21,234 Forcible entry and detainer; appeal; operate as supersedeas; bond or surety required.

No appeal shall operate as a supersedeas unless the appellant, within thirty days after the entry of the judgment, deposits with the clerk of the court in which the judgment was entered a cash bond or undertaking with at least one good and sufficient surety approved by the court conditioned in case of appeal by the plaintiff that he or she will satisfy the final judgment and costs and, in case of appeal by the defendant, that he or she will satisfy the final judgment and costs and will pay a reasonable rent for the premises during the time he or she shall have unlawfully withheld the same.

Source: Laws 1929, c. 82, § 132, p. 313; C.S.1929, § 22-1216; R.S.1943, § 26-1,133; Laws 1972, LB 1032, § 83; Laws 1981, LB 42, § 14; Laws 1984, LB 13, § 28; R.S.1943, (1985), § 24-583; Laws 1999, LB 43, § 13; Laws 2004, LB 1207, § 14.

25-21,235 Forcible entry and detainer; restitution notwithstanding appeal; bond; conditions.

In all actions of forcible entry and detention as well as of forcible detention only, notwithstanding the execution of an undertaking or filing of a proper cash bond for supersedeas or appeal, the judgment for restitution of the premises may be enforced, in the discretion of the court, or a judge thereof in vacation, upon the execution of a bond with sufficient surety, to defendant, or the deposit of a cash bond in such sum as the court shall fix, conditioned that in case the plaintiff shall finally be defeated he will pay the defendant his costs and all damages he may have suffered by reason of the execution of the judgment, the bond to be approved by the court or judge.

Source: Laws 1929, c. 82, § 133, p. 313; C.S.1929, § 22-1217; R.S.1943, § 26-1,134; Laws 1972, LB 1032, § 84; R.S.1943, (1985), § 24-584.

(x) RELEASE OF ANIMALS

25-21,236 Release of animal; liability to owner.

(1) A person who intentionally, willfully, and without permission releases an animal lawfully confined for science, research, commerce, agriculture, or education is liable to the owner of the animal for damages, including the costs of restoring the animal to confinement and to its health condition prior to release and the costs for damage to real property caused by the released animal. If the release causes the failure of an experiment, the person shall also be liable for all costs of repeating the experiment, including replacement of the animals, labor, and materials.

(2) For purposes of this section, animal shall mean any warmblooded or coldblooded animal used in food, fur, or fiber production, agriculture, research, testing, or education and shall include dogs, cats, poultry, fish, and invertebrates.

(3) This section shall not apply to lawful activities of any governmental agency or employees or agents of such agency carrying out their duties prescribed by law.

Source: Laws 1992, LB 312, § 1.

(y) MOTOR VEHICLE GUEST STATUTE

25-21,237 Motor vehicle owner or operator; liability to guest passenger; limitation.

The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.

For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser. Relationship by consanguinity or affinity within the second degree shall include parents, grandparents, children, grandchildren, and brothers and sisters. Should the marriage of the driver or owner be terminated by death or dissolution, the affinal relationship with the blood kindred of his or her spouse shall be deemed to continue.

Source: Laws 1931, c. 105, § 1, p. 278; C.S.Supp.,1941, § 39-1129; R.S.1943, § 39-740; Laws 1981, LB 54, § 1; R.S.1943, (1988), § 39-6,191; Laws 1993, LB 370, § 5.

1. Guest status
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1. Guest status

Gross negligence, within the meaning of the Nebraska guest statute, means gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Klundt ex rel. Karr v. Karr, 261 Neb. 577, 624 N.W.2d 30 (2001).

The Nebraska guest statute is constitutional. Coburn v. Reiser, 254 Neb. 495, 577 N.W.2d 289 (1998).

There can be no contribution or apportionment between a host driver and the driver of another vehicle where the guest statute would preclude a judgment in favor of the guest passenger against a host driver. Coburn v. Reiser, 254 Neb. 495, 577 N.W.2d 289 (1998).

Summary judgment was properly granted as deceased was clearly a guest and undisputed facts did not satisfy requirement that gross negligence of host be proved. Luther v. Pawling, 195 Neb. 679, 240 N.W.2d 42 (1976).

The guest statute relieves both the owner and the operator from liability for damages to a guest unless caused by the driver being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator. Gertsch v. Gerber, 193 Neb. 181, 226 N.W.2d 132 (1975).

The term compensation is not limited to payment for transportation in cash or its equivalent. Vandenberg v. Langan, 192 Neb. 779, 224 N.W.2d 366 (1974); Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N.W.2d 451 (1943).

Upon the facts in this case, the trial court's determination that plaintiff was a guest and that there was no gross negligence was correct; and the issue of constitutionality of the guest statute was not before the court because not raised in pleadings and could not have been because plaintiff having sought the benefit of it could not question its constitutionality. Zoimen v. Landsman, 192 Neb. 561, 223 N.W.2d 49 (1974).

This section, formerly 39-740, is applicable to operation of a motor vehicle upon private property as well as upon public highways; and one just entering the vehicle having accepted a ride therein without giving compensation is a guest. Hale v. Taylor, 192 Neb. 298, 220 N.W.2d 378 (1974).

Term compensation not limited to payment for transportation in cash or equivalent or required to pass exclusively from passenger to driver. Johnson v. Riecken, 185 Neb. 78, 173 N.W.2d 511 (1970).

Instructions of trial court were sufficient to raise the issue of liability under the guest statute. Younker v. Peter Kiewit Sons Co., 180 Neb. 835, 146 N.W.2d 202 (1966).

A thirteen-year-old child riding as a gratuitous passenger in a motor vehicle is a guest. Kolar v. Divis, 179 Neb. 756, 140 N.W.2d 658 (1966).

A guest is a person who accepts a ride in a motor vehicle without giving compensation therefor. Davis v. Landis Outboard Motor Co., 179 Neb. 391, 138 N.W.2d 474 (1965); Carter v. Chicago, B. & Q. R. R. Co., 175 Neb. 188, 121 N.W.2d 44 (1963); Sunderman v. Wardlaw, 170 Neb. 70, 101 N.W.2d 848 (1960); Eilts v. Bendt, 162 Neb. 538, 76 N.W.2d 623 (1956); Born v. Estate of Matzner, 159 Neb. 169, 65 N.W.2d 593 (1954).

Minor child was not a guest where owner of motor vehicle was paid compensation for taking care of child. Snelling v. Pieper, 178 Neb. 818, 135 N.W.2d 707 (1965).

Instruction given on definition of a guest passenger was not erroneous. O'Brien v. Anderson, 177 Neb. 635, 130 N.W.2d 560 (1964).

To remove an occupant riding in a motor vehicle from the provisions of the guest statute, the benefit to the owner or operator must be tangible and substantial. Carter v. Chicago, B. & Q. R.R. Co., 170 Neb. 438, 103 N.W.2d 152 (1960).

To recover, plaintiff must establish either gross negligence or that he was a passenger for hire when negligence is less than gross. Lincoln v. Knudsen, 163 Neb. 390, 79 N.W.2d 716 (1956).

Passengers for hire are exempted from provisions of this section. Hansen v. Lawrence, 149 Neb. 26, 30 N.W.2d 63 (1947).

Where filling station operator invited his employee to attend sales meeting and then took him to night clubs and upon leaving night clubs employee went to sleep and was injured in collision, whether employee was a guest at time of accident was question for jury. Svitak v. Sun Indemnity Co., 136 Neb. 303, 285 N.W. 604 (1939).

A guest is any passenger or person riding in a motor vehicle as a guest, or by invitation, and not for hire. McWilliams v. Griffin, 132 Neb. 753, 273 N.W. 209 (1937).

Driver of automobile owes passengers duty of exercising ordinary care in the operation of the automobile whether invited guests or engaged in joint enterprise. Garrotto v. Butera, 123 Neb. 682, 243 N.W. 879 (1932).

Where transportation was for mutual benefit of all concerned, decedent was not a guest within purview of this section. Carman v. Harrison, 362 F.2d 694 (8th Cir. 1966).

Status of guest did not exist where compensation was paid to owner of automobile by federal government for transportation of owner and passenger in carrying on governmental program. Bailey v. Pennington, 274 F.2d 328 (8th Cir. 1960).

Guest statute was not applicable to transportation of veteran in ambulance to hospital. Fulmer v. United States, 133 F.Supp. 775 (D. Neb. 1955).

2. Gross negligence defined

Gross negligence within the meaning of the guest statute is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty; it may be established if there is a persistence in negligence without regard for the consequences. Youngs v. Potter, 237 Neb. 583, 467 N.W.2d 49 (1991).

Under the guest statute the defendant is not liable to the plaintiff unless the accident was caused by the defendant's being under the influence of intoxicating liquor or by his gross negligence. Gross negligence is great or excessive negligence, or negligence in a very high degree, indicating absence of even slight care in the performance of a duty. Trial court had no evidence before it, on motion for summary judgment, which would support a finding of gross negligence by the defendant, under the guest statute. Carlson v. Waddle, 223 Neb. 671, 392 N.W.2d 777 (1986).

Significant in the determination of gross negligence is the presence of imminence of danger that is visible to, known by, or made known to a driver together with the persistence in negligence, heedless of the consequences. Jones v. Foutch, 203 Neb. 246, 278 N.W.2d 572 (1979).

Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. Jones v. Foutch, 203 Neb. 246, 278 N.W.2d 572 (1979); Thorpe v. Zwonechek, 177 Neb. 504, 129 N.W.2d 483 (1964).

Gross negligence within the meaning of this section means gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Wagner v. Mines, 203 Neb. 143, 277 N.W.2d 672 (1979).

The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence; entrustment in itself is not gross negligence. Wagner v. Mines, 203 Neb. 143, 277 N.W.2d 672 (1979).

Failure to stop before entering an intersection, as directed by a traffic signal or stop sign, is not when standing alone sufficient to constitute gross negligence. Liston v. Bradshaw, 202 Neb. 272, 275 N.W.2d 59 (1979).

The meaning of gross negligence under the comparative negligence rule is contrasted with its meaning under the guest passenger statute. Johnson v. Roueche, 188 Neb. 716, 199 N.W.2d 1 (1972); Brackman v. Brackman, 169 Neb. 650, 100 N.W.2d 774 (1960); Sheehy v. Abboud, 126 Neb. 554, 253 N.W. 683 (1934).

The definition of gross negligence in Nebraska Jury Instruction No. 7.51 has been approved by the Supreme Court of Nebraska. Demont v. Mattson, 188 Neb. 277, 196 N.W.2d 190 (1972).

Gross negligence is negligence in a very high degree; the absence of slight care in performance of a duty; or entire failure to exercise care. Reeder v. Rinne, 183 Neb. 734, 164 N.W.2d 203 (1969).

Gross negligence within meaning of this section defined. Brugh v. Peterson, 183 Neb. 190, 159 N.W.2d 321 (1968).

Guest passenger failed to prove gross negligence of driver of motor vehicle. Warmbier v. Zeurlein, 182 Neb. 425, 155 N.W.2d 364 (1967).

There is no fixed rule for the ascertainment of what is gross negligence. Callen v. Knopp, 180 Neb. 421, 143 N.W.2d 266 (1966); Cole v. Wentworth, 175 Neb. 325, 121 N.W.2d 567 (1963); Pester v. Nelson, 168 Neb. 243, 95 N.W.2d 491 (1959).

A guest passenger can recover only if negligence of operator of motor vehicle is gross. Boismier v. Maragues, 176 Neb. 547, 126 N.W.2d 844 (1964); Schlines v. Ekberg, 172 Neb. 510, 110 N.W.2d 49 (1961); Bishop v. Schofield, 156 Neb. 830, 58 N.W.2d 207 (1953).

Gross negligence means negligence in a very high degree, or the absence of even slight care in the performance of a duty. Robinson v. Hammes, 173 Neb. 692, 114 N.W.2d 730 (1962); Sautter v. Poss, 155 Neb. 62, 50 N.W.2d 547 (1951); Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943); Fairman v. Cook, 142 Neb. 893, 8 N.W.2d 315 (1943); Rogers v. Brown, 129 Neb. 9, 260 N.W. 794 (1935); Morris v. Erskine, 124 Neb. 754, 248 N.W. 96 (1933).

Several acts of negligence charged are to be considered as a whole in determining issue of gross negligence. Smith v. Damato, 172 Neb. 811, 112 N.W.2d 21 (1961).

Several acts of ordinary negligence do not necessarily constitute gross negligence. Cunning v. Knott, 157 Neb. 170, 59 N.W.2d 180 (1953).

Guest must establish that gross negligence proximately caused accident. Paxton v. Nichols, 157 Neb. 152, 59 N.W.2d 184 (1953).

What amounts to gross negligence depends upon facts and circumstances of each case. Montgomery v. Ross, 156 Neb. 875, 58 N.W.2d 340 (1953); Covey v. Anderson, 130 Neb. 702, 266 N.W. 595 (1936).

Gross negligence means negligence in a very high degree. Pavlicek v. Cacak, 155 Neb. 454, 52 N.W.2d 310 (1952); Gilbert v. Bryant, 125 Neb. 731, 251 N.W. 823 (1933).

Gross negligence indicates absence of even slight care in the performance of a duty. Johnson v. Jastram, 155 Neb. 376, 52 N.W.2d 245 (1952).

Gross negligence is great or excessive negligence, or negligence in a very high degree, and indicates absence of even slight care in performance of duty. Komma v. Kreifels, 144 Neb. 745, 14 N.W.2d 591 (1944).

Gross negligence, under guest statute, is the entire failure to exercise care, or the exercise of so slight a degree of care. Mierendorf v. Saalfeld, 138 Neb. 876, 295 N.W. 901 (1941).

Gross negligence is negligence of a very high degree that includes but does not necessarily extend to wanton, willful or intentional disregard of the guest's safety. Gosnell v. Montgomery, 133 Neb. 871, 277 N.W. 429 (1938).

Generally, an automobile host is liable for injuries to guest caused by a defective automobile, where defect is known to him, but not known or discoverable by the guest. In re Estate of O'Bryne, 133 Neb. 750, 277 N.W. 74 (1938).

Gross negligence within meaning of the statute means negligence in a very high degree, or the absence of even slight care in performance of a duty, and the existence of gross negligence must be determined from the facts and circumstances of each case. Lemon v. Hoffmark, 132 Neb. 421, 272 N.W. 214 (1937); Heesacker v. Bosted, 131 Neb. 42, 267 N.W. 177 (1936).

Gross negligence signifies a degree of negligence greater than want of ordinary care or slight negligence, but not necessarily extending to wanton, willful or intentional disregard for the guest's safety. Sterns v. Hellerich, 130 Neb. 251, 264 N.W. 677 (1936).

3. Intoxication

Driving of motor vehicle by a person under the influence of intoxicating liquor constitutes gross negligence. O'Neill v. Henke, 167 Neb. 631, 94 N.W.2d 322 (1959).

An unintoxicated owner or operator of a motor vehicle is not liable to guest riding therein in the absence of gross negligence, which term means a degree of negligence greater than want of ordinary care. James v. Krebeck, 142 Neb. 757, 7 N.W.2d 637 (1943).

Under this section, owner is not liable for injury to guest except where driver is under influence of intoxicating liquor or is guilty of gross negligence. Brown v. Mulready, 140 Neb. 500, 300 N.W. 421 (1941).

Nebraska guest statute, unlike that of Kansas, specifies as a distinct ground of liability that the driver of automobile is intoxicated. McCown v. Schram, 137 Neb. 498, 289 N.W. 890 (1940).

4. Speed

Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered. Jones v. Foutch, 203 Neb. 246, 278 N.W.2d 572 (1979).

Driving at excessive rate of speed in combination with other acts of negligence may be sufficient to make a case for the jury on question of gross negligence. Jennings v. Lowrey, 168 Neb. 831, 97 N.W.2d 345 (1959).

Operation of a motor vehicle at a rate of speed prohibited by law is not in itself gross negligence. Calvert v. Miller, 163 Neb. 501, 80 N.W.2d 123 (1957).

Where host's automobile was being driven on a protected highway on the proper side of the road at a lawful rate of speed, and no other acts of negligence were shown, trial court should direct verdict for host. Gohinghorst v. Ruess, 146 Neb. 470, 20 N.W.2d 381 (1945).

A rate of speed which would amount to gross negligence in one case might, under different surroundings and circumstances, fall far short thereof. Gummere v. Mudd, 139 Neb. 370, 297 N.W. 622 (1941).

Rate of speed which would be gross negligence under certain circumstances may fall short thereof under other conditions. Thurston v. Carrigan, 127 Neb. 625, 256 N.W. 39 (1934).

5. Failure to maintain lookout

A momentary distraction cannot be defined as gross negligence under the automobile guest statute where there is no evidence that the driver knew of an imminent danger and yet persisted in a negligent manner. Youngs v. Potter, 237 Neb. 583, 467 N.W.2d 49 (1991).

Momentary inattention to driving does not ordinarily constitute gross negligence. Holliday v. Patchen, 164 Neb. 53, 81 N.W.2d 593 (1957).

Gross negligence cannot be predicated upon momentary distraction of driver. Ottersberg v. Holz, 159 Neb. 239, 66 N.W.2d 571 (1954).

The continued failure of driver of automobile to maintain proper lookout, when driving at high speed on country road at night, is sufficient to take case to jury on question of gross negligence. Larson v. Storm, 137 Neb. 420, 289 N.W. 792 (1940).

Where only negligence shown was driver's failure to see unlighted truck ahead in time to avoid a collision, it is not sufficient to constitute gross negligence. Holberg v. McDonald, 137 Neb. 405, 289 N.W. 542 (1940).

Where speed is not in itself excessive, turning of head by driver for an instant is not sufficient to constitute gross negligence. Black v. Neill, 134 Neb. 764, 279 N.W. 471 (1938).

6. Failure to control

Motorist who is forced to swing off of icy pavement to avoid collision and who in returning to pavement catches rear wheel on pavement causing his car to skid in front of approaching automobile is not guilty of gross negligence rendering him liable to a guest for injuries. Amerine v. O'Neal, 136 Neb. 642, 287 N.W. 56 (1939).

Failure to lift foot off the gas and put it on the brake when attempting to turn into a narrow street traveling about twenty miles per hour is not gross negligence. Munsell v. Gardner, 136 Neb. 214, 285 N.W. 555 (1939).

Failure to negotiate a turn onto a bridge constructed on an angle to right of general line of highway did not, under the circumstances, constitute gross negligence. Johnk v. Scanlon, 136 Neb. 187, 285 N.W. 488 (1939).

Where person driving automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which deliberate judgment might prove to be wrong. Oakes v. Gregory, 133 Neb. 407, 275 N.W. 607 (1937).

Where guest sued for injuries resulting when automobile skidded on icy pavement and collided with truck, evidence justified trial court in directing verdict for defendants. Woodworth v. Johnston, 131 Neb. 113, 267 N.W. 243 (1936).

Driver confronted with emergency is not necessarily guilty of negligence in pursuing a course which mature reflection might prove to be wrong. Belik v. Warsocki, 126 Neb. 560, 253 N.W. 689 (1934).

If accident was caused by loss of control occasioned by punctured rear tire, driver is not guilty of gross negligence under this section. State Farm Mut. Auto. Ins. Co. v. Bonacci, 111 F.2d 412 (8th Cir. 1940).

7. Admissibility of evidence

Driving a motor vehicle down a steep hill, in the night-time, in a cloud of dust which lights fail to penetrate, is evidence of gross negligence. Kovar v. Beckius, 133 Neb. 487, 275 N.W. 670 (1937).

In action for damages for personal injuries sustained by guest in automobile, it was error to exclude from evidence testimony as to statements of defendant admitting negligence. McDaniel v. Farlow, 132 Neb. 273, 271 N.W. 905 (1937).

Statements of driver made a few minutes after injury were part of res gestae. Roh v. Opocensky, 125 Neb. 551, 251 N.W. 102 (1933).

8. Province of court and jury

In an action based on gross negligence under this section courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. Liston v. Bradshaw, 202 Neb. 272, 275 N.W.2d 59 (1979).

Where there is adequate proof of negligence in an action under the guest statute, a verdict should be directed for defendant only when the evidence fails to approach the level of negligence of a high degree. Thompson v. Edler, 138 Neb. 179, 292 N.W. 236 (1940).

Where the nature of the case and the clearly established relations of the parties involved necessitate, strict tests should be applied to evidence. Bonacci v. Cerra, 134 Neb. 588, 279 N.W. 314 (1938).

In passing on question of gross negligence, it is the province of reviewing court to take a series of facts and circumstances conceded or proved, and to declare the rights of the parties arising out of them. Clark v. Weatherly, 131 Neb. 816, 270 N.W. 316 (1936).

Question of gross negligence is for the jury. Swengil v. Martin, 125 Neb. 745, 252 N.W. 207 (1933).

Evidence held sufficient to create a differing of reasonable minds as to whether or not actions of driver constituted gross negligence; issue should therefore have been submitted to jury under sections 39-6,191 and 39-6,191.01. Arthur v. Arthur, 684 F.2d 558 (8th Cir. 1982).

Great care should be exercised by reviewing court in weighing evidence owing to fact that defendants are often willing to confess negligence. Ohio Casualty Co. of Hamilton, Ohio v. Swan, 89 F.2d 719 (8th Cir. 1937).

9. Constitutionality

Guest statute held constitutional. Cushing v. Bernhardt, 210 Neb. 272, 313 N.W.2d 688 (1981).

This section is constitutional; court's holding to that effect in Wagner v. Mines, 203 Neb. 143, 277 N.W.2d 672 (1979), followed; Kreifels v. Wurtele, 206 Neb. 491, 293 N.W.2d 407 (1980).

The guest statute does not violate the Constitution of Nebraska. Circo v. Sisson, 193 Neb. 704, 229 N.W.2d 50 (1975).

This statute does not violate the Equal Protection Clause of the Fourteenth Amendment nor any provision of the Constitution of Nebraska. Lubash v. Langemeier, 193 Neb. 371, 227 N.W.2d 405 (1975).

The guest statute is not unconstitutional. Botsch v. Reisdorff and Marohn, 193 Neb. 165, 226 N.W.2d 121 (1975).

Motor vehicle guest statute is not violative of equal protection clause. Stoehr v. Whipple, 405 F.Supp. 1249 (D. Neb. 1976).

10. Miscellaneous

For purposes of this statute, the affinial relationship with the blood kindred of one's ex-spouse does not continue if dissolution was granted before the motor vehicle accident occurred. Clinchard v. White, 223 Neb. 139, 388 N.W.2d 477 (1986).

A motorboat is not a motor vehicle within the meaning of the automobile guest statute. Reed v. Reed, 182 Neb. 136, 153 N.W.2d 356 (1967).

Two distinct grounds for recovery under this section are provided. Kaufman v. Tripple, 180 Neb. 593, 144 N.W.2d 201 (1966).

Addition to verdict for plaintiff that defendant was guilty of slight negligence made verdict contradictory and authorized granting of new trial. Olson v. Shellington, 162 Neb. 325, 75 N.W.2d 709 (1956).

Enforcement of motor vehicle laws of a sister state on a cause of action arising therein is not contrary to public policy of this state. Whitney v. Penrod, 149 Neb. 636, 32 N.W.2d 131 (1948).

Prior to statute, owner of private motor vehicle owed guest duty of exercising ordinary care in its operation and was liable in damages if his failure to exercise care was proximate cause of guest's injury. Moran v. Moran, 124 Neb. 379, 246 N.W. 711 (1933).

Contention that Nebraska guest statute denied equal protection would not be considered for first time on appeal. Gardner v. Meyers, 491 F.2d 1184 (8th Cir. 1974).

Federal court applied lex loci delecti conflicts rule on guest statute tort claim where accident occurred in foreign state. United States v. Neal, 443 F.Supp. 1307 (D. Neb. 1978).

25-21,238 Liability to guest passenger; applicable; when.

Section 25-21,237 shall apply only to injuries or deaths occurring on or after August 30, 1981.

Source: Laws 1981, LB 54, § 2; R.S.1943, (1988), § 39-6,191.01; Laws 1993, LB 370, § 6.

(z) LEASED TRUCK AND TRAILER LIABILITY

25-21,239 Leased trucks, truck-tractors, and trailers; liability of owner for damages.

The owner of any truck, truck-tractor, whether with or without trailer, or trailer, leased for a period of less than thirty days or leased for any period of time and used for commercial purposes, shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state, except that the owner shall not be jointly and severally liable if there is in effect at the time the claim arises a valid liability insurance policy with coverage limits in the minimum amount of one million dollars per occurrence which is available to compensate any person with a claim arising out of the operation or use of the leased truck, truck-tractor, or trailer. This section shall not limit or reduce the owner's liability for

his or her own acts or omissions which cause damage to any person or when the lessee is a related entity or by reason of any workers' compensation law.

Source: Laws 1957, c. 170, § 1, p. 591; R.R.S.1943, § 39-7,135; R.S. 1943, (1988), § 39-6,193; Laws 1993, LB 370, § 7; Laws 1997, LB 527, § 1.

A minivan used primarily as a passenger vehicle is not a truck under this section. Philpot v. Aguglia, 259 Neb. 573, 611 N.W.2d 93 (2000).

This section held inapplicable in workmen's compensation case arising from use of hoist, not the truck. Vangreen v. Interstate Machinery & Supply Co., 197 Neb. 29, 246 N.W.2d 652 (1976).

Section 39-6,193, imposing vicarious liability on owners-lessors of trucks is constitutional. Bridgeford v. U-Haul Co., 195 Neb. 308, 238 N.W.2d 443 (1976) (pursuant to Laws 1993, LB 370, section 7, language from section 37-6,193 was placed in section 25-21,239).

This section, imposing vicarious liability on owners-lessors of trucks for damages by lessees and operators of the leased trucks, is constitutional. Bridgeford v. U-Haul Co., 195 Neb. 308, 238 N.W.2d 443 (1976).

Section did not make lessee of trailer of lessor, and did not impute lessee's negligence to lessor under nonresident motor vehicle statute. Peterson v. U-Haul Co., 409 F.2d 1174 (8th Cir. 1969).

(aa) DIRECTORS AND OFFICERS OF INSURED FINANCIAL DEPOSITORY INSTITUTIONS

25-21,240 Claim or action for money damages; limitation.

No claim or action seeking to recover money damages shall be brought by the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or any other federal banking regulatory agency against any director or officer, including any former director or officer, of any insured financial depository institution as defined in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 unless such claim or action arises out of the gross negligence or willful or intentional misconduct of such director or officer during his or her term of office with such insured financial depository institution.

Source: Laws 1993, LB 253, § 1.

(bb) PUBLIC PETITION AND PARTICIPATION

25-21,241 Legislative findings and declarations.

The Legislature finds and declares that:

(1) It is the policy of the state that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this state must provide the utmost protection for the free exercise of these petition, speech, and association rights;

(2) Civil actions for damages have been filed against citizens and organizations of this state as a result of the valid exercise of their constitutional rights to petition, speech, and association. There has been a disturbing increase in such strategic lawsuits against public participation in government;

(3) The threat of strategic lawsuits against public participation, personal liability, and burdensome litigation costs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can

and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs; and

(4) It is in the public interest and it is the purpose of sections 25-21,241 to 25-21,246 to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speech, and association, to protect and encourage public participation in government to the maximum extent permitted by law, to establish an efficient process for identification and adjudication of strategic lawsuits against public participation, and to provide for costs, attorney's fees, and actual damages.

Source: Laws 1994, LB 665, § 1.

25-21,242 Terms, defined.

For purposes of sections 25-21,241 to 25-21,246:

(1) Action involving public petition and participation shall mean an action, claim, cross-claim, or counterclaim for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose the application or permission;

(2) Communication shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention, or other expression;

(3) Government body shall mean a city, a village, a political subdivision, a state agency, the state, the federal government, or a public authority, board, or commission; and

(4) Public applicant or permittee shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body or any person with an interest, connection, or affiliation with such person that is materially related to such application or permission.

Source: Laws 1994, LB 665, § 2.

25-21,243 Defendant in action involving public petition and participation; action authorized; costs, attorney's fees, and damages; authorized; waiver; section, how construed.

(1) A defendant in an action involving public petition and participation may maintain an action, claim, cross-claim, or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action. Costs and attorney's fees may be recovered upon a demonstration that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. Other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights.

(2) The right to bring an action, claim, cross-claim, or counterclaim under this section may be waived only if it is waived specifically.

(3) Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law or by statute, rule, or regulation.

Source: Laws 1994, LB 665, § 3.

25-21,244 Action involving public petition and participation; damages; standard of proof; section, how construed.

(1) In an action involving public petition and participation, the plaintiff may recover damages, including costs and attorney's fees, only if he or she, in addition to all other necessary elements, has established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, if the truth or falsity of such communication is material to the cause of action at issue.

(2) Nothing in this section shall be construed to limit any constitutional, statutory, or common-law protections of defendants to actions involving public petition and participation.

Source: Laws 1994, LB 665, § 4.

25-21,245 Action involving public petition and participation; motion to dismiss; when granted; duty to expedite.

A motion to dismiss based on a failure to state a cause of action shall be granted when the moving party demonstrates that the action, claim, cross-claim, or counterclaim subject to the motion is an action involving public petition and participation unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law. The court shall expedite and grant preference in the hearing of such motion.

Source: Laws 1994, LB 665, § 5.

25-21,246 Action involving public petition and participation; motion for summary judgment; when granted.

A motion for summary judgment shall be granted when the moving party has demonstrated that the action, claim, cross-claim, or counterclaim subject to the motion is an action involving public petition and participation unless the party responding to the motion demonstrates that the action, claim, cross-claim, or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification, or reversal of existing law. The court shall grant preference in the hearing of such motion.

Source: Laws 1994, LB 665, § 6.

(cc) HEALTH CARE PAYORS

25-21,247 Health care payor or employee; immunity from criminal or civil liability; when.

(1) For purposes of this section, health care payor shall include, but not be limited to:

(a) An insurer;

(b) A health maintenance organization;

(c) Medicare or medicaid;

(d) A legal entity which is self-insured and provides health care benefits for its employees; or

(e) A person responsible for administering the payment of health care expenses for another person or entity.

(2) Any health care payor or employee thereof who has reasonable cause to believe that there has been a violation of section 38-178 or 38-179 or a fraudulent insurance act described in the Insurance Fraud Act or section 28-631 may discuss or inquire of other health care payors about such violation or act. Any health care payor or employee so discussing or inquiring or responding to such an inquiry from another health care payor shall be immune from criminal penalty or from civil liability for slander, libel, defamation, or breach of the physician-patient privilege if the discussion, inquiry, or response is made in good faith without reckless disregard for the truth.

Source: Laws 1994, LB 1223, § 131; Laws 1995, LB 385, § 9; Laws 2007, LB463, § 1116.

Cross References

Insurance Fraud Act, see section 44-6601.

(dd) TERRORISTIC THREATS

25-21,248 Terroristic threats; action authorized.

Any individual, partnership, firm, limited liability company, corporation, company, society, or association, the state or any department, agency, or subdivision thereof, or any other public or private entity aggrieved by the actions of an individual convicted of a violation of section 28-311.01 shall have a cause of action for any loss or damage, including reasonable costs and attorney's fees, resulting from the underlying conduct which was the basis for the conviction.

Source: Laws 1995, LB 371, § 30.

(ee) EQUINE ACTIVITIES

25-21,249 Equine activities; legislative intent.

The Legislature recognizes that persons who participate in equine activities may incur injuries as a result of the risks involved in such activities. The Legislature also finds that the state and its citizens derive numerous economic and personal benefits from such activities. It is, therefor, the intent of the Legislature to encourage equine activities by providing reasonable standards for those involved in such activities.

Source: Laws 1997, LB 153, § 1.

25-21,250 Equine activities; terms, defined.

For purposes of sections 25-21,249 to 25-21,253:

(1) Engages in an equine activity means riding, training, assisting in medical treatment of, driving, or being a passenger upon an equine, whether mounted or unmounted, or being a passenger upon an equine-drawn vehicle, or any

person assisting a participant or assisting show management. Engages in an equine activity does not include being a spectator at an equine activity except in cases when the spectator places himself or herself in an unauthorized area;

(2) Equine means a horse, pony, donkey, mule, hinny, or llama;

(3) Equine activity means:

(a) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter, and jumper horse shows, grand-prix jumping, three-day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding, western games, and hunting;

(b) Equine training or teaching activities or both;

(c) Boarding equines;

(d) Riding, inspecting, or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine;

(e) Rides, trips, hunts, or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor; and

(f) Placing or replacing horseshoes on an equine;

(4) Equine activity sponsor means an individual, group, club, partnership, limited liability company, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for an equine activity, including, but not limited to, pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college-sponsored classes, programs, and activities, therapeutic riding programs, and operators, instructors, and promoters of equine facilities, including, but not limited to, stables, clubhouses, ponyride strings, fairs, and arenas at which the equine activity is held;

(5) Equine professional means a person engaged for compensation:

(a) In instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine; or

(b) In renting equipment or tack to a participant;

(6) Inherent risks of equine activities means those dangers or conditions which are an integral part of equine activities, including, but not limited to:

(a) The propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around them;

(b) The unpredictability of an equine's reaction to such things as sounds, sudden movement, and unfamiliar objects, persons, or other animals;

(c) Certain hazards such as surface and subsurface conditions;

(d) Collisions with other equines or objects; and

(e) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the equine or not acting within his or her ability; and

(7) Participant means any person, whether amateur or professional, who engages in an equine activity whether or not a fee is paid to participate in the equine activity.

Source: Laws 1997, LB 153, § 2.

25-21,251 Equine activities; liability and claims; limitations.

Except as provided in section 25-21,252, (1) an equine activity sponsor, an equine professional, or any other person, which includes a corporation, limited liability company, or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities and (2) no participant nor participant's representative shall make any claim against, maintain an action against, or recover from an equine activity sponsor, an equine professional, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of equine activities.

Source: Laws 1997, LB 153, § 3.

25-21,252 Equine activities; applicability of other laws; liability enumerated.

(1) Sections 25-21,249 to 25-21,253 shall not apply to the horseracing industry as regulated in sections 2-1201 to 2-1229.

(2) Nothing in section 25-21,251 prevents or limits the liability of an equine activity sponsor, an equine professional, or any other person if the equine activity sponsor, equine professional, or person:

(a) Provided the equipment or tack and the equipment or tack caused the injury because the equine activity sponsor or professional failed to reasonably and prudently inspect or maintain the equipment or tack;

(b) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity and determine the ability of the participant to safely manage the particular equine based on the participant's representations of his or her ability;

(c) Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries or death because of a dangerous latent condition which was known or should have been known to the equine activity sponsor, equine professional, or person and for which warning signs were not conspicuously posted;

(d) Commits an act or omission which a reasonable, prudent person would not have done or omitted under the same or similar circumstances or which constitutes willful or wanton disregard for the safety of the participant and that act or omission was a proximate cause of the injury; or

(e) Intentionally injures the participant.

(3) Nothing in section 25-21,251 prevents or limits the liability of an equine activity sponsor or an equine professional under product liability laws.

Source: Laws 1997, LB 153, § 4.

25-21,253 Equine activities; signs and contracts; requirements.

(1) Every equine professional shall post and maintain signs which contain the following warning notice:

WARNING

Under Nebraska Law, an equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to sections 25-21,249 to 25-21,253.

The warning notice signs shall be placed in a clearly visible location on or near stables, corrals, or arenas where the equine professional conducts equine activities if such stables, corrals, or arenas are owned, leased, rented, managed, or controlled by the equine professional. The placement of warning notice signs shall be such that they may be readily seen by participants in equine activities. The warning notice signs shall have black letters with each letter of the word ''WARNING'' a minimum of three inches in height and the rest of the letters a minimum of one inch in height.

(2) Every written contract entered into by an equine professional for providing professional services, instruction, or rental of equipment or tack or an equine to a participant, whether or not the contract involves equine activities on or off the location or site of the equine professional's business, shall contain in clearly readable print the warning notice specified in subsection (1) of this section.

Source: Laws 1997, LB 153, § 5; Laws 2002, LB 684, § 1.

(ff) ENVIRONMENTAL AUDITS

25-21,254 Legislative intent.

The Legislature finds and declares that protection of the environment is enhanced by the public's voluntary compliance with environmental requirements and the local counterpart or extension of such requirements and that the public will benefit from incentives to identify and remedy environmental compliance issues. The Legislature further declares that it is in the public interest to encourage such activities by assuring limited protection of environmental audit findings and of providing fair treatment of those who report environmental audit findings to regulatory authorities.

Source: Laws 1998, LB 395, § 1.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,255 Terms, defined.

For the purposes of sections 25-21,254 to 25-21,264:

(1) Environmental audit means any document dated and labeled as a confidential environmental audit and prepared pursuant to a specific written directive to review compliance with an environmental requirement or requirements, including any report, finding, communication, or opinion or any draft of a report, finding, communication, or opinion, related to and prepared as a result of a voluntary self-evaluation that is done in good faith;

(2) Environmental requirement means an environmental protection requirement contained in (a) the Environmental Protection Act, the Integrated Solid Waste Management Act, the Nebraska Chemigation Act, the Pesticide Act, the Petroleum Products and Hazardous Substances Storage and Handling Act, sections 81-1575 to 81-1577, or federal law, a rule or regulation adopted and promulgated pursuant to such acts, sections, or laws, a permit or order issued pursuant to such acts, sections, or laws, or an agreement entered into or court order issued pursuant to any of the foregoing or (b) an ordinance or other legally binding requirement of a local governmental unit under authority granted by state or federal law relating to environmental protection;

(3) Person means any individual, partnership, limited liability company, association, public or private corporation, trustee, receiver, assignee, agent, municipality, other governmental subdivision, public agency, other legal entity, or any officer or governing or managing body of any public or private corporation, municipality, governmental subdivision, public agency, or other legal entity; and

(4) Voluntary self-evaluation means a self-initiated assessment, audit, or review, not otherwise expressly required by environmental requirements, that is performed by any person for himself, herself, or itself, either by an employee of such person assigned the responsibility of performing such assessment, audit, or review or by a consultant engaged by such person specifically for the purpose of performing such assessment, audit, or review to determine whether such person is in compliance with environmental requirements.

Source: Laws 1998, LB 395, § 2.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.
Environmental Protection Act, see section 81-1532.
Integrated Solid Waste Management Act, see section 13-2001.
Nebraska Chemigation Act, see section 46-1101.
Pesticide Act, see section 2-2622.
Petroleum Products and Hazardous Substances Storage and Handling Act, see section 81-15,117.

25-21,256 Environmental audit; use as evidence prohibited; exceptions.

(1) An environmental audit prepared under sections 25-21,254 to 25-21,264 is not admissible as evidence in any civil or administrative proceeding or enforcement proceedings under local ordinances, except (a) as provided in sections 25-21,257 to 25-21,259, (b) an agency having regulatory authority may obtain and review such audit for the limited purposes of determining if the audit exists and if any exceptions to the liability provisions of sections 25-21,254 to 25-21,264 exist with respect to the audit, (c) with respect to the generation, storage, transport, or disposal of radioactive material, low-level radioactive waste, and high-level radioactive waste as defined in section 71-3503, and (d) no protections are given under this section with respect to violations which would likely result or have resulted in a significant adverse impact on the public health or the environment.

(2) Neither any person who conducted the audit nor any person to whom the audit results are disclosed can be compelled to testify regarding any matter which was the subject of the audit and which is addressed in the environmental audit.

Source: Laws 1998, LB 395, § 3.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,257 Environmental audit; use as evidence; waiver.

Except as provided in section 25-21,259, the person for whom the environmental audit was prepared, whether the audit was prepared by the person, by an employee of the person, or by a consultant hired by the person, may waive the protection provided in section 25-21,256 only by an express waiver.

Source: Laws 1998, LB 395, § 4.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,258 Environmental audit; use as evidence; exceptions.

The protection created by section 25-21,256 does not apply to:

(1) Documents or information required to be developed, maintained, or reported pursuant to any environmental requirements;

(2) Documents or other information required to be available or furnished to a regulatory agency pursuant to any environmental requirements or any other law;

(3) Documents or information maintained or developed relating to grants or other financial assistance sponsored by the state or federal government;

(4) Information obtained by a regulatory agency through observation, inspection, sampling, or monitoring pursuant to an environmental requirement; or

(5) Information obtained through any source independent of the environmental audit.

Source: Laws 1998, LB 395, § 6.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,259 Environmental audit; admissible as evidence; when.

(1) An environmental audit is admissible as evidence in any civil or administrative proceeding or enforcement proceedings under local ordinances if a court of record determines that:

(a)(i) The environmental audit shows evidence that the person for which the environmental audit was prepared is not or was not in compliance with an environmental requirement; and

(ii) The person did not initiate, after the audit, appropriate efforts to achieve compliance with the environmental requirement or complete in good faith any necessary permit application promptly after the noncompliance with the environmental requirement was discovered and, as a result, the person did not or will not achieve compliance with the environmental requirement or complete the necessary permit application within a reasonable amount of time; or

(b) The protection provided in section 25-21,256 is being asserted for a fraudulent purpose or the environmental audit was prepared in order to avoid disclosure of information in an investigative, administrative, or judicial proceeding that was underway, that was imminent, or for which the person had been provided written notification that an investigation into a specific violation had been initiated; or

(c) The information contained in the environmental audit shows (i) violations which would likely result in or have resulted in a significant adverse impact on the public health or the environment or (ii) water contamination.

(2) For the purposes of subdivision (1)(a) of this section, if the evidence shows noncompliance with more than one environmental requirement by a person, the person may demonstrate to the court that appropriate efforts to achieve compliance were or are being taken by instituting a comprehensive program

that establishes a phased schedule of actions to be taken to bring the person into compliance with all of such environmental requirements.

Source: Laws 1998, LB 395, § 5.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,260 Voluntary self-evaluation; disclose possible violations.

A person performing a voluntary self-evaluation may disclose in writing a possible violation of an environmental requirement to an agency having regulatory authority showing:

(1) A description of the possible violation;

(2) The date of discovery of the possible violation and, if known, the date the possible violation occurred; and

(3) Actions taken to correct the possible violation and, if applicable, a schedule to achieve compliance.

Source: Laws 1998, LB 395, § 7.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,261 Voluntary self-evaluation; disclosure; effect; exceptions.

(1) If disclosure is made pursuant to section 25-21,260 and the agency having regulatory authority has approved the action taken or the schedule to achieve compliance, as appropriate, which approval shall not be unreasonably withheld, the person is not liable for civil penalties unless (a) the disclosure was not made within sixty days after knowledge of the information disclosed was obtained by the person and was not disclosed to the agency having regulatory authority prior to the agency having knowledge of the violation contained in the disclosure, (b) the disclosure did not arise out of a voluntary self-evaluation, (c) the person making the disclosure did not initiate the appropriate efforts to achieve compliance, did not pursue compliance with due diligence, and did not correct the noncompliance as soon as reasonably practicable after discovery of the violation during the course of the environmental audit, (d) the person making the disclosure did not cooperate with the agency having regulatory authority with regard to the violation disclosed regarding investigation of the issues identified in the disclosure, (e) the violation was due to a lack of good faith efforts to understand or comply with environmental requirements, (f) the violation was knowing and willful, or (g) the violation would likely result or has resulted in significant adverse impact on the public health or the environment. If the noncompliance under subdivision (c) of this subsection is the failure to obtain a permit, appropriate efforts to correct the noncompliance may be demonstrated by the submission of a complete permit application within a reasonable time and a permit for such activities is subsequently issued by the agency.

(2) This section does not apply to violations of the terms of any agreement entered into or court order or administrative order issued pursuant to an environmental requirement, including, but not limited to, consent decrees or plea agreements.

(3) This section does not preclude the agency having regulatory authority from seeking the recovery of any economic benefit resulting from noncompliance with an environmental requirement.

(4) For purposes of this section, (a) if a person is required, under an environmental requirement, under a specific permit condition, or under an order issued by the agency, to make a disclosure to an agency having regulatory authority with regard to the violation disclosed, the disclosure is not voluntary with respect to that agency, and (b) repeat violations or closely related additional violations within five years after a previous violation shall be prima facie evidence of a lack of good faith efforts to comply with environmental requirements.

Source: Laws 1998, LB 395, § 8.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,262 Regulatory authority; sections; how construed.

Except as specifically provided in sections 25-21,254 to 25-21,261, such sections do not affect the regulatory authority that any department or agency has to require any action associated with the information disclosed.

Source: Laws 1998, LB 395, § 9.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,263 Privileges; sections; how construed.

Sections 25-21,254 to 25-21,262 do not limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.

Source: Laws 1998, LB 395, § 10.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

25-21,264 Venue.

The district court of the county in which the facility is located or, if all parties agree, the district court of Lancaster County shall have jurisdiction of actions brought under section 25-21,259.

Source: Laws 1998, LB 395, § 11.

Cross References

Applicability to Residential Lead-Based Paint Professions Practice Act, see section 71-6331.01.

(gg) COMPUTER DATE FAILURES

25-21,265 Terms, defined.

For purposes of sections 25-21,265 to 25-21,269:

(1) Complying financial institution defendant means a federally insured financial institution that has substantially complied with or received a satisfactory rating with regard to examinations, guidelines, rules, or regulations of applicable federal regulatory agencies to protect against a computer date failure;

(2) Complying public defendant means the state or a political subdivision of the state that has made reasonable efforts to protect its computer systems, programs, or software from a computer date failure; and

(3) Computer date failure means the present or future failure or inability of a computer, computer network, computer program, computer software, computer chip, embedded chip, or other information system to accurately process, including, but not limited to, calculating, comparing, interpreting, generating, receiving, or sequencing, date or time data in, from, into, and between the years 1999 and 2000 and beyond, the twentieth and twenty-first centuries, and leap-year calculations.

Source: Laws 1999, LB 661, § 1.

25-21,266 Damages; limitation.

Damages recoverable in a civil action against a complying public defendant or a complying financial institution defendant which result from a computer date failure shall only be based on a contract to which the plaintiff is a party.

Source: Laws 1999, LB 661, § 2.

25-21,267 Class action against complying public defendant; prohibited.

No action shall be brought under section 25-319 against a complying public defendant for damages resulting from a computer date failure.

Source: Laws 1999, LB 661, § 3.

25-21,268 Class action against complying financial institution; restrictions.

No action shall be brought under section 25-319 against a complying financial institution defendant for damages resulting from a computer date failure within one hundred eighty days after the cause of action accrues.

Source: Laws 1999, LB 661, § 4.

25-21,269 Applicability of sections.

(1) Sections 25-21,265 to 25-21,269 do not apply to any cause of action for personal injuries or wrongful death.

(2) Sections 25-21,265 to 25-21,269 do not apply to any cause of action accruing on or after January 31, 2002.

Source: Laws 1999, LB 661, § 5.

(hh) CHANGE OF NAME

25-21,270 Change of name; authority of district court.

The district court shall have authority to change the names of persons, towns, villages and cities within this state.

Source: Laws 1871, p. 62; R.S.1913, § 5315; C.S.1922, § 4608; C.S. 1929, § 61-101; R.S.1943, § 61-101; R.S.1943, (1996), § 61-101.

Whether a minor child's surname may be changed depends on, and is determined by, the best interests of the child. Factors to be considered are (1) the misconduct by one of the child's parents, (2) a parent's failure to support the child, (3) parental failure to maintain contact with the child, (4) the length of time that a surname has been used for or by the child, and (5) whether the child's surname is different from the surname of the child's custodial parent. Additionally, a court may consider the child's reasonable preference for a surname; the effect of the name change on the child's relationship with each parent;

community respect associated with the surname; the difficulties, harassment, or embarrassment associated with either the present or proposed surname; and the identification of the child as part of the family unit. In re Change of Name of Andrews, 235 Neb. 170, 454 N.W.2d 488 (1990).

Change of name of minor child granted only when the substantial welfare of the child requires the change. Spatz v. Spatz, 199 Neb. 332, 258 N.W.2d 814 (1977).

Decree is not a matter of right, but of judicial discretion, and evidence must be produced that there is sufficient and reasonable cause for change of name. In re Taminosian, 97 Neb. 514, 150 N.W. 824 (1915).

25-21,271 Change of name; persons; procedure.

(1) Any person desiring to change his or her name may file a petition in the district court of the county in which such person may be a resident, setting forth (a) that the petitioner has been a bona fide citizen of such county for at least one year prior to the filing of the petition, (b) the cause for which the change of petitioner's name is sought, and (c) the name asked for.

(2) Notice of the filing of the petition shall be published in a newspaper in the county, and if no newspaper is printed in the county, then in a newspaper of general circulation therein. The notice shall be published (a) once a week for four consecutive weeks if the petitioner is nineteen years of age or older at the time the action is filed and (b) once a week for two consecutive weeks if the petitioner is under nineteen years of age at the time the action is filed. In an action involving a petitioner under nineteen years of age who has a noncustodial parent, notice of the filing of the petition shall be sent by certified mail within five days after publication to the noncustodial parent at the address provided to the clerk of the district court pursuant to subsection (1) of section 42-364.13 for the noncustodial parent if he or she has provided an address. The clerk of the district court shall provide the petitioner with the address upon request.

(3) It shall be the duty of the district court, upon being duly satisfied by proof in open court of the truth of the allegations set forth in the petition, that there exists proper and reasonable cause for changing the name of the petitioner, and that notice of the filing of the petition has been given as required by this section, to order and direct a change of name of such petitioner and that an order for the purpose be made in the journals of the court.

Source: Laws 1871, p. 62; R.S.1913, § 5316; C.S.1922, § 4609; C.S. 1929, § 61-102; R.S.1943, § 61-102; Laws 1963, c. 367, § 1, p. 1184; Laws 1994, LB 892, § 1; Laws 1995, LB 161, § 1; R.S.1943, (1996), § 61-102.

The mere fact that a petitioner is an inmate is not a substantial reason for denying a petition for name change. In re Change of Name of Picollo, 12 Neb. App. 174, 668 N.W.2d 712 (2003).

When considering a petition for name change, a district court must make findings sufficiently definitive that if an appeal is taken, the appellate court can determine whether or not the request for a name change was arbitrarily denied. In re Change of Name of Picollo, 12 Neb. App. 174, 668 N.W.2d 712 (2003).

25-21,272 Change of name; town, village, or city; procedure.

(1) Whenever it may be desirable to change the name of any town, village, or city in any county of the state, a petition for that purpose may, in like manner, be filed in the district court of such county, signed by a majority of the legal voters of such town, village, or city, setting forth the cause why such change is desirable and the name desired to be substituted.

(2) Notice of the filing of the petition shall be published once a week for four consecutive weeks in a newspaper in the county, and if no newspaper is printed in the county, then in a newspaper of general circulation therein.

(3) The court, upon being satisfied by proof that the prayer of the petitioners is reasonable and just, that notice as required in this section has been given,

that two-thirds of the legal voters of such town, village, or city desire the change, and that there is no other town, village, or city in the state of the name prayed for, may order the change prayed for in such petition.

Source: Laws 1871, p. 62; R.S.1913, § 5317; C.S.1922, § 4610; C.S. 1929, § 61-103; R.S.1943, § 61-103; Laws 1995, LB 161, § 2; R.S.1943, (1996), § 61-103.

25-21,273 Change of name; effect; costs; how taxed.

All proceedings under sections 25-21,270 to 25-21,272 shall be at the cost of the petitioner or petitioners, for which fee-bill or execution may issue as in civil cases. Any change of names under the provisions of said sections, shall not in any manner affect or alter any right of action, legal process or property.

Source: Laws 1871, p. 63; R.S.1913, § 5318; C.S.1922, § 4611; C.S. 1929, § 61-104; R.S.1943, § 61-104; R.S.1943, (1996), § 61-104.

(ii) MOTOR VEHICLE COLLISION WITH DOMESTIC ANIMAL

25-21,274 Motor vehicle collision with domestic animal; principles applied.

(1) In any civil action brought by the owner, operator, or occupant of a motor vehicle or by his or her personal representative or assignee or by the owner of the livestock for damages resulting from collision of a motor vehicle with any domestic animal or animals on a public highway, the following shall apply:

(a) The plaintiff's burden of proving his or her case shall not shift at any time to the defendant;

(b) The fact of escaped livestock is not, by itself, sufficient to raise an inference of negligence against the defendant; and

(c) The standard of care shall be according to principles of ordinary negligence and shall not be strict or absolute liability.

(2) For purposes of this section, highway and motor vehicle have the same meaning as in section 39-101.

Source: Laws 2001, LB 781, § 1.

(jj) DIVERSION OF UTILITY SERVICES

25-21,275 Diversion of utility services; terms, defined.

For purposes of sections 25-21,275 to 25-21,278, unless the context otherwise requires:

(1) Bypassing means the act of attaching, connecting, or in any manner affixing any wire, cord, socket, motor, pipe, or other instrument, device, or contrivance to the utility supply system or any part of the system in such a manner as to transmit, supply, or use any utility service without passing through an authorized meter or other device provided for measuring, registering, determining, or limiting the amount of electricity, gas, or water consumed. Bypassing also means the act of employing any means to obtain the use or benefit of electricity, gas, or water without paying for the use at the rate established by the supplier of such utilities;

(2) Customer means the person responsible for payment for utility services for the premises and includes employees and agents of the customer;

(3) Person means any individual, firm, partnership, limited liability company, corporation, company, association, joint-stock association, and other legal entity;

(4) Tampering means the act of damaging, altering, adjusting, or in any manner interfering with or obstructing the action or operation of any meter or other device provided for measuring, registering, determining, or limiting the amount of electricity, gas, or water consumed;

(5) Unauthorized metering means the act of removing, moving, installing, connecting, reconnecting, or disconnecting any meter or metering device for utility service by a person other than an authorized employee or agent of such utility;

(6) Utility means any person or entity lawfully operating in whole or in part for the purpose of supplying electricity, gas, water, including steam, or any combination thereof, to the public or to any person;

(7) Utility service means the provision of electricity, gas, steam, water, or any other service or commodity furnished by the utility for compensation; and

(8) Utility supply system means and includes all wires, conduits, pipes, cords, sockets, motors, meters, instruments, load control equipment, and other devices used by the utility for the purpose of providing utility services.

Source: Laws 1983, LB 350, § 1; Laws 1993, LB 121, § 551; R.S.1943, (1999), § 86-331.01; Laws 2002, LB 1105, § 421.

25-21,276 Diversion of utility services; civil actions; recovery authorized.

(1) A utility may bring a civil action for damages against any person who commits, authorizes, solicits, aids, abets, or attempts (a) bypassing, (b) tampering, or (c) unauthorized metering when such act results in damages to the utility. A utility may bring a civil action for damages pursuant to this section against any person receiving the benefit of utility service through means of bypassing, tampering, or unauthorized metering.

(2) In any civil action brought pursuant to this section, the utility shall be entitled, upon proof of willful or intentional bypassing, tampering, or unauthorized metering, to recover as damages:

(a) The amount of actual damage or loss if the amount of the damage or loss is susceptible of reasonable calculation; or

(b) Liquidated damages of seven hundred fifty dollars if the amount of actual damage or loss is not susceptible of reasonable calculation.

In addition to damage or loss under subdivision (a) or (b) of this subsection, the utility may recover all reasonable expenses and costs incurred on account of the bypassing, tampering, or unauthorized metering, including, but not limited to, disconnection, reconnection, service calls, equipment, costs of the suit, and reasonable attorneys' fees in cases within the scope of section 25-1801.

Source: Laws 1983, LB 350, § 2; R.S.1943, (1999), § 86-331.02; Laws 2002, LB 1105, § 422.

25-21,277 Diversion of utility services; rebuttable presumption; when.

(1) There shall be a rebuttable presumption that a tenant or occupant at any premises where bypassing, tampering, or unauthorized metering is proven to

exist caused or had knowledge of such bypassing, tampering, or unauthorized metering if the tenant or occupant (a) had access to the part of the utility supply system on the premises where the bypassing, tampering, or unauthorized metering is proven to exist and (b) was responsible or partially responsible for payment, either directly or indirectly, to the utility or to any other person for utility services to the premises.

(2) There shall be a rebuttable presumption that a customer at any premises where bypassing, tampering, or unauthorized metering is proven to exist caused or had knowledge of such bypassing, tampering, or unauthorized metering if the customer controlled access to the part of the utility supply system on the premises where the bypassing, tampering, or unauthorized metering was proven to exist.

Source: Laws 1983, LB 350, § 3; R.S.1943, (1999), § 86-331.03; Laws 2002, LB 1105, § 423.

25-21,278 Diversion of utility services; additional remedies.

The remedies provided by sections 25-21,275 to 25-21,278 shall be deemed to be supplemental and additional to powers conferred by existing laws. The remedies provided in sections 25-21,275 to 25-21,278 are in addition to and not in limitation of any other civil or criminal statutory or common-law remedies.

Source: Laws 1983, LB 350, § 4; R.S.1943, (1999), § 86-331.04; Laws 2002, LB 1105, § 424.

Cross References

Criminal penalties, see sections 28-515.01, 28-515.02, 28-1311, 70-310, and 76-2325.01.
One-Call Notification System Act, civil enforcement, see section 76-2301.

(kk) CRIME VICTIM'S REPARATIONS AND ASSISTANCE

25-21,279 Action to seek injunction; authorized.

Any victim as defined in section 29-119 may pursue a civil action to seek an injunction to enforce the Nebraska Crime Victim's Reparations Act and sections 81-1843 to 81-1851.

Source: Laws 2004, LB 270, § 2.

Cross References

Nebraska Crime Victim's Reparations Act, see section 81-1841.

(ll) EMERGENCY RESPONSE TO ASTHMA OR ALLERGIC REACTIONS

25-21,280 School, educational service unit, early childhood education program, school nurse, medication aide, and nonmedical staff person; immunity; when.

(1) Any person employed by a school approved or accredited by the State Department of Education, employed by an educational service unit and working in a school approved or accredited by the department, or employed by an early childhood education program approved by the department who serves as a school nurse or medication aide or who has been designated and trained by the school, educational service unit, or program as a nonmedical staff person to implement the emergency response to life-threatening asthma or systemic allergic reactions protocols adopted by the school, educational service unit, or

program shall be immune from civil liability for any act or omission in rendering emergency care for a person experiencing a potentially life-threatening asthma or allergic reaction event on school grounds, in a vehicle being used for school purposes, in a vehicle being used for educational service unit purposes, at a school-sponsored activity or athletic event, at a facility used by the early childhood education program, in a vehicle being used for early childhood education program purposes, or at an activity sponsored by the early childhood education program which results in damage or injury unless such damage or injury was caused by the willful or wanton act or omission of such employee.

(2) The individual immunity granted by subsection (1) of this section shall not extend to the school district, educational service unit, or early childhood education program and shall not extend to any act or omission of such employee which results in damage or injury if the damage or injury is caused by such employee while impaired by alcohol or any controlled substance enumerated in section 28-405.

(3) Any school nurse, such nurse's designee, or other designated adult described in section 79-224 shall be immune from civil liability for any act or omission described in such section which results in damage or injury unless such damage or injury was caused by the willful or wanton act or omission of such school nurse, nurse's designee, or designated adult.

Source: Laws 2004, LB 868, § 2; Laws 2005, LB 361, § 30; Laws 2006, LB 1148, § 2.

(mm) ANHYDROUS AMMONIA

25-21,281 Tampering with anhydrous ammonia or anhydrous ammonia equipment; effect on liability.

(1) Any person who owns, maintains, or installs anhydrous ammonia equipment, uses anhydrous ammonia for any lawful purpose, sells anhydrous ammonia for any lawful purposes, or transports anhydrous ammonia in a manner prescribed by law shall not be liable to any person who tampers with, or assists in tampering with, such anhydrous ammonia, or such anhydrous ammonia equipment, for personal injury, wrongful death, or any other economic or noneconomic damages arising out of such tampering, unless such liability is a result of the willful, wanton, reckless, or intentional acts or omissions of such person.

(2) For purposes of this section:

(a) Anhydrous ammonia equipment means any equipment used in the application of anhydrous ammonia for agricultural purposes that meets all applicable safety requirements established by state and federal statutes and regulations or any container or storage facility used to store anhydrous ammonia in a manner that meets all applicable safety requirements established by state and federal statutes and regulations; and

(b) Tampering with anhydrous ammonia means intentionally, knowingly, and unlawfully gaining access or attempting to gain access to anhydrous ammonia or anhydrous ammonia equipment.

Source: Laws 2004, LB 1207, § 9.

(nn) FIRE CONTROL OR RESCUE EQUIPMENT DONATIONS

25-21,282 Immunity from liability; exceptions.

(1) A person who donates fire control or rescue equipment to a fire department or a political subdivision for use by its fire department shall not be liable for civil damages for personal injuries, property damage or loss, or death caused by the fire control or rescue equipment after donation, except for injury, damage, loss, or death caused by the donor's intentional or reckless conduct or gross negligence.

(2) Subsection (1) of this section shall not apply to a vendor or manufacturer of fire control or rescue equipment.

(3) For purposes of this section:

(a) Fire control or rescue equipment means any vehicle, equipment, tool, communications equipment, or protective gear used in firefighting, rescue services, or emergency medical services;

(b) Fire department means any paid or volunteer fire department, company, association, or organization or first-aid, rescue, or emergency squad serving a city, village, county, township, or rural or suburban fire protection district or any other public or private fire department; and

(c) Person means any individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, fire department, public corporation, other legal or commercial entity, or governmental subdivision, agency, or instrumentality.

Source: Laws 2007, LB160, § 1.

ARTICLE 22

GENERAL PROVISIONS

(a) PROCESS

(b) CLERKS OF COURTS; DUTIES

(c) SHERIFF; DUTIES

(a) PROCESS

25-2201 Process; style.

The style of all processes shall be ''The State of Nebraska, ... county.'' It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it issued.

Source: R.S.1867, Code § 880, p. 547; R.S.1913, § 8549; C.S.1922, § 9500; C.S.1929, § 20-2201.

Cross References

Constitutional requirements, see Article V, section 24, Constitution of Nebraska.

Summons with venue laid in county where action was brought, but directed to sheriff of another county for service upon defendant there, was proper. Alden Merc. Co. v. Randall, 102 Neb. 738, 169 N.W. 433 (1918).

Presumption exists that original summons was issued under seal. Herold v. Coates, 88 Neb. 487, 129 N.W. 998 (1911).

Legislature intended to establish a uniform rule with respect to legal procedure. Motion for new trial may be filed on Memorial Day. Tully v. Grand Island Tel. Co., 87 Neb. 822, 128 N.W. 508 (1910).

Writ of mandamus must be issued by clerk under seal of court. State ex rel. Hansen v. Carrico, 86 Neb. 448, 125 N.W. 1110 (1910).

Process headed, ''The State of Nebraska, County of Gage, to the sheriff of said county,'' was proper. Hoyt v. Little, 55 Neb. 71, 75 N.W. 56 (1898).

Process for violation of city ordinance should run in the name of ''The People of the State of Nebraska'' and not in name of city. City of Brownville v. Cook, 4 Neb. 101 (1875).

25-2202 Service when sheriff is a party or is interested.

An order for a provisional remedy or any other process, in an action wherein the sheriff is a party, or is interested, shall be directed to the coroner. If both these officers are interested, the process shall be directed to and executed by a person appointed by the court or judge.

Source: R.S.1867, Code § 881, p. 547; R.S.1913, § 8550; C.S.1922, § 9501; C.S.1929, § 20-2202.

Where sheriff is party, private person may be deputized to serve process. Mysenburg v. Leisure, 63 Neb. 239, 88 N.W. 478 (1901).

25-2203 Process; special process server; return; appointed on motion; fees.

The court or judge, for good cause, may appoint a person, corporation, partnership, or limited liability company to serve a particular process or order which person or entity shall have the same power to execute it which the sheriff has. The person or entity may be appointed on the motion of the party obtaining the process or order, and the return must be verified by affidavit. Such appointment may be made in the form of a general order of the court for the purpose of service of process or orders which may be sought by the movant. The person or entity shall be entitled to the fees allowed to the sheriff for similar services.

Source: R.S.1867, Code § 882, p. 547; R.S.1913, § 8551; C.S.1922, § 9502; C.S.1929, § 20-2203; R.S.1943, § 25-2203; Laws 1994, LB 1224, § 38.

Justice of the peace may deputize a private person to serve a summons. Mysenburg v. Leisure, 63 Neb. 239, 88 N.W. 478 (1901).

Constable cannot deputize person to serve process; county judge or justice may. Gilbert v. Brown, 9 Neb. 90, 2 N.W. 376 (1879).

(b) CLERKS OF COURTS; DUTIES

25-2204 Clerks of courts; writs and orders; issuance; praecipes.

All writs and orders for provisional remedies and process of every kind, shall be issued by the clerks of the several courts. Before they shall be issued a praecipe shall be filed with the clerk, demanding the same; which praecipe shall be for the direction of the clerk, and not material to the papers in the case after the issuing of such writ or process.

Source: R.S.1867, Code § 883, p. 547; R.S.1913, § 8552; C.S.1922, § 9503; C.S.1929, § 20-2204.

In compensation case, where claimant filed notice of appeal with compensation commissioner and filed petition on appeal in district court, right of review attached, it became duty of clerk to issue summons without praecipe being filed. McIntosh v. Standard Oil Co., 121 Neb. 92, 236 N.W. 152 (1931).

Writ of mandamus issued by judge is void. State ex rel. Hansen v. Carrico, 86 Neb. 448, 125 N.W. 1110 (1910).

Clerk of district court may issue writ of commitment after sentence without special directions by court or judge. Rhodes v. Meyer, 225 F.Supp. 80 (D. Neb. 1963).

25-2205 Papers; filing; preservation.

It is the duty of the clerk of each of the courts to file together and carefully preserve in his office all papers delivered to him for that purpose in every action or special proceeding.

Source: R.S.1867, Code § 884, p. 547; R.S.1913, § 8553; C.S.1922, § 9504; C.S.1929, § 20-2205.

Papers are filed in office of clerk of district court only when deposited with the proper officer in his office and received by him in his official capacity. Jolliffe v. City of North Platte, 139 Neb. 431, 297 N.W. 666 (1941).

25-2206 Papers; endorsement.

The clerk of the court shall endorse upon every paper filed with him, the day of filing it; and upon every order for a provisional remedy, and upon every undertaking given under the same, the day of its return to his office.

Source: R.S.1867, Code § 885, p. 547; R.S.1913, § 8554; C.S.1922, § 9505; C.S.1929, § 20-2206.

25-2207 Record of service of summons; entry as evidence.

The clerk of the court shall, upon the return of every summons served, enter upon the docket the name of the defendant or defendants summoned, and the day of the service upon each one. The entry shall be evidence of the service of the summons in case of the loss thereof.

Source: R.S.1867, Code § 886, p. 548; R.S.1913, § 8555; C.S.1922, § 9506; C.S.1929, § 20-2207.

25-2208 Judicial records; duty to keep.

The clerk of the court shall keep the records, books and papers appertaining to the court, and record its proceedings.

Source: R.S.1867, Code § 887, p. 548; R.S.1913, § 8556; C.S.1922, § 9507; C.S.1929, § 20-2208.

Section is mandatory and clerk must make complete record, though fees and costs not tendered. State v. Several Parcels of Land, 82 Neb. 51, 117 N.W. 450 (1908).

Clerk is liable to county for expense of replacing books lost through his negligence. Toncray v. Dodge County, 33 Neb. 802, 51 N.W. 235 (1892).

25-2209 Clerk of district court; required records enumerated; compilation and filing; methods authorized.

The clerk of the district court shall keep records to be called the appearance docket, the trial docket, the journal, the complete record, the execution docket, the fee book, the general index, and the judgment record. Such records may be compiled, filed, and maintained on a computer system. Effective not later than October 1, 1992, provision for dockets and records of the district courts shall be established by rule of the Supreme Court. The journal and complete record may be compiled and filed on microfilm. The recording of all instruments by the roll form of microfilm may be substituted for the method of recording instruments in books. If this method of recording instruments on microfilm is used, a security copy on silver negative microfilm in roll form must be maintained and filed off premises under safe conditions to insure the protection of the records. The internal reference copies or work copies of the instruments recorded on microfilm may be in any photographic form to provide the necessary information as may be determined by the official in charge, and shall meet the microfilm standards as prescribed by the State Records Administrator.

Source: R.S.1867, Code § 321, p. 448; G.S.1873, c. 57, § 321, p. 579; R.S.1913, § 8557; C.S.1922, § 9508; C.S.1929, § 20-2209; R.S. 1943, § 25-2209; Laws 1971, LB 128, § 1; Laws 1992, LB 1059, § 13.

Appearance docket is required to be kept by clerk of district court. Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N.W. 254 (1939).

Failure of court in decree of confirmation to direct clerk to make entry on journal that court is satisfied of legality of such sale is not prejudicial where clerk had, in fact, made such entry. Erwin v. Brunke, 133 Neb. 745, 277 N.W. 48 (1938).

Satisfaction of judgment entered on appearance docket is not such as contemplated by law. Knaak v. Brown, 115 Neb. 260, 212 N.W. 431 (1927).

Court may order that paid judgment be canceled of record. Manker v. Sine, 47 Neb. 736, 66 N.W. 840 (1896).

25-2210 Clerk of district court; records; contents; appearance docket; general index; judgment record; transcripts from inferior courts; discharge of judgments.

On the appearance docket, the clerk of the district court shall enter all actions in the order in which they were brought, the date of the summons, the time of the return thereof by the officer and his or her return thereon, the time

of filing the complaint or petition, and all subsequent pleadings. On the general index he or she shall enter the names of the parties to every suit, both direct and inverse, with the page and book where all proceedings in such action may be found. The judgment record shall contain the names of the judgment debtor and the judgment creditor, arranged alphabetically, the date of the judgment, the amount of the judgment, and the amount of costs, with the page and the book where the judgment may be found. Transcripts of judgments from county courts filed in the district court shall be entered upon the judgment record. Whenever any judgment is paid and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose.

Source: R.S.1867, Code § 322, p. 448; G.S.1873, c. 57, § 322, p. 579; R.S.1913, § 8558; C.S.1922, § 9509; C.S.1929, § 20-2210; R.S. 1943, § 25-2210; Laws 1991, LB 1, § 3; Laws 2002, LB 876, § 53.

On satisfactory proof that judgment has been paid, district court may order it discharged and canceled of record. Hopwood v. Hopwood, 169 Neb. 760, 100 N.W.2d 833 (1960).

Federal court judgment is lien only upon property in county where rendered, and not in other county, unless transcript is filed and entered upon judgment record there. Rathbone Co. v. Kimball, 117 Neb. 229, 220 N.W. 244 (1928).

Satisfaction of judgment entered on court record may be avoided by evidence that payment was not made or that it has become inoperative for equitable reason. Knaak v. Brown, 115 Neb. 260, 212 N.W. 431 (1927).

Court, on motion and satisfactory proof that judgment has been paid, may order it discharged and canceled of record. Manker v. Sine, 47 Neb. 736, 66 N.W. 840 (1896).

Judgment is sufficient, though not entered on general index. Hamilton v. Whitney, Clark & Co., 19 Neb. 303, 27 N.W. 125 (1886).

Judgment must be properly indexed in alphabetical index. Metz v. State Bank of Brownville, 7 Neb. 165 (1878).

On motion and satisfactory proof that a judgment has been paid or satisfied, a district court may order such judgment discharged. Gutierrez v. Gutierrez, 5 Neb. App. 205, 557 N.W.2d 44 (1996).

25-2211 Clerk of district court; trial docket; how kept.

The trial docket shall be made out by the clerk of the court at least twelve days before the first day of each term of the court; and the actions shall be set for particular days in the order in which the issues were made up, whether of law or of fact, and so arranged that the cases set for each day shall be tried as nearly as may be on that day. For the purpose of arranging the docket, an issue shall be considered as made up when either party is in default of a pleading. If the defendant fails to answer, the cause for the purpose of this section shall be deemed to be at issue upon questions of fact, but in every such case the plaintiff may move for and take such judgment as he or she is entitled to, on the defendant's default, on or after the day on which the action is set for trial. No witnesses shall be subpoenaed in any case while the cause stands upon issue of law. Whenever the court regards the answer in any case as frivolous, and put in for delay only, no leave to answer or reply shall be given, unless upon payment of all costs then accrued in the action. When the number of actions to be docketed exceeds three hundred, the judge or judges of the district court for the county may, by rule or order, classify them in such manner as they may deem expedient and cause them to be placed according to such classifications upon different dockets; and the respective dockets may be proceeded with and causes thereon tried, heard, or otherwise disposed of, concurrently by one or more of the judges. Provision may be made by rule of court that issues of fact shall not be for trial at any term when the number of pending actions exceeds three hundred, except upon such previous notice of trial as may be prescribed thereby.

Source: R.S.1867, Code § 323, p. 448; Laws 1887, c. 94, § 1, p. 647; Laws 1899, c. 83, § 1, p. 338; R.S.1913, § 8559; C.S.1922, § 9510; C.S.1929, § 20-2211; R.S.1943, § 25-2211; Laws 1951, c. 74, § 2(1), p. 230; Laws 2002, LB 876, § 54.

Demurrer ore tenus is recognized as permissible practice. Dickinson v. Lawson, 125 Neb. 646, 251 N.W. 656 (1933).

Assignment of cases for trial at beginning of term is only provisional, and may be advanced by continuance of preceding cases. Poggensee v. Feddern, 75 Neb. 584, 106 N.W. 654 (1906).

It is not essential to trial that case appear on docket. Shelby v. St. James Orphan Asylum, 66 Neb. 40, 92 N.W. 155 (1902).

County judge must make docket of term cases on first day of term. Bond v. Wycoff, 42 Neb. 214, 60 N.W. 564 (1894).

25-2211.01 Clerk of district court; trial docket; disposal; procedure.

When after a lapse of ten years, if the record in the district court does not show any unfinished matter pending in the cases set out in the trial dockets, upon such notice as the court may direct, such trial dockets may be disposed of in any way that any judge of such court may direct when approval is given by the State Records Administrator pursuant to sections 84-1201 to 84-1220.

Source: Laws 1951, c. 74, § 2(2), p. 231; Laws 1969, c. 105, § 8, p. 482.

25-2211.02 Clerk of district court; depositions; disposal; procedure.

When after a lapse of ten years, if the record in the district court does not show any unfinished matter pending in the case, and upon such notice as the court may direct, any and all depositions in the case may be removed from the files and disposed of in any way that any judge of such court may direct when approval is given by the State Records Administrator pursuant to sections 84-1201 to 84-1220.

Source: Laws 1951, c. 74, § 1, p. 230; Laws 1969, c. 105, § 9, p. 483.

25-2212 Repealed. Laws 1992, LB 1059, § 29.

25-2213 Clerks of courts of record other than district courts; duties.

The provisions of sections 25-2204 to 25-2211.02 shall, as far as applicable, apply to clerks of other courts of record.

Source: R.S.1867, Code § 888, p. 548; R.S.1913, § 8562; C.S.1922, § 9513; C.S.1929, § 20-2214; R.S.1943, § 25-2213; Laws 1992, LB 1059, § 14.

25-2214 Clerks of courts; general powers and duties.

The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this code, by other statutes and by the common law. In the performance of his duties he shall be under the direction of his court. It shall be the duty of the clerk of each of said courts to prepare and file the annual inventory statement with the county board of his county of all county personal property in his custody or possession, as provided in sections 23-346 to 23-350.

Source: R.S.1867, Code § 889, p. 548; R.S.1913, § 8563; C.S.1922, § 9514; C.S.1929, § 20-2215; Laws 1939, c. 28, § 21, p. 159; C.S.Supp.,1941, § 20-2215.

Although the clerk of the district court is authorized to spread upon the court journal the proceedings had and relief granted by the court, and to that extent is responsible for entry of the judgment, such clerk has no authority to perform the judicial function of rendering a judgment. Building Systems, Inc. v. Medical Center, Ltd., 228 Neb. 168, 421 N.W.2d 773 (1988).

Where petition on appeal is filed in district court in compensation case, it is clerk's duty to issue summons, and place same in hands of proper officer for service, without praecipe being filed. McIntosh v. Standard Oil Co., 121 Neb. 92, 236 N.W. 152 (1931).

Supreme Court will not issue mandamus to clerk unless district court has refused. State ex rel. Fitzgerald v. Houseworth, 63 Neb. 658, 88 N.W. 858 (1902).

Money paid to clerk, pursuant to order or judgment of court, is received in official capacity, and sureties are liable for failure to account therefor. Bantley v. Baker, 61 Neb. 92, 84 N.W. 603 (1900).

Clerk of court is the proper custodian of money paid into court. Dirks v. Juel, 59 Neb. 353, 80 N.W. 1045 (1899).

Money paid to clerk in mortgage foreclosure proceeding before judgment was not received in official capacity. Commercial Inv. Co. v. Peck, 53 Neb. 204, 73 N.W. 452 (1897).

Mandamus will not lie in Supreme Court to compel clerk of district court to issue execution on judgment when no application for such order has been made to district court. State ex rel. Ogden v. Frank, 52 Neb. 553, 72 N.W. 857 (1897).

District court has jurisdiction to direct clerk in the performance of his official duties. State ex rel. Solmon v. Moores, 29 Neb. 122, 45 N.W. 278 (1890).

Clerks perform their duties under the direction of the court. State v. Wahrman, 11 Neb. App. 101, 644 N.W.2d 572 (2002).

25-2214.01 Clerk of district court; money or property received; powers and duties.

(1) Whenever any money or other property is received by the clerk of the district court, he or she shall carefully manage it and may, when the money cannot immediately be paid out to its rightful owner, deposit the money in interest-bearing accounts in insured banking or savings institutions. Any interest accrued from such deposit shall be paid over to the county treasurer to be credited to the county general fund, except that when the funds so deposited belonged to a deceased person whose personal representative has not yet been appointed by a court of competent jurisdiction, then the interest accruing on such money shall be paid to the estate of such person after the appointment of a personal representative and upon order of the court.

(2) Any property other than money which is received by the clerk of the district court shall be held by him or her in safekeeping until claimed by the rightful owner or, if there is a dispute as to the ownership of such property, until ordered by a court of competent jurisdiction to give possession of the property to some person.

Source: Laws 1979, LB 179, § 2; R.S.1943, (1985), § 24-337.03.

(c) SHERIFF; DUTIES

25-2215 Transferred to section 23-1701.05.

25-2216 Transferred to section 23-1701.06.

25-2217 Transferred to section 23-1701.03.

(d) MISCELLANEOUS

25-2218 Common law; applicability.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code.

Source: R.S.1867, Code § 1, p. 394; R.S.1913, § 8567; C.S.1922, § 9518; C.S.1929, § 20-2219.

1. Construction
2. Miscellaneous

1. Construction

Liberal construction cannot, for the purpose of embracing other persons than those to whom a statute is expressly made applicable, supply that which the Legislature has omitted. Downing v. Schwenck, 138 Neb. 395, 293 N.W. 278 (1940).

Provisions of code of civil procedure must be liberally construed. Orchard & Wilhelm Co. v. North, 125 Neb. 723, 251 N.W. 895 (1933).

Liberal construction required sustaining of jurisdiction of district court in workmen's compensation case on filing of petition for appeal, and to require clerk to issue summons without praecipe. McIntosh v. Standard Oil Co., 121 Neb. 92, 236 N.W. 152 (1931).

Statute, providing how and who may intervene, should be liberally construed. Webb v. Patterson, 114 Neb. 346, 207 N.W. 522 (1926).

Petition should be liberally construed as against objection that it stated two causes of action instead of one jointly. Pier v. Cauley, 98 Neb. 80, 152 N.W. 298 (1915).

Remedial statute should be liberally construed. Rine v. Rine, 91 Neb. 248, 135 N.W. 1051 (1912).

Statutory procedure for adoption of children should be liberally construed. Ferguson v. Herr, 64 Neb. 659, 94 N.W. 542 (1903), reversing 64 Neb. 649, 90 N.W. 625 (1902).

Where petition is first attacked by objection to introduction of testimony, it will be liberally construed. Fire Assn. of Philadelphia v. Ruby, 60 Neb. 216, 82 N.W. 629 (1900).

Courts are prohibited from applying rule of strict construction to provisions of code of civil procedure. Kearney Electric Co. v. Laughlin, 45 Neb. 390, 63 N.W. 941 (1895).

2. Miscellaneous

This section, along with another section, forms the basis of the right to bring a cross-suit. Rogers v. Western Electric Co., 179 Neb. 359, 138 N.W.2d 423 (1965).

Where party sought to reserve right to introduce further evidence, trial court abused discretion in denying defendant leave to withdraw motion to dismiss and introduce further evidence. Adams v. Seeley, 94 Neb. 243, 142 N.W. 541 (1913).

Cross-petition for relief against the plaintiff is recognized. Armstrong v. Mayer, 69 Neb. 187, 95 N.W. 51 (1903).

25-2219 Deputies of ministerial officers; acts; effect.

Any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy.

Source: R.S.1867, Code § 893, p. 548; R.S.1913, § 8568; C.S.1922, § 9519; C.S.1929, § 20-2220.

Performance of duties of an office by a de facto incumbent gives him no claim to the official compensation. McCollough v. County of Douglas, 150 Neb. 389, 34 N.W.2d 654 (1948).

Deputy sheriff may conduct foreclosure sale. Richardson v. Hahn, 63 Neb. 294, 88 N.W. 527 (1901).

Deputy clerk may settle bill of exceptions, though clerk not absent. Brownell & Co. v. Fuller, 54 Neb. 586, 74 N.W. 1105 (1898).

Deputy sheriff may act for sheriff in appraising property. Nebraska Loan & Building Assn. v. Marshall, 51 Neb. 534, 71 N.W. 63 (1897).

25-2220 Oaths and affirmations.

Whenever an oath is required by this code, the affirmation of a person conscientiously scrupulous of taking an oath, shall have the same effect.

Source: R.S.1867, Code § 894, p. 549; R.S.1913, § 8569; C.S.1922, § 9520; C.S.1929, § 20-2221.

It is not contempt of court to decline to be sworn by taking the usual oath, since the witness has the right to affirm. Wilcox v. State, 46 Neb. 402, 64 N.W. 1072 (1895).

25-2221 Time; how computed; offices may be closed, when; federal holiday schedule observed; exceptions.

Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open.

All courts and their offices may be closed on Saturdays, Sundays, days on which a specifically designated court is closed by order of the Chief Justice of the Supreme Court, and these holidays: New Year's Day, January 1; Birthday of Martin Luther King, Jr., the third Monday in January; President's Day, the third Monday in February; Arbor Day, the last Friday in April; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veterans Day, November 11; Thanksgiving Day, the fourth Thursday in November; the day after Thanksgiving; Christmas Day, December 25; and all days declared by law or proclamation of the Governor to be holidays. Such days shall be designated as nonjudicial days. If any such holiday falls on Sunday, the following Monday shall be a holiday. If any such holiday falls on Saturday, the

preceding Friday shall be a holiday. Court offices shall be open on all other days. If the date designated by the state for observance of any legal holiday pursuant to this section, except Veterans Day, is different from the date of observance of such holiday pursuant to a federal holiday schedule, the federal holiday schedule shall be observed.

Source: R.S.1867, Code § 895, p. 549; R.S.1913, § 8570; C.S.1922, § 9521; C.S.1929, § 20-2222; R.S.1943, § 25-2221; Laws 1959, c. 108, § 1, p. 437; Laws 1967, c. 151, § 1, p. 448; Laws 1969, c. 844, § 1, p. 3179; Laws 1973, LB 34, § 1; Laws 1975, LB 218, § 1; Laws 1978, LB 855, § 1; Laws 1988, LB 821, § 1; Laws 1988, LB 909, § 1; Laws 2002, LB 876, § 55; Laws 2003, LB 760, § 6.

1. Scope
2. Miscellaneous

1. Scope

This section controls the method of computing the statutory filing deadline imposed by section 32-707.01. State ex rel. Wieland v. Beermann, 246 Neb. 808, 523 N.W.2d 518 (1994).

When a statute requires an act to be done a certain number of days before a known event, the fact that the last day for the action to be done in order to give the appropriate number of days falls on a Saturday, Sunday, or legal holiday postpones the time for performance to the next following business day. State v. Tasich, 242 Neb. 870, 496 N.W.2d 538 (1993).

When the period within which an act is to be done in any action or proceeding is given in terms of months or years, the last day of the period is the appropriate anniversary of the triggering act or event, unless that anniversary falls on a Saturday, Sunday, or court holiday. Licht v. Association Servs., Inc., 236 Neb. 616, 463 N.W.2d 566 (1990).

Defendant was afforded an extra day to file his appeal because one month from the overruling of his motion for a new trial was a Sunday. State v. Bridger, 223 Neb. 250, 388 N.W.2d 831 (1986).

Excluding September 5, 1969, the last day on which work was done, the last day of the four-year period of limitations was September 5, 1973. George P. Rose Sodding & Grading Co. v. Dennis, 195 Neb. 221, 237 N.W.2d 418 (1976).

Due to intervening weekend and holiday, transcript on appeal was timely filed. Knoefler Honey Farms v. County of Sherman, 193 Neb. 95, 225 N.W.2d 855 (1975).

This section does not require courts to be closed on Saturday. Rhodes v. Crites, 173 Neb. 501, 113 N.W.2d 611 (1962).

All courts may be open for business on Saturdays, Sundays, and holidays in the discretion of the court. Rhodes v. Star Herald Printing Co., 173 Neb. 496, 113 N.W.2d 658 (1962).

This section establishes a uniform rule applicable alike to the construction of statutes and matters of practice. State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N.W.2d 297 (1950).

Where a statute provides that it shall take effect from and after its passage and approval, the day of its passage is excluded in computing the time it goes into effect. Wilson & Co. v. County of Otoe, 140 Neb. 518, 300 N.W. 415 (1941).

In determining the time within which an appeal can be taken, the last day should be included even though it is a holiday for the purposes of the Negotiable Instruments Act. Taylor Dairy Products Company v. Owen, 139 Neb. 603, 298 N.W. 332 (1941).

This section is general in application and does not control where there is special provision directing method of computing time. Garrett v. State, 118 Neb. 373, 224 N.W. 860 (1929).

When the last day of the two-year period to redeem land sold at tax sale falls on Sunday, the owner's right of redemption exists during all of the next day. Counselman v. Samuels, 93 Neb. 168, 139 N.W. 862 (1913).

In filing motion for new trial where last day is a holiday, it is included. Tully v. Grand Island Tel. Co., 87 Neb. 822, 128 N.W. 508 (1910).

Special provision for entering judgment by justice of peace as to computation of time was not controlled by this section. Calland v. Wagner, 86 Neb. 755, 126 N.W. 375 (1910).

Section controls on computation of time, although period be days, months or years. When last day falls on Sunday, it is excluded. Johnston v. New Omaha Thomson-Houston Electric Light Co., 86 Neb. 165, 125 N.W. 153 (1910).

If the last day of the time within which an appeal bond must be given falls on Sunday, bond may be given on Monday. Deere, Wells & Co. v. Hodges, 59 Neb. 288, 80 N.W. 897 (1899).

Section applies to construction of statutes, as well as practice. McGinn v. State, 46 Neb. 427, 65 N.W. 46 (1895).

On summons in justice court, service three days before trial, including day of service, is sufficient. White v. German Ins. Co., 15 Neb. 660, 20 N.W. 30 (1884).

On appeal from justice court, where tenth day falls on Sunday, bond filed on Monday is proper. Monell & Lashley v. Terwilliger, 8 Neb. 360, 1 N.W. 246 (1879).

In computing time from a designated date, first day should be excluded and last day of period included. In re Schmidt, 54 F.Supp. 262 (D. Neb. 1944).

2. Miscellaneous

When the 10th day after a judgment is a Saturday or Sunday, a motion for new trial is timely filed on the following Monday. Wanha v. Long, 255 Neb. 849, 587 N.W.2d 531 (1998).

Uniform rule is established applicable alike to construction of statutes and matters of practice. Ruan Transport Corp. v. Peake, Inc., 163 Neb. 319, 79 N.W.2d 575 (1956).

Applied to computation of time for filing motion for new trial. Harsche v. Czyz, 157 Neb. 699, 61 N.W.2d 265 (1953).

Where notice is required to be published "for at least one week," publication September 3, in weekly paper, of notice of meeting on eleventh, is sufficient, although paper was published also on tenth. Bancroft Drainage Dist. v. Chicago, St. P., M. & O. Ry. Co., 102 Neb. 455, 167 N.W. 731 (1918).

Section applied; requirement of two weeks' publication of application for liquor license was not met. Pelton v. Drummond, 21 Neb. 492, 32 N.W. 593 (1887).

25-2222 Sureties; affidavit of qualifications; effect.

Ministerial officers, whose duty it is to take security on undertakings, bonds and recognizances, provided by this code, shall require the person offered as surety to make an affidavit of his qualifications. The taking of such an affidavit shall not exempt any ministerial officer, or other officer acting in a ministerial capacity, from any liability to which he might otherwise be subject for taking insufficient surety.

Source: R.S.1867, Code § 894, p. 549; Laws 1905, c. 179, § 1, p. 672; R.S.1913, § 8571; C.S.1922, § 9522; Laws 1923, c. 112, § 1, p. 270; Laws 1927, c. 68, § 1, p. 231; C.S.1929, § 20-2223; R.S. 1943, § 25-2222; Laws 1972, LB 1032, § 145.

Where county judge in probate matter approves appeal bond without required affidavit of qualification and justification of sureties, a surety on bond is estopped from alleging its invalidity, notwithstanding statute requires such affidavit. In re Kothe's Estate, 131 Neb. 531, 268 N.W. 464 (1936), opinion vacated on rehearing, 131 Neb. 780, 270 N.W. 117 (1936).

Appeal bond to review judgment of county court in probate proceeding may be amended. In re Estate of Hoagland, 128 Neb. 219, 258 N.W. 538 (1935).

Letters testamentary are not void or subject to collateral attack because sureties on executor's bond failed to make affidavit as to qualifications. In re Hoferer's Estate, 116 Neb. 254, 216 N.W. 826 (1927).

Section is not applicable to sheriff taking recognizances under criminal code. Berrer v. Moorhead, 22 Neb. 687, 36 N.W. 118 (1888).

Clerk taking insufficient security on stay of execution is liable. Brock v. Hopkins, 5 Neb. 231 (1876).

25-2223 Sureties; justification; requirements.

The surety in every undertaking, bond and recognizance, provided by this code, must be a resident of this state and must have property, liable to execution, situate in the county in this state in which such undertaking, bond or recognizance is to be given and filed, worth at least double the sum to be secured, beyond the amount of all liens and encumbrances thereon and his exemptions therein; but this provision shall not be held to apply to incorporated surety companies authorized by the laws of this state to transact business. Except in the case of incorporated surety companies, where there are two or more sureties in the same undertaking, bond or recognizance, they must, in the aggregate, have the qualifications prescribed in this section.

Source: R.S.1867, Code § 898, p. 549; Laws 1897, c. 96, § 1, p. 379; R.S.1913, § 8572; C.S.1922, § 9523; Laws 1923, c. 112, § 2, p. 270; C.S.1929, § 20-2224.

Sureties on appeal or supersedeas bond are required to justify, or bond may be quashed. Fisher v. Keeler, 142 Neb. 79, 5 N.W.2d 143 (1942).

Where appeal bond on appeal from county court was given with but one surety and was otherwise defective and appellant refused to amend bond notwithstanding appellee's repeated and specific objections, district court had no jurisdiction and should have sustained motions for nonsuit and dismissal. In re Estate of Kothe, 131 Neb. 531, 268 N.W. 464 (1936), opinion vacated on rehearing, 131 Neb. 780, 270 N.W. 117 (1936).

Court may permit amendment of bond by adding affidavit of justification. In re Estate of Hoagland, 128 Neb. 219, 258 N.W. 538 (1935).

Letters testamentary are not void or subject to collateral attack because sureties on executor's bond failed to make affidavit as to qualifications. In re Hoferer's Estate, 116 Neb. 254, 216 N.W. 826 (1927).

Residence in county is not essential unless specifically required by statute. State ex rel. Lions Ins. Co. v. Baker, 45 Neb. 39, 63 N.W. 139 (1895).

25-2224 Cases not provided for in this code; procedure.

If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.

Source: R.S.1867, Code § 901, p. 550; R.S.1913, § 2573; C.S.1922, § 9524; C.S.1929, § 20-2225.

1. Remedies retained
2. Practice and procedure
3. Miscellaneous

1. Remedies retained

Writ of prohibition may still be used in this state. State ex rel. Wright v. Barney, 133 Neb. 676, 276 N.W. 676 (1937).

Writ of error coram nobis exists in this state. Carlsen v. State, 129 Neb. 84, 261 N.W. 339 (1935).

This section provides for and contemplates continuance of existing common-law remedies available at and prior to adoption of the civil code. Hamaker v. Patrick, 123 Neb. 809, 244 N.W. 420 (1932).

While writ of certiorari has been abolished, principles of writ have been preserved by error proceedings. Engles v. Morgenstern, 85 Neb. 51, 122 N.W. 688 (1909).

Common-law remedies are continued in force where code has failed to provide a remedy. Moline, Milburn & Stoddard Co. v. Curtis, 38 Neb. 520, 57 N.W. 161 (1893).

Common-law and equity practice is available for vacating decrees for fraud. Smithson v. Smithson, 37 Neb. 535, 56 N.W. 300 (1893).

2. Practice and procedure

Provisions of civil code not only abolish bills of equity with discovery as incident thereto but prevent incorporation in petitions and answers essential elements on which discovery, under former procedure, was based. Marshall v. Rowe, 126 Neb. 817, 254 N.W. 480 (1934).

Party may have equitable relief in probate court; equity pleading applicable. Genau v. Abbott, 68 Neb. 117, 93 N.W. 942 (1903).

Procedure in original actions in Supreme Court may be prescribed by its order or in accordance with its rules. In re Petition of Attorney General, 40 Neb. 402, 58 N.W. 945 (1894).

Section does not give right to supersede judgment of removal by county board. State ex rel. Dodson v. Meeker, 19 Neb. 444, 27 N.W. 427 (1886).

3. Miscellaneous

Purpose of this section was to assure that courts should interpret the code of civil procedure in a liberal spirit. Mathews v. Hedlund, 82 Neb. 825, 119 N.W. 17 (1908).

Section is not applicable where remedy provided by code is lost by laches. Flint v. Chaloupka, 81 Neb. 87, 115 N.W. 535 (1908).

25-2225 Special statutory proceedings; procedure; how affected by this code.

Where, by general or special statute, a civil action, legal or equitable, is given and the mode of proceeding therein is prescribed, this code shall not affect the proceedings under such statute, until the Legislature shall otherwise provide; but in all such cases, as far as it may be consistent with the statute giving such action, and practicable under this code, the proceedings shall be conducted in conformity thereto. Where the statute designates by name or otherwise the kind of action, but does not prescribe the mode of proceedings therein, such action shall be commenced and prosecuted in conformity to this code; where the statute gives an action, but does not designate the kind of action, or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this code and proceeded in accordingly.

Source: R.S.1867, Code § 903, p. 550; Laws 1867, § 1, p. 71; R.S.1913, § 8574; C.S.1922, § 9525; C.S.1929, § 20-2226.

During pendency of an appeal in district court in workmen's compensation case, plaintiff has the right to dismiss action without prejudice. Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N.W. 366 (1939).

Proceedings in election contest case should be in harmony with provisions of the code of civil procedure, except where controlled by specific provisions of special act. Swan v. Bowker, 135 Neb. 405, 281 N.W. 891 (1938).

In mandamus proceedings no pleading is authorized other than the writ and the answer; intervention should be denied. State ex rel. Randall v. Hall, 125 Neb. 236, 249 N.W. 756 (1933).

District court on filing of petition for appeal, will proceed in accordance with compensation act, and requirement of praecipe before issuance of summons does not apply. McIntosh v. Standard Oil Co., 121 Neb. 92, 236 N.W. 152 (1931).

Special proceeding before Supreme Court Justice to compel election commissioner to file nomination acceptance and place name on ballot is civil action, and must be brought in county where cause of action arose. State ex rel. Meissner v. McHugh, 120 Neb. 356, 233 N.W. 1 (1930).

Special divorce statute requires plaintiff to give actual notice to nonresident defendant whose address is known. Williams v. Williams, 101 Neb. 369, 163 N.W. 147 (1917).

Original actions in Supreme Court are governed by code. State v. State Journal Co., 77 Neb. 771, 111 N.W. 118 (1907).

Divorce is special proceeding. Eager v. Eager, 74 Neb. 827, 105 N.W. 636, 107 N.W. 254 (1905).

25-2226 Terms, defined.

The words found in Chapter 25 shall be construed and held to mean as follows: Complainant means plaintiff; bill means complaint; suit means action or civil action; and decree means judgment; and all other words and terms found in Chapter 25, heretofore applicable to the chancery practice hereby

repealed, shall be so construed and held as to carry out the intention of such chapter, prevent a failure of justice, and give adequate relief in all cases.

Source: Laws 1867, § 5, p. 71; R.S.1913, § 8575; C.S.1922, § 9526; C.S.1929, § 20-2227; R.S.1943, § 25-2226; Laws 2002, LB 876, § 56.

A judgment and a decree are synonymous terms. Spencer v. Spencer, 165 Neb. 675, 87 N.W.2d 212 (1957).

Decree of divorce is judgment. Wharton v. Jackson, 107 Neb. 288, 185 N.W. 428 (1921).

25-2227 Legal notices; week, defined.

Wherever the statutes of Nebraska provide for the publication of notices any number of weeks, or for any number of weeks, the term week shall be construed to mean either a period of time known as a calendar week beginning on Sunday and ending with Saturday, or any period of seven consecutive days beginning with the date of the first publication of notice; *Provided, however*, nothing herein contained shall be held to apply to any notice published prior to April 17, 1915.

Source: Laws 1915, c. 222, § 1, p. 491; C.S.1922, § 9527; C.S.1929, § 20-2228.

Notice of publication of formation of drainage district was sufficient. Prucka v. Eastern Sarpy Drainage Dist., 157 Neb. 284, 59 N.W.2d 761 (1953).

Construction of statute providing for notice of time and place of proving will was not affected by this section. Johnson v. Richards, 155 Neb. 552, 52 N.W.2d 737 (1952).

Section is constitutional. Did not change construction of statutes providing for publication in weekly newspapers. In re Johnson's Estate, 99 Neb. 275, 155 N.W. 1100 (1916).

25-2228 Legal notices; how published.

All legal publications and notices of whatever kind or character that may by law be required to be published a certain number of days or a certain number of weeks shall be legally published when they have been published in one issue in each week in a daily, semiweekly, or triweekly newspaper, such publication in such daily, semiweekly, or triweekly paper or papers to be made upon any one day of the week upon which such paper is published, except Sunday. Nothing in this section shall be construed as preventing the publication of such legal notices and publications in weekly newspapers. Any newspaper publishing such legal notices or publications, as hereinbefore provided, must be otherwise qualified under existing law to publish such notices or publications. All legal publications and all notices of whatever kind or character that may be required by law to be published a certain number of days or a certain number of weeks, shall be and hereby are declared to be legally published when they shall have been published once a week in a weekly, semiweekly, triweekly, or daily newspaper for the number of weeks, covering the period of publication. For the purpose of this section, when a newspaper is published regularly four or more times each week, it shall be deemed a daily newspaper.

Source: Laws 1917, c. 202, § 1, p. 481; C.S.1922, § 9528; Laws 1923, c. 100, § 1, p. 255; Laws 1927, c. 63, § 1, p. 225; C.S.1929, § 20-2229; R.S.1943, § 25-2228; Laws 1943, c. 47, § 1, p. 198; Laws 1996, LB 299, § 21.

If a publication day falls upon a holiday, publication the preceding day complies with this section. Hollstein v. Adams, 187 Neb. 781, 194 N.W.2d 216 (1972).

This section supersedes and effectively abrogates contrary provision of statute and home rule charter. Skag-Way Department Stores, Inc. v. City of Grand Island, 176 Neb. 169, 125 N.W.2d 529 (1964).

Last part of section refers only to number of times notice is required to be published and not to duration of notice. Johnson v. Richards, 155 Neb. 552, 52 N.W.2d 737 (1952).

(e) CONSTABLES AND SHERIFFS

25-2229 Constables; contracts authorized.

(1) In counties having a population of one hundred thousand or more inhabitants, each judge of the county court may contract with one constable for purposes of serving or otherwise executing, according to law, and returning writs or other legal process. Such constables shall not be considered employees of the state or its political subdivisions. Notwithstanding any other provision of law, the terms of such contract shall be prescribed by the State Court Administrator.

(2) In counties having more than one contracted constable, the party requesting the constable to serve or otherwise execute any legal process may designate by name the constable who shall serve or otherwise execute such legal process.

Source: Laws 1941, c. 36, § 7, p. 149; C.S.Supp.,1941, § 22-1512; R.S.1943, § 26-1,183; R.S.1943, (1979), § 26-1,183; Laws 1984, LB 13, § 45; R.S.1943, (1985), § 24-5,106; Laws 1992, LB 1059, § 15; Laws 1999, LB 319, § 3.

25-2230 Constables; bond; approval; amount.

Constables in county court shall give bond in the amount of five thousand dollars signed by two or more sureties who shall each qualify in twice the amount of the bond, or by some responsible surety or bonding company authorized by law to execute surety bonds in this state, to be approved by the presiding judge of the district court of the county to be conditioned upon the faithful discharge of his or her duties as constable.

Source: Laws 1929, c. 82, art. XV, § 181, p. 325; C.S.1929, § 22-1511; R.S.1943, § 26-1,182; Laws 1971, LB 959, § 3; R.S.1943, (1979), § 26-1,182; Laws 1984, LB 13, § 44; R.S.1943, (1985), § 24-5,105.

25-2231 Constables; authority; violation; penalty.

In serving all civil process and in doing his or her duties generally, when not otherwise restricted by law, the authority of a constable shall extend throughout the territory in which the judges of the county court who appointed him or her have jurisdiction, and in executing and serving process issued by courts inferior to the district court, he or she shall have and exercise the same authority and powers over goods and chattels and the persons or parties and in serving process as is granted by law to a sheriff under like process issued from courts of record. Any constable who shall knowingly perform or attempt to perform any official act outside of the territory in which the court which appointed him or her has jurisdiction shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten nor more than one hundred dollars or shall be imprisoned for not more than ten days.

Source: Laws 1929, c. 82, art. XV, § 177, p. 324; C.S.1929, § 22-1507; R.S.1943, § 26-1,178; R.S.1943, (1979), § 26-1,178; Laws 1984, LB 13, § 42; Laws 1988, LB 1030, § 12; R.S.Supp.,1988, § 24-5,101.

25-2232 Sheriffs; general powers.

All sheriffs shall be ministerial officers in county courts in their respective jurisdictions' civil and criminal cases, and civil and criminal processes may be executed by them throughout the jurisdiction.

Source: Laws 1929, c. 82, art. XV, § 171, p. 323; C.S.1929, § 22-1501; R.S.1943, § 26-1,172; R.S.1943, (1979), § 26-1,172; Laws 1984, LB 13, § 40; Laws 1988, LB 1030, § 11; R.S.Supp,1988, § 24-595; Laws 1992, LB 1059, § 16.

25-2233 Sheriff; service of process.

It shall be the duty of every sheriff to serve and execute all warrants, writs, precepts, executions, and other legal process to him or her directed and delivered.

Source: Laws 1929, c. 82, art. XV, § 172, p. 324; C.S.1929, § 22-1502; R.S.1943, § 26-1,173; R.S.1943, (1979), § 26-1,173; Laws 1984, LB 13, § 41; R.S.1943, (1985), § 24-596; Laws 1992, LB 1059, § 17.

25-2234 Sheriff; return of process.

It shall be the duty of every sheriff to make due return of all legal process to him or her directed and by him or her delivered or served by certified or registered mail, at the proper office and on the proper return day thereof, or if the judgment is docketed in the district court, appealed, or stayed, upon which he or she has an execution, on notice thereof, to return the execution, stating thereon such facts.

Source: Laws 1929, c. 82, art. XV, § 173, p. 324; C.S.1929, § 22-1503; Laws 1933, c. 44, § 4, p. 253; C.S.Supp.,1941, § 22-1503; R.S. 1943, § 26-1,174; R.S.1943, (1979), § 26-1,174; Laws 1987, LB 93, § 7; R.S.Supp.,1988, § 24-597; Laws 1992, LB 1059, § 18.

25-2235 Sheriff; process; return; contents.

It shall be the duty of every sheriff, on the receipt of any writ or other legal process, except subpoenas, to note thereon the time of receiving the same. The sheriff shall also state in his or her return on the same the time and manner of executing it.

Source: Laws 1929, c. 82, art. XV, § 174, p. 324; C.S.1929, § 22-1504; R.S.1943, § 26-1,175; R.S.1943, (1979), § 26-1,175; R.S.1943, (1985), § 24-598; Laws 1992, LB 1059, § 19.

25-2236 Constables and sheriffs; return of not found; when made.

No officer shall make a return on any process of ''not found'' as to any defendant, unless he shall have been once at least to the usual place of residence of the defendant, if such defendant has any in the jurisdiction of the court.

Source: Laws 1929, c. 82, art. XV, § 175, p. 324; C.S.1929, § 22-1505; R.S.1943, § 26-1,176; R.S.1943, (1979), § 26-1,176; R.S.1943, (1985), § 24-599.

25-2237 Constables and sheriffs; take person into custody; procedure.

When it shall become the duty of the officer to take the body of any person to the jail of the county, he shall deliver to the sheriff or jailer a certified copy of the execution, commitment or other processes, whereby he holds such person in custody, and return the original to the clerk who issued the same, which copy shall be sufficient authority to the sheriff or jailer to keep the prisoner in jail until discharged by due course of law.

Source: Laws 1929, c. 82, art. XV, § 178, p. 325; C.S.1929, § 22-1508; R.S.1943, § 26-1,179; R.S.1943, (1979), § 26-1,179; R.S.1943, (1985), § 24-5,102.

25-2238 Sheriffs; money collected; accounting and payment.

Sheriffs shall pay over to the party entitled thereto all money received in his or her official capacity if demand is made by such party, or such party's agent or attorney, at any time before he or she returns the writ upon which he or she has received it. If not paid over by that time, the sheriff shall pay the same to the clerk of the county court when he or she returns the writ.

Source: Laws 1929, c. 82, art. XV, § 179, p. 325; C.S.1929, § 22-1509; R.S.1943, § 26-1,180; R.S.1943, (1979), § 26-1,180; Laws 1984, LB 13, § 43; R.S.1943, (1985), § 24-5,103; Laws 1992, LB 1059, § 20.

25-2239 Sheriffs; neglect of duty; penalty; how recovered.

Sheriffs shall be liable to twenty percent penalty upon the amount of damages for which judgment may be entered against them for failing to make return, making false return, or failing to pay over money collected or received in his or her official capacity. Such judgment must include, in addition to the damages and costs, the penalty herein provided.

Source: Laws 1929, c. 82, art. XV, § 180, p. 325; C.S.1929, § 22-1510; R.S.1943, § 26-1,181; R.S.1943, (1979), § 26-1,181; R.S.1943, (1985), § 24-5,104; Laws 1992, LB 1059, § 21.

ARTICLE 23

PROCEEDINGS IN FORMA PAUPERIS

Section

25-2301 Terms, defined.

For purposes of sections 25-2301 to 25-2310:

(1) Case includes any suit, action, or proceeding; and

(2) In forma pauperis means the permission given by the court for a party to proceed without prepayment of fees and costs or security.

Source: Laws 1972, LB 1120, § 1; Laws 1979, LB 148, § 1; Laws 1986, LB 750, § 3; Laws 1999, LB 689, § 2.

The plain language of the in forma pauperis statutes, taken as a whole, does not excuse a litigant who seeks the status of a pauper from paying the cost of a premium for a replevin bond pursuant to section 25-1098. Jacob v. Schlichtman, 261 Neb. 169, 622 N.W.2d 852 (2001).

Although jurisdiction is vested in an appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court. This section requires the lower court to act if it determines that the allegations of poverty are untrue. In re Interest of Noelle F. & Sarah F., 249 Neb. 628, 544 N.W.2d 509 (1996).

Generally, in the absence of good cause evident in the record, it is necessary for a party appealing to personally sign the affidavit in support of her or his motion to proceed in forma pauperis. Mere absence from the jurisdiction of the court from which the appeal is being taken, without more, does not show good cause for a party's failure to sign a poverty affidavit. In re Interest of T.W. et al., 234 Neb. 966, 453 N.W.2d 436 (1990).

As an alternative to depositing a docket fee, a person who is unable to pay the required fee may file an affidavit of poverty and proceed with an appeal in forma pauperis. State v. Hunter, 234 Neb. 567, 451 N.W.2d 922 (1990).

In order to perfect an appeal in forma pauperis, all that is necessary to confer jurisdiction on the Supreme Court is to file a notice of appeal and an affidavit signed by the appellant, as required by this section. In re Interest of N.L.B., 234 Neb. 280, 450 N.W.2d 676 (1990).

Courts must make specific findings of fact that establish the expected fees and costs and the ability of the appellant to pay those costs within the time required before denying the appellant in forma pauperis status for an appeal under this section. Fine v. Fine, 4 Neb. App. 101, 537 N.W.2d 642 (1995).

Where, after petitioner's appeal was dismissed by Nebraska Supreme Court for failure to deposit cash or bond and United States Supreme Court granted certiorari, sections 25-2301 to 25-2307 were enacted permitting appeal in forma pauperis, judgment was vacated, and cause remanded for reconsideration. Huffman v. Boersen, 406 U.S. 337 (1972).

25-2301.01 Application; contents.

Any county or state court, except the Nebraska Workers' Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis. An application to proceed in forma pauperis shall include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

Source: Laws 1999, LB 689, § 3.

Failure to file an application separate from the poverty affidavit under this section does not divest the court of jurisdiction. State v. McLemore, 261 Neb. 452, 623 N.W.2d 315 (2001).

This section does not require that a separate application to proceed in forma pauperis be filed in addition to the poverty affidavit as long as the poverty affidavit itself contains some indication that a defendant is requesting or applying for in forma pauperis status. State v. Campbell, 260 Neb. 1021, 620 N.W.2d 750 (2001).

If a request to proceed in forma pauperis is granted by the district court, an appellate court obtains jurisdiction when the notice of appeal is timely filed, and any failure of the affidavit to state the nature of the action or that the affiant is entitled to redress under this section will not divest the court of jurisdiction. State v. Dallmann, 260 Neb. 937, 621 N.W.2d 86 (2000).

The absence of language in a poverty affidavit indicating the nature of the action being appealed and that the affiant is entitled to redress will not divest an appellate court of jurisdiction over the appeal where the district court has already granted the application for in forma pauperis status on appeal. State v. Grant, 9 Neb. App. 919, 623 N.W.2d 337 (2001).

25-2301.02 Application; objection; hearing; appeal.

(1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application or at any time if the ground for the objection is that the initial application was fraudulent. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and

conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

(2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid. The appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.

Source: Laws 1999, LB 689, § 4; Laws 2004, LB 1207, § 15.

An appellate court obtains jurisdiction over an appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit, without literal payment of the fees, costs, or security mentioned in subsection (1) of this section. Glass v. Kenney, 268 Neb. 704, 687 N.W.2d 907 (2004).

Following a denial of an application to proceed in forma pauperis, under subsection (1) of this section, a party may either proceed with the trial action or appeal the ruling denying in forma pauperis status. Glass v. Kenney, 268 Neb. 704, 687 N.W.2d 907 (2004).

Under this section, there is a statutory right of interlocutory appellate review of a decision denying in forma pauperis eligibility. Glass v. Kenney, 268 Neb. 704, 687 N.W.2d 907 (2004).

Pursuant to subsection (1) of this section, in order to perfect his appeal, the appellant had 30 days from the district court's denial of his application to proceed in forma pauperis in which to file a docket fee with the clerk of the district court. Martin v. McGinn, 267 Neb. 931, 678 N.W.2d 737 (2004).

A frivolous legal position pursuant to this section is one wholly without merit, that is, without rational argument based on the law or on the evidence. Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, this section allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial. This section contains no requirement that the court grant leave to amend the underlying petition before denying a request to proceed in forma pauperis. Cole v. Blum, 262 Neb. 1058, 637 N.W.2d 606 (2002).

A court is not required to conduct a hearing before denying an application to proceed in forma pauperis if the court has objected to the application on its own motion on the ground that the legal positions asserted therein are frivolous or malicious, and if the court provides a written statement of its reasons, findings, and conclusions for denying the application to proceed in forma pauperis. Moore v. Nebraska Bd. of Parole, 12 Neb. App. 525, 679 N.W.2d 427 (2004).

This section supersedes the requirement set forth in Flora v. Escudero, 247 Neb. 260, 526 N.W.2d 643 (1995), that a court provide a hearing before denying any application to proceed in forma pauperis. Moore v. Nebraska Bd. of Parole, 12 Neb. App. 525, 679 N.W.2d 427 (2004).

25-2302 Costs of action.

In any civil or criminal case in which a party is permitted to proceed in forma pauperis, the court shall direct the responsible officer of the court to issue and serve all the necessary writs, process, and proceedings and perform all such duties without charge.

Source: Laws 1972, LB 1120, § 2; Laws 1999, LB 689, § 5.

25-2303 Process; costs; payment by county.

In any civil or criminal case in which a party is permitted to proceed in forma pauperis, the court shall direct that the expense of process by publication, if such process is required by the court, be paid by the county in the same manner as other claims are paid.

Source: Laws 1972, LB 1120, § 3; Laws 1999, LB 689, § 6.

25-2304 Witness; subpoena; process; fees; payment by county.

In any civil or criminal case in which a party is permitted to proceed in forma pauperis, the court may order witnesses to be subpoenaed if the court finds that they have evidence material and necessary to the case and that they are within the judicial district in which the court is held or within one hundred miles of the place of trial. In such case the process and the fees of the witnesses shall be paid by the county in the same manner as other claims are paid.

Source: Laws 1972, LB 1120, § 4; Laws 1999, LB 689, § 7.

25-2305 Appeal; printing of record; cost paid by county.

In civil or criminal cases in which a party is permitted to proceed in forma pauperis, the court shall direct that the expenses of printing the record on appeal, if such printing is required by the appellate court, be paid by the county in the same manner as other claims are paid.

Source: Laws 1972, LB 1120, § 5; Laws 1999, LB 689, § 8.

To be effective, a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit. State v. Hunter, 234 Neb. 567, 451 N.W.2d 922 (1990).

25-2306 Transcripts; costs; payment by county.

In any civil or criminal case in which a party is permitted to proceed in forma pauperis, the court shall order transcripts to be furnished without cost if the suit or appeal is not frivolous but presents a substantial question and if the transcript is needed to prepare, present, or decide the issue presented by the case or appeal. Such costs shall be paid by the county in the same manner as other claims are paid.

Source: Laws 1972, LB 1120, § 6; Laws 1999, LB 689, § 9.

25-2307 Appellate briefs; costs; payment by county.

In any civil or criminal case in which a party is permitted to proceed in forma pauperis, on appeal the court shall direct that the expense of printing of the appellate briefs, if such printing is required by the court, be paid by the county in the same manner as other claims are paid.

Source: Laws 1972, LB 1120, § 7; Laws 1999, LB 689, § 10.

The expense of photocopying is included in the expense of ''printing'', which is required under this section to be paid by the county when a party has been permitted to proceed in forma pauperis. Heathman v. Kenney, 263 Neb. 966, 644 N.W.2d 558 (2002).

25-2308 Repealed. Laws 1999, LB 689, § 17.

25-2309 Satisfaction of costs; when.

In the event any person prosecutes or defends a case in forma pauperis successfully, any and all cost deferred by the court under sections 25-2301 to 25-2310 shall be first satisfied out of any money paid in satisfaction of judgment.

Source: Laws 1972, LB 1120, § 9; Laws 1999, LB 689, § 11.

25-2310 Fraudulent practices; penalty.

Anyone who fraudulently fails to disclose material assets or income for the purpose of invoking the privileges of sections 25-2301 to 25-2310 is guilty of perjury and shall, upon conviction thereof, be punished as provided in section 28-915.

Source: Laws 1972, LB 1120, § 10; Laws 1978, LB 748, § 4; Laws 1999, LB 689, § 12.

ARTICLE 24
INTERPRETERS

Section
25-2401. Interpreters; public policy.
25-2402. Terms, defined.
25-2403. Interpreter; appointment.
25-2404. Interpreters; qualifications.
25-2405. Interpreters; oath.
25-2406. Interpreters; fees and expenses.
25-2407. Interpreters; qualifications.

25-2401 Interpreters; public policy.

It is hereby declared to be the policy of this state that the constitutional rights of persons unable to communicate the English language cannot be fully protected unless interpreters are available to assist such persons in legal proceedings. It is the intent of sections 25-2401 to 25-2407 to provide a procedure for the appointment of such interpreters to avoid injustice and to assist such persons in their own defense.

Source: Laws 1973, LB 116, § 1; Laws 1987, LB 376, § 11; Laws 2002, LB 22, § 8.

If a defendant understands and communicates reasonably well in the English language, the mere fact that such defendant might be able to accomplish self-expression a little better in another language does not warrant utilizing an interpreter at trial. State v. Topete, 221 Neb. 771, 380 N.W.2d 635 (1986).

25-2402 Terms, defined.

For the purposes of sections 25-2401 to 25-2407 unless the context otherwise requires:

(1) Deaf or hard of hearing person means a person whose hearing impairment, with or without amplification, is so severe that he or she may have difficulty in auditorily processing spoken language without the use of an interpreter or a person with a fluctuating or permanent hearing loss which may adversely affect the ability to understand spoken language without the use of an interpreter or other auxiliary aid;

(2) Person unable to communicate the English language means a person who cannot readily understand or communicate the English language; and

(3) Proceeding means any legal proceeding or any hearing preliminary thereto involving persons unable to communicate the English language or deaf or hard of hearing persons unable to communicate by a spoken language.

Source: Laws 1973, LB 116, § 2; Laws 1987, LB 376, § 12; Laws 1997, LB 851, § 11; Laws 2002, LB 22, § 9.

25-2403 Interpreter; appointment.

In any proceeding the presiding judge shall appoint an interpreter to assist any person unable to communicate the English language for preparation and trial of his or her case.

Source: Laws 1973, LB 116, § 3; Laws 1987, LB 376, § 13.

25-2404 Interpreters; qualifications.

No person shall be appointed as an interpreter pursuant to sections 25-2401 to 25-2407 unless such person is readily able to communicate with the person unable to communicate the English language, translate the proceedings for him or her, and accurately repeat and translate the statements of such person to the jury, judge, and officials before whom such proceeding takes place.

Source: Laws 1973, LB 116, § 4; Laws 1987, LB 376, § 14; Laws 2002, LB 22, § 10.

25-2405 Interpreters; oath.

Every interpreter appointed pursuant to sections 25-2401 to 25-2407, before entering upon his or her duties as such, shall take an oath that he or she will, to the best of his or her skill and judgment, make a true interpretation to such person unable to communicate the English language of all the proceedings in a language which such person understands and that he or she will, in the English language, repeat the statements of such person to the court, jury, or officials before whom such proceeding takes place.

Source: Laws 1973, LB 116, § 5; Laws 1987, LB 376, § 15; Laws 2002, LB 22, § 11.

25-2406 Interpreters; fees and expenses.

The fees and expenses of an interpreter shall be fixed and ordered paid by the judge before whom such proceeding takes place, in accordance with a fee schedule established by the Supreme Court, and be paid out of the General Fund with funds appropriated to the Supreme Court for that purpose.

Source: Laws 1973, LB 116, § 6; Laws 1999, LB 54, § 3.

25-2407 Interpreters; qualifications.

Any person who serves as an interpreter for persons unable to communicate the English language in court proceedings or probation services as provided in subsection (6) of section 29-2259 shall meet the standards adopted by the Supreme Court. Such standards shall require that interpreters demonstrate the ability to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary special vocabulary. A person appointed to interpret for deaf and hard of hearing persons shall be a licensed interpreter as defined in section 20-151 or, if a licensed interpreter is unavailable, an interpreter licensed under the laws of another state.

Source: Laws 1999, LB 54, § 1; Laws 2002, LB 22, § 12.

ARTICLE 25

UNIFORM PROCEDURE FOR ACQUIRING PRIVATE PROPERTY FOR PUBLIC USE

Section

25-2501 Intent and purpose.

It is the intent and purpose of sections 25-2501 to 25-2506 to establish a uniform procedure to be used in acquiring private property for a public purpose by the State of Nebraska and its political subdivisions and by all privately owned public utility corporations and common carriers which have been granted the power of eminent domain. Such sections shall not apply to:

(1) Water transmission and distribution pipelines and their appurtenances and common carrier pipelines and their appurtenances;

(2) Public utilities and cities of all classes and villages when acquiring property for a proposed project involving the acquisition of rights or interests in ten or fewer separately owned tracts or when the acquisition is within the corporate limits of any city or village;

(3) Sanitary and improvement districts organized under sections 31-727 to 31-762 when acquiring easements for a proposed project involving the acquisition of rights or interests in ten or fewer separately owned tracts;

(4) Counties and municipalities which acquire property through the process of platting or subdivision or for street or highway construction or improvements;

(5) Common carriers subject to regulation by the Federal Railroad Administration of the United States Department of Transportation; or

(6) The Department of Roads when acquiring property for highway construction or improvements.

Source: Laws 1973, LB 187, § 1; Laws 1978, LB 917, § 1; Laws 1994, LB 441, § 2; Laws 2002, LB 176, § 1.

The purpose of the hearing provided for in the uniform procedure for acquiring property for public use is merely to explain the taking and to inform landowners of their procedural rights. Seward County Board of Commissioners v. City of Seward, 196 Neb. 266, 242 N.W.2d 849 (1976).

25-2502 Terms, defined.

As used in sections 25-2501 to 25-2506 and 70-301, unless the context otherwise requires:

(1) Agency shall include the State of Nebraska and any department, board, commission, or similar entity thereof which possesses the authority to acquire property either with or without the use of eminent domain, any political subdivision of the State of Nebraska, and any privately owned public utility corporation or common carrier not exempted by section 25-2501 which possesses the authority to acquire property through the use of eminent domain;

(2) Property shall include any right or interest in real property, including but not limited to easements, but shall not include easements for public utilities located adjacent to and within ten feet of a public road right-of-way; and

(3) Negotiations shall mean communications between representatives of the agency and the property owner or his representatives who are specifically authorized to attempt to reach agreement on terms by which the agency shall acquire such property.

Source: Laws 1973, LB 187, § 2; Laws 1974, LB 653, § 1.

25-2503 Agency; notice; contents.

Any agency which proposes to acquire private property for a public purpose shall give notice of such proposed acquisition at least forty-five days before beginning negotiations for such acquisition. The notice shall be directed to each owner of property over or across which any right or interest is to be acquired and shall be deemed properly given if delivered personally or mailed by registered or certified mail addressed to the property owner and to the address shown on the tax records in the office of the county treasurer, except that such notice shall be sufficient if given to the administrator or executor of the estate of a deceased person, the trustee of a trust estate, the guardian of the estate of a minor or incompetent person, or a conservator. The notice shall (1) describe the property proposed to be acquired and the compensation to be given for such property, (2) include a statement of the authority for the acquisition, (3) include the nature of and necessity and purpose for which the land shall be used, (4) include the title, right, or interest in the property to be acquired, (5) specify the amount of property needed for the public purpose, (6) include the reasons for selecting the proposed location or route, and (7) state that if approval of any other agency is required, the condemner shall set forth which other agency's approval shall be necessary and, when the acquisition involves a highway, power line, telephone line, or similar project, shall include a map showing the proposed route to be followed by the project.

Source: Laws 1973, LB 187, § 3; Laws 1978, LB 917, § 2; Laws 2002, LB 1105, § 425.

A notice of acquisition sent to a landowner prior to beginning condemnation proceedings constitutes a privileged communication during statutorily required negotiations and, thus, may be excluded pursuant to section 27-408. In re Application of SID No. 384 of Douglas County, 259 Neb. 351, 609 N.W.2d 679 (2000).

25-2504 Agency; hearing; where held; relocations; notice; hearings.

After giving notice pursuant to section 25-2503, the agency shall hold a public hearing on the proposed project and acquisition at least thirty days before beginning negotiations for such acquisition. Notice of such public hearing shall be published at least ten days prior to such hearing in a legal newspaper published in and of general circulation in each county, if such a newspaper exists, or if no such newspaper is published in the county, notice shall be published in a newspaper which has been designated as the official legal notice publication by the county board and is of general circulation in the county or counties in which the hearing is to be held. When the proposed acquisition consists of property from more than one county, a hearing shall be held in the county seat of each county. When the proposed acquisition is countywide in scope, the hearing shall be held at the county seat. When the proposed acquisition involves a lesser area, the hearing shall be held in a location convenient to the property to be acquired. When the proposed acquisition involves property located outside this state, the hearing shall be held at the principal office of the agency.

At the hearing, the agency shall explain the nature of and necessity for the project for which it seeks to acquire property, the reasons for selecting the particular location or route, the right of each owner of property to be represented by an attorney and to negotiate and accept or reject the offer of damages which will be sustained by the proposed acquisition, and the right to require that such damages be determined pursuant to the procedures for acquisition by eminent domain. The agency shall hear and consider any objections from any person.

If the agency relocates the proposed project following such hearing and such relocation would require the acquisition of rights or interests in the property of more than ten additional owners of separately owned tracts to whom notice was not previously given, the agency shall give notice as provided in section 25-2503 to such additional owners and shall hold a public hearing as provided in this section with reference solely to that part of the project which has been relocated; *Provided*, that the time restrictions in section 25-2503 and this section shall not be applicable to any such additional notice, hearing, or negotiations.

Source: Laws 1973, LB 187, § 4; Laws 1974, LB 653, § 2; Laws 1983, LB 538, § 1.

A notice of acquisition sent to a landowner prior to beginning condemnation proceedings constitutes a privileged communication during statutorily required negotiations and, thus, may be excluded pursuant to section 27-408. In re Application of SID No. 384 of Douglas County, 259 Neb. 351, 609 N.W.2d 679 (2000).

The grant of eminent domain for municipal airport authorities renders the units immune from zoning regulations. Seward County Board of Commissioners v. City of Seward, 196 Neb. 266, 242 N.W.2d 849 (1976).

25-2505 Public notice; public hearings; when not required; hearing by school district.

Any agency acquiring property on a willing buyer-willing seller basis or by gift, devise, or any other form of voluntary transfer shall not be required to give the notice set forth in section 25-2503 if such agency has no planned project involving acquisition of the specific property, or any part thereof, through the use of eminent domain or the agency has no authority to use eminent domain for acquisition of property, but such agency shall hold a public hearing at least thirty days prior to consummation of the transaction whereby such property is acquired which public hearing and public notice of the same shall comply, where applicable, with section 25-2504. A school district may conduct any hearing required by this section as a part of the agenda at a regular or special meeting of its school board or board of education at the board's usual meeting place or at such other location within the school district as the board may designate.

Source: Laws 1973, LB 187, § 5; Laws 1974, LB 653, § 3; Laws 1987, LB 359, § 1.

25-2506 Sections, how construed.

Sections 25-2501 to 25-2506 shall be construed to be cumulative and independent legislation and complete in themselves.

Source: Laws 1973, LB 187, § 6.

ARTICLE 26

ARBITRATION

Section
25-2601. Act, how cited.
25-2602. Repealed. Laws 1997, LB 151, § 14.
25-2602.01. Validity of arbitration agreement.
25-2602.02. Contract; statement required.
25-2603. Proceedings to compel or stay arbitration.
25-2604. Appointment of arbitrators by court.
25-2604.01. Arbitrators; disqualification.
25-2605. Majority action by arbitrators.

25-2601 Act, how cited.

Sections 25-2601 to 25-2622 shall be known and may be cited as the Uniform Arbitration Act.

Source: Laws 1987, LB 71, § 1; Laws 1997, LB 151, § 1.

25-2602 Repealed. Laws 1997, LB 151, § 14.

25-2602.01 Validity of arbitration agreement.

(a) A written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.

(b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly.

(c) The Uniform Arbitration Act applies to arbitration agreements between employers and employees or between their respective representatives.

(d) Contract provisions agreed to by the parties to a contract control over contrary provisions of the act other than subsections (e) and (f) of this section.

(e) Subsections (a) and (b) of this section do not apply to a claim for workers' compensation.

(f) Subsection (b) of this section does not apply to:

(1) A claim arising out of personal injury based on tort;

(2) A claim under the Nebraska Fair Employment Practice Act;

(3) Any agreement between parties covered by sections 60-1401.01 to 60-1440; and

(4) Except as provided in section 44-811, any agreement concerning or relating to an insurance policy other than a contract between insurance companies including a reinsurance contract.

(g) When a conflict exists, the Uniform Arbitration Act shall not apply to the Uniform Act on Interstate Arbitration and Compromise of Death Taxes and

sections 44-811, 44-4824, 54-404 to 54-406, 60-2701 to 60-2709, and 70-1301 to 70-1329.

Source: Laws 1997, LB 151, § 2; Laws 2002, LB 1105, § 426; Laws 2005, LB 645, § 8.

Cross References

Nebraska Fair Employment Practice Act, see section 48-1125.
Uniform Act on Interstate Arbitration and Compromise of Death Taxes, see section 77-3315.

The public policy of the state did not change until this section became Effective on June 11, 1997. Any contract clause allowing for predispute binding arbitration entered into before that date is void as against public policy. Millennium Solutions, Inc. v. Davis, 258 Neb. 293, 603 N.W.2d 406 (1999).

25-2602.02 Contract; statement required.

The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

Source: Laws 1997, LB 151, § 7.

25-2603 Proceedings to compel or stay arbitration.

(a) On application of a party showing an agreement described in section 25-2602.01 and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a) of this section, the application shall be made therein. Otherwise and subject to section 25-2619, such application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

Source: Laws 1987, LB 71, § 3; Laws 1997, LB 151, § 3.

25-2604 Appointment of arbitrators by court.

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method

fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators, except that the court shall always appoint an odd number of arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement. Upon appointment an arbitrator shall disclose his or her hourly or daily rate for arbitration services.

Source: Laws 1987, LB 71, § 4.

25-2604.01 Arbitrators; disqualification.

Any person proposed for nomination by all parties or all party arbitrators to serve as a neutral arbitrator shall disqualify himself or herself, upon demand of any party to the arbitration agreement made before the commencement of the proceedings, on any of the grounds specified in section 24-739 for disqualification of a judge or on the ground that such person is an employee or independent contractor of an industry, trade, or professional association of which only one party is a member if the grounds were known or should have been known by the movant.

Source: Laws 1997, LB 151, § 5.

25-2605 Majority action by arbitrators.

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by the Uniform Arbitration Act.

Source: Laws 1987, LB 71, § 5.

25-2606 Hearing.

Unless otherwise provided by the agreement:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered or certified mail not less than ten days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion, may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy;

(b) The parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing; and

(c) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

Arbitration proceedings shall take place in the county designated in section 25-403.01 unless the parties otherwise agree at a time subsequent to the arising of the controversy.

Source: Laws 1987, LB 71, § 6; Laws 1997, LB 151, § 4.

25-2607 Representation by attorney.

A party has the right to be represented by an attorney at any proceeding or hearing under the Uniform Arbitration Act. A waiver thereof prior to the proceeding or hearing is ineffective.

Source: Laws 1987, LB 71, § 7.

25-2608 Witnesses, subpoenas, depositions.

(a) The arbitrators may issue or cause to be issued subpoenas for the attendance of witnesses, for the taking of depositions, and for the production of books, records, documents, and other evidence and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the county court.

Source: Laws 1987, LB 71, § 8.

25-2609 Award.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered or certified mail or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party but not more than thirty days after the hearing. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he or she notifies the arbitrators of his or her objection prior to the delivery of the award to him or her.

Source: Laws 1987, LB 71, § 9.

Pursuant to subsection (a) of this section, an arbitration award signed by only one of three arbitrators required to sign the award was defective in form but not in substance, and thus the parties were permitted to make timely application to modify or correct the award under subsection (a)(3) of section 25-2614. Hartman v. City of Grand Island, 265 Neb. 433, 657 N.W.2d 641 (2003).

25-2610 Change of award by arbitrators.

On application of a party or, if an application to the court is pending under section 25-2612, 25-2613, or 25-2614, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in subdivisions (a)(1) and (a)(3) of section 25-2614 or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he or she must serve his or her objections thereto, if any, within ten days from the

notice. The award so modified or corrected is subject to the provisions of sections 25-2612 to 25-2614.

Source: Laws 1987, LB 71, § 10.

25-2611 Fees and expenses of arbitration.

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award.

Source: Laws 1987, LB 71, § 11.

25-2612 Confirmation of award.

Within sixty days of the application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 and 25-2614.

Source: Laws 1987, LB 71, § 12.

25-2613 Vacating an award.

(a) Upon application of a party, the court shall vacate an award when:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party;

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or

(6) An arbitrator was subject to disqualification pursuant to section 25-2604.01 and failed, upon receipt of timely demand, to disqualify himself or herself as required by such section.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that if predicated upon corruption, fraud, or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in subdivision (a)(5) of this section, the court may order a rehearing before the new arbitrators chosen as provided in the agreement or, in the absence thereof, by the court in accordance with section 25-2604, or if the award is vacated on grounds set forth in subdivisions (a)(3) and (a)(4) of this section, the court may order a rehearing before the arbitrators who made the award or their successors

appointed in accordance with section 25-2604. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

Source: Laws 1987, LB 71, § 13; Laws 1997, LB 151, § 6.

Pursuant to subsection (a)(6) of this section, the district court lacked authority to vacate the arbitrator's award pursuant to the Uniform Arbitration Act on the basis that it was inequitable. Hartman v. City of Grand Island, 265 Neb. 433, 657 N.W.2d 641 (2003).

25-2614 Modification or correction of award.

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

Source: Laws 1987, LB 71, § 14.

Pursuant to subsection (a) of section 25-2609, an arbitration award signed by only one of three arbitrators required to sign the award was defective in form but not in substance, and thus the parties were permitted to make application to modify or correct the award under subsection (a)(3) of this section. Hartman v. City of Grand Island, 265 Neb. 433, 657 N.W.2d 641 (2003).

Under subsection (a)(1) of this section, an ''evident miscalculation of figures'' occurs when there is a mathematical error in the arbitration award that is both obvious and unambiguous. Jones v. Summit Ltd. Partnership Five, 262 Neb. 793, 635 N.W.2d 267 (2001).

25-2615 Judgment or decree on award.

Upon the granting of an order confirming, modifying, or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto and disbursements may be awarded by the court.

Source: Laws 1987, LB 71, § 15.

25-2616 Judgment roll, docketing.

(a) On entry of judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

(1) The agreement and each written extension of the time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying, or correcting the award; and

(4) A copy of the judgment or decree.

(b) The judgment or decree may be docketed as if rendered in an action.

Source: Laws 1987, LB 71, § 16.

25-2617 Application to court; procedure.

Except as otherwise provided, an application to the court under the Uniform Arbitration Act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

Source: Laws 1987, LB 71, § 17.

25-2618 District court; jurisdiction; act; how construed.

(a) The term court shall mean any district court of this state. The making of an agreement described in section 25-2602.01 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under the Uniform Arbitration Act and to enter judgment on an award thereunder.

(b) Nothing in the Uniform Arbitration Act shall be construed to empower the Commission of Industrial Relations to order that any party under its jurisdiction submit to, or contract to submit to, arbitration.

Source: Laws 1987, LB 71, § 18; Laws 1997, LB 151, § 9.

25-2618.01 Small Claims Court; jurisdiction; when; transfer limited; appeal.

(a) Whenever the amount of a controversy subject to the terms of an otherwise valid arbitration agreement is within the jurisdiction of the Small Claims Court under section 25-2802, a party may submit the controversy to the Small Claims Court for ultimate resolution under sections 25-2801 to 25-2807.

(b) A controversy submitted to the Small Claims Court under this section shall not be transferred to the regular docket of the county court under section 25-2805.

(c) In all appeals involving cases submitted under subsection (a) of this section, the judgment shall be affirmed unless:

(i) The judgment was procured by corruption, fraud, or other undue means;

(ii) There was evident partiality or corruption by the judge or misconduct prejudicing the rights of any party;

(iii) The judge exceeded his or her powers;

(iv) The judge refused to postpone the trial upon sufficient cause being shown therefor, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party;

(v) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the Small Claims Court hearing without raising the objection; or

(vi) The judge was subject to disqualification and failed, upon receipt of timely demand, to disqualify himself or herself as required by law.

Source: Laws 1997, LB 151, § 8.

25-2619 Venue.

An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the county where the adverse party resides or has a place of business or, if he or she has no residence or place of business in this state, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

Source: Laws 1987, LB 71, § 19.

25-2620 Appeals.

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under section 25-2603;

(2) An order granting an application to stay arbitration made under subsection (b) of section 25-2603;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of the Uniform Arbitration Act.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

Source: Laws 1987, LB 71, § 20.

Under subsection (a)(5) of this section, an order which vacates an arbitrator's award without directing a rehearing is appealable, whereas an order which vacates an award and directs a rehearing is not appealable. Nebraska Dept. of Health & Human Servs. v. Struss, 261 Neb. 435, 623 N.W.2d 308 (2001).

25-2621 Act not retroactive.

The Uniform Arbitration Act applies only to agreements made subsequent to August 30, 1987.

Source: Laws 1987, LB 71, § 21.

25-2622 Act, how construed.

The Uniform Arbitration Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Source: Laws 1987, LB 71, § 22.

ARTICLE 27

PROVISIONS APPLICABLE TO COUNTY COURTS

(a) MISCELLANEOUS PROCEDURAL PROVISIONS

Section
25-2701. Rules of procedure.
25-2702. Appearances; representation; attorney; qualification.
25-2703. Cities and villages; prosecution of complaints; ordinances; file with court.
25-2704. Summons; pleadings; time for filings; trial date; telephonic or videoconference hearing; authorized.

(a) MISCELLANEOUS PROCEDURAL PROVISIONS

25-2701 Rules of procedure.

All provisions in the codes of criminal and civil procedure governing actions and proceedings in the district court not in conflict with statutes specifically

governing procedure in county courts and related to matters for which no specific provisions have been made for county courts shall govern and apply to all actions and proceedings in the county court.

Source: Laws 1972, LB 1032, § 28; R.S.1943, (1985), § 24-528.

On appeal from a county or municipal court, notice of appeal and bond must be filed within ten days after rendition of judgment and this period cannot be prolonged by filing a motion for new trial. Edward Frank Rozman Co. v. Keillor, 195 Neb. 587, 239 N.W.2d 779 (1976).

25-2702 Appearances; representation; attorney; qualification.

No person shall appear in the county court to represent another, or act as attorney therein for any person other than himself or herself, unless he or she is regularly admitted as an attorney in this state.

Source: Laws 1929, c. 82, art. I, § 14, p. 282; C.S.1929, § 22-114; R.S.1943, § 26-115; Laws 1972, LB 1032, § 85; Laws 1984, LB 13, § 29; R.S.1943, (1985), § 24-585.

25-2703 Cities and villages; prosecution of complaints; ordinances; file with court.

Any city or village attorney may sign and prosecute complaints in the county court for any violation of any ordinance of the city or village for which he or she is attorney.

After January 1, 1974, no city or village may prosecute complaints for violations of ordinances unless such city or village has on file with the court a current copy of the ordinances of such city or village. Subject to guidelines provided by the State Court Administrator, the court shall prescribe the form in which such ordinances shall be filed.

Source: Laws 1972, LB 1032, § 33; Laws 1973, LB 226, § 8; Laws 1984, LB 13, § 17; R.S.1943, (1985), § 24-533.

25-2704 Summons; pleadings; time for filings; trial date; telephonic or videoconference hearing; authorized.

(1) In any civil action in county court, the summons, pleadings, and time for filings shall be the same as provided for civil actions in district court. A case shall stand for trial at the earliest available time on the court docket after the issues therein are or, according to the times fixed for pleading, should have been made up.

(2) All nonevidentiary hearings, and any evidentiary hearings approved by the county court and by stipulation of all parties that have filed an appearance, may be heard by the court telephonically or by videoconferencing or similar equipment at any location within the judicial district as ordered by the court and in a manner that ensures the preservation of an accurate record. Such hearings shall not include trials before a jury. Hearings conducted in this manner shall be consistent with the public's access to the courts.

Source: Laws 1972, LB 1032, § 35; R.S.1943, (1985), § 24-535; Laws 1997, LB 363, § 1; Laws 1998, LB 234, § 9; Laws 2002, LB 876, § 57; Laws 2008, LB1014, § 12.
Operative date January 1, 2009.

25-2705 Trial by jury; demand for; exceptions; laws applicable.

Either party to any case in county court, except criminal cases arising under city or village ordinances, traffic infractions, other infractions, and any matter arising under the Nebraska Probate Code or the Nebraska Uniform Trust Code, may demand a trial by jury. In civil cases, the demand shall be in writing and shall be filed on or before answer day except as otherwise provided in section 25-2805. All provisions of law relating to juries in the district courts shall apply to juries in the county courts, and the district court jury list shall be used, except that juries in the county courts shall consist of six persons.

Source: Laws 1972, LB 1032, § 36; Laws 1973, LB 6, § 1; Laws 1973, LB 548, § 1; Laws 1975, LB 481, § 5; Laws 1979, LB 534, § 6; Laws 1984, LB 13, § 18; Laws 1987, LB 77, § 4; R.S.Supp.,1988, § 24-536; Laws 2003, LB 130, § 116.

Cross References

Nebraska Probate Code, see section 30-2201.
Nebraska Uniform Trust Code, see section 30-3801.

1. Constitutionality of statute
2. When right exists
3. Necessity for demand
4. Miscellaneous

1. Constitutionality of statute

This section, which denies jury trials for criminal cases arising under city or village ordinances or from traffic infractions, is unconstitutional to the extent it denies a jury trial to defendants charged with third-offense driving while intoxicated or greater who are subject to a sentence of up to 6 months in jail and a 15-year operator's license suspension. State v. Wiltshire, 241 Neb. 817, 491 N.W.2d 324 (1992).

There is no right to a jury trial for violations of municipal ordinances. State v. Blair, 230 Neb. 775, 433 N.W.2d 518 (1988).

Where the constitutionality of this section, insofar as it requires the defendant to request a jury trial, was not raised at any time prior to appeal, it will not be considered on appeal. State v. Hiross, 211 Neb. 319, 318 N.W.2d 291 (1982).

This section, providing for jury trials in the municipal courts except criminal cases arising under city or village ordinances, does not violate Article I, section 6, of Nebraska Constitution. State v. Flores, 209 Neb. 302, 307 N.W.2d 523 (1981).

2. When right exists

A defendant is not entitled to a jury trial in a prosecution for violation of a municipal ordinance. State v. Cozzens, 241 Neb. 565, 490 N.W.2d 184 (1992).

A demand for a jury trial by a defendant is necessary to involve the statutory right to a jury trial. State v. Miller, 226 Neb. 576, 412 N.W.2d 849 (1987).

This section does not provide a right to a jury trial for the violation of a municipal ordinance where the offense charged is petty. State v. Richter, 225 Neb. 871, 408 N.W.2d 324 (1987).

A defendant who appears pro se must make a proper demand for a jury trial pursuant to this section or that right will be deemed waived. State v. Lafler, 224 Neb. 613, 399 N.W.2d 808 (1987).

In municipal court prosecution for operating a vehicle while under the influence, defendant enjoys no constitutional right to trial by jury, and untimely request constituted waiver. State v. Nielsen, 199 Neb. 597, 260 N.W.2d 321 (1977).

There is no constitutional right to trial before a twelve-member jury on a petit offense. State v. Soester, 199 Neb. 477, 259 N.W.2d 921 (1977).

Under this section, defendant is expressly granted the right to a jury trial in the county court and municipal court. State v. Young, 194 Neb. 544, 234 N.W.2d 196 (1975).

3. Necessity for demand

To invoke this statutory right, an accused must make a demand for a jury trial by filing a timely request in accordance with the court rules. State v. Bishop, 224 Neb. 522, 399 N.W.2d 271 (1987).

As reflected by this section, the right to a jury trial is part of our fundamental law. State v. Kennedy, 224 Neb. 164, 396 N.W.2d 722 (1986).

Challenger of this section must show he or she would receive a benefit by a declaration of invalidity before standing will be allowed. State v. Lynch, 223 Neb. 849, 394 N.W.2d 651 (1986).

A demand is required to invoke the statutory right to a jury trial. State v. Vernon, 218 Neb. 539, 356 N.W.2d 887 (1984).

There is no constitutional right to a jury trial for an offense carrying a minimum sentence of six months or less and, while this section gives a statutory right to a jury trial in such cases, a demand must be made in order to invoke this right. State v. Mangelsen, 207 Neb. 213, 297 N.W.2d 765 (1980).

4. Miscellaneous

No right to jury trial if charged under municipal ordinance equivalent to section 39-669.07. State v. Lynch, 223 Neb. 849, 394 N.W.2d 651 (1986).

A defendant in a criminal case may make an oral request for a jury trial at the time of arraignment or may make the request in writing according to the rules set by the trial court. State v. Gerber, 206 Neb. 75, 291 N.W.2d 403 (1980).

Supreme Court will take judicial notice of all rules of district, separate juvenile, county, municipal, and workmen's compensation courts on file with the Clerk of the Supreme Court. State v. Barrett, 200 Neb. 553, 264 N.W.2d 434 (1978).

Under this section, a trial court is not required to advise a defendant, charged with a petty offense, of his or her statutory right to a jury trial or the time and manner which must be followed to invoke that right, even if he elects to proceed pro se, when that defendant is penalized only by fine. State v. Golden, 8 Neb. App. 601, 599 N.W.2d 224 (1999).

25-2706 County court; certify proceedings to district court; when; avoidance of county court jurisdiction; recovery of costs prohibited.

The county court shall certify proceedings to the district court of the county in which an action is pending (1) when the pleadings or discovery proceedings indicate that the amount in controversy is greater than the jurisdictional amount in subdivision (5) of section 24-517 and a party to the action requests the transfer or (2) when the relief requested is exclusively within the jurisdiction of the district court. The county court shall certify the proceedings to the district court and file the original papers of such action and a certified transcript of the docket entries with the clerk of the district court. The action shall then be tried and determined by the district court as if the proceedings were originally brought in such district court, except that no new pleadings need be filed unless ordered by the district court.

If it is determined, upon adjudication, that the allegations of either party to such action are asserted with the intention solely of avoiding the jurisdiction of the county court, the offending party shall not recover any costs in the county court or the district court.

Source: Laws 1983, LB 137, § 3; Laws 1986, LB 750, § 2; R.S.Supp.,1988, § 24-302.01; Laws 1991, LB 422, § 2; Laws 1993, LB 69, § 1; Laws 2001, LB 269, § 2.

This section does not require a district court to issue a new summons for service of process when an action has been certified to it from the county court under this section. Hunt v. Trackwell, 262 Neb. 688, 635 N.W.2d 106 (2001).

Plaintiff may not transfer jurisdiction of a case from county court to district court by simply filing the county court transcript in the district court. Collection Bureau of Grand Island, Inc. v. Fry, 9 Neb. App. 277, 610 N.W.2d 442 (2000).

25-2707 Garnishment; amount in excess of jurisdiction of county court; transfer to district court; proceedings certified.

Whenever proceedings under sections 25-1011 and 25-1026 to 25-1031.01, or under section 25-1056, are had in any county court and it shall appear by the pleadings or other answers to interrogatories filed by the garnishee that there is an amount in excess of the jurisdictional dollar amount specified in section 24-517, or property with a value of more than such amount, the title or ownership of which is in dispute, or when at any time during such proceedings it shall appear from the evidence or other pleadings that there is property of the value of more than the jurisdictional dollar amount specified in section 24-517, the title or ownership of which is in dispute, such court shall proceed no further, but shall forthwith certify the proceedings to the district court of the county in which the action is pending, and thereupon shall file the original papers, together with a certified transcript of docket entries, in the clerk's office of the district court, the matter to be held for trial and determination by the district court as if the proceedings were originally had in district court, except that no new pleadings need be filed except as ordered by the district court.

Source: Laws 1961, c. 116, § 1, p. 358; R.S.1943, § 24-502.01; Laws 1972, LB 1032, § 40; Laws 1986, LB 749, § 1; R.S.Supp.,1988, § 24-540.

25-2708 Estates, guardianships, conservatorships, and trusts; real estate; certificate of pending proceeding; filing; county judge; duties.

In any proceeding in the county court involving (1) the probate of wills, (2) the administration of estates, (3) the determination of heirs, (4) the determination of inheritance tax, (5) guardianships, (6) conservatorships, where real estate is any part of the assets of the estate or proceeding, or (7) trusts, where real estate is specifically described as an asset of the trust, the county judge

before whom the proceeding is pending shall issue a certificate which shall be filed with the register of deeds of the county in which the real estate is located within ten days after the description of the real estate is filed in the proceeding. The certificate shall be in the following form:

This is to certify that there is pending in the county court of ..... County, a proceeding .....

(describe proceeding and name of person involved)

in which the following described real estate is involved, to wit:

. . . . . .

(describe real estate)

.....
County Judge

Source: Laws 1969, c. 240, § 1, p. 885; Laws 1971, LB 41, § 1; R.S.Supp.,1971, § 24-562.01; Laws 1972, LB 1032, § 59; Laws 1975, LB 481, § 7; Laws 1980, LB 694, § 1; R.S.1943, (1985), § 24-559; Laws 2003, LB 130, § 117.

25-2709 Probate, adoption, trust jurisdiction; continuances.

In all proceedings within the probate, guardianship, conservatorship, adoption, or trust jurisdiction of the county court when a date for a hearing has been fixed and when no action is taken by the court at the time so fixed, the cause shall stand continued from day to day as a matter of law and may thereafter be heard and determined by the court without further notice at any time, except that any party who has filed an appearance or pleading in such proceedings shall be given such notice of the hearing in such manner as the court shall direct.

Source: Laws 1951, c. 55, § 1, p. 188; R.S.1943, § 24-528.01; Laws 1972, LB 1032, § 53; Laws 1977, LB 167, § 1; R.S.1943, (1985), § 24-553.

(b) FEES AND COSTS

25-2710 Fees and costs; payment; effect.

It shall be lawful for any person liable for the payment of any fees and costs charged or taxed in any civil or criminal action, or in any proceeding authorized by law to be brought in the county court, to pay such costs and fees to the county judge or to the clerk of the county court, and such payment shall operate as a satisfaction of such person's liability to all concerned. Each county court may accept credit cards as a means of payment for any money due the court.

Source: Laws 1909, c. 40, § 1, p. 226; R.S.1913, § 1242; C.S.1922, § 1165; C.S.1929, § 27-545; R.S.1943, § 24-549; Laws 1972, LB 1032, § 30; Laws 1988, LB 370, § 1; R.S.Supp.,1988, § 24-530.

25-2711 Clerk; liable for fees; accounting; indigent person; waiver of fees, when.

It shall be the duty of the clerk of the court to demand the payment of all fees in advance in civil cases. He or she shall be charged with all fees earned by the

court and shall be required to account for the same. Upon written application by and such evidence as the court may require from an indigent person, the clerk of the court may be directed, by a judge of the court by a written order, to file all necessary pleadings and to issue necessary process thereon to meet the requirements of justice, in which case no fees shall be charged and collected by the clerk of the court from such person except upon final order or judgment in the action, and in that case the clerk shall not be charged with the fees in the case and required to account for the same unless the same are collected by him or her.

Source: Laws 1972, LB 1032, § 31; Laws 1988, LB 370, § 2; R.S.Supp.,1988, § 24-531.

Cross References

Unclaimed witness fees, disposition, see sections 33-140 to 33-140.03.

25-2712 Fees and costs; amount; transmit to State Treasurer; deposited in General Fund.

Fees and costs in the county court shall be those provided by Chapter 33. Each clerk of the court shall, not later than the fifteenth day of the month following the calendar month in which they were received, transmit all such fees and costs received together with any interest or other income accumulated as a result of section 25-2713 and any fees for credit card use, reduced by any costs incurred as a result of credit card use and any other bank charges, to the State Treasurer who shall deposit the same in the General Fund.

Source: Laws 1972, LB 1032, § 32; Laws 1975, LB 286, § 2; Laws 1985, LB 326, § 1; Laws 1988, LB 370, § 3; R.S.Supp.,1988, § 24-532.

25-2713 Clerk of county court; invest money received; rules.

When any money received by the clerk of the county court is not immediately paid out and the investment of such money is not otherwise provided for by law, the clerk of the county court shall invest such money or portion thereof as may be provided for by rules issued by the Supreme Court.

Source: Laws 1985, LB 326, § 2; Laws 1986, LB 891, § 1; Laws 1986, LB 529, § 10; Laws 1988, LB 370, § 4; R.S.Supp.,1988, § 24-532.01.

(c) UNCLAIMED FUNDS

25-2714 Legacies, devises, distributive shares; unclaimed; payment to judge; effect.

In case of an executor of a last will and testament which has been admitted to probate in any county court in this state, and in case of an administrator of the estate of a deceased intestate, upon making a satisfactory showing to the court of the inability of such an executor to find any legatee or devisee named in such will, or of the inability of an administrator to find an heir at law to which the county court has ordered payment to be made out of funds in his hands, or in case such legatee, devisee or an heir at law is found, and shall refuse to accept the legacy, devise, or amount ordered paid by the county court to such heir at law, or in case of any creditor whose claim has been allowed and who cannot

be found or to whom for any reason payment cannot be made by such executor or administrator to such claimant, it shall be lawful for such executor or administrator to pay the county judge of the county having the settlement of such estate in charge, the amount of such legacy, devise or sum so ordered paid to an heir at law, or the amount of such claim so allowed and unpaid, for the use and benefit of such persons, and such payment shall discharge such executor or administrator from all further liability with reference thereto.

Source: Laws 1909, c. 40, § 1, p. 226; R.S.1913, § 1242; C.S.1922, § 1165; C.S.1929, § 27-545; R.S.1943, § 24-550; Laws 1967, c. 139, § 1, p. 425; R.S.Supp.,1969, § 24-550; Laws 1972, LB 1032, § 60; R.S.1943, (1985), § 24-560.

25-2715 Fees, legacies, devises, distributive shares; payment to claimant; record.

It shall be the duty of the county judge to pay any fees, money, costs, legacies, devises, or sums due creditors, held by him, to the person entitled thereto, upon proof of his identity to the satisfaction of the judge. A plain record shall be kept of all such fees, money, costs, legacies, devises, and money due heirs, creditors, or other persons, paid as aforesaid, and the same shall always be open to the inspection of the public.

Source: Laws 1909, c. 40, § 2, p. 227; R.S.1913, § 1243; Laws 1921, c. 105, § 1, p. 376; C.S.1922, § 1166; C.S.1929, § 27-546; R.S. 1943, § 24-551; Laws 1967, c. 139, § 2, p. 426; R.R.S.1943, § 24-551; Laws 1972, LB 1032, § 61; R.S.1943, (1985), § 24-561.

25-2716 Unclaimed funds; judge; payment to successor.

Upon the expiration of any judge's term of office, he shall pay to his successor in office, any fees, money, costs, legacies, devises or money due any heir, creditor, or other person, in his possession, which have not been paid to the persons entitled thereto, or applied as provided by law.

Source: Laws 1909, c. 40, § 2, p. 227; R.S.1913, § 1243; Laws 1921, c. 105, § 1, p. 376; C.S.1922, § 1166; C.S.1929, § 27-546; R.S. 1943, § 24-552; Laws 1967, c. 139, § 3, p. 426; R.R.S.1943, § 24-552; Laws 1972, LB 1032, § 62; R.S.1943, (1985), § 24-562.

25-2717 Unclaimed funds; payment to State Treasurer; disposition.

If any fees, money, condemnation awards, legacies, devises, sums due creditors, or costs due or belonging to any heir, legatee, or other person or persons have not been paid to or demanded by the person or persons entitled to the funds within three years from the date the funds were paid to the county judge or his or her predecessors in office, it shall be the duty of the county judge to notify the State Treasurer of the fees, money, condemnation awards, legacies, devises, sums due creditors, or costs remaining. When directed by the State Treasurer, the county judge shall remit the fees, money, condemnation awards, legacies, devises, sums due creditors, or costs to the State Treasurer for deposit in a separate trust fund pursuant to section 69-1317. Such payment shall release the bond of the county judge making such payment of all liability for such fees, money, condemnation awards, legacies, devises, sums due creditors,

and costs due to heirs, legatees, or other persons paid in compliance with this section.

Source: Laws 1909, c. 40, § 2, p. 227; R.S.1913, § 1243; Laws 1921, c. 105, § 1, p. 376; C.S.1922, § 1166; C.S.1929, § 27-546; R.S. 1943, § 24-553; Laws 1949, c. 49, § 1, p. 157; Laws 1967, c. 139, § 4, p. 427; R.R.S.1943, § 24-553; Laws 1972, LB 1032, § 63; Laws 1978, LB 860, § 1; R.S.1943, (1985), § 24-563; Laws 1992, Third Spec. Sess., LB 26, § 2.

Cross References

Uniform Disposition of Unclaimed Property Act, see section 69-1329.

(d) JUDGMENTS

25-2718 Offer of judgment; effect; as evidence.

If the defendant, at any time before trial, offers in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued. If he does not accept such offer before the trial, and fails to recover in the action a sum equal to the offer, he shall not recover costs accrued after the offer and costs shall be adjudged against him; but the offer and failure to accept it cannot be given in evidence, to affect the recovery, otherwise than as to costs as above provided.

Source: Laws 1929, c. 82, art. X, § 102, p. 305; C.S.1929, § 22-1006; R.S.1943, § 26-1,103; Laws 1972, LB 1032, § 38; R.S.1943, (1985), § 24-538.

25-2719 Judgments; notice; to whom sent.

Within three days after entry of any judgment, the clerk of the county court shall send notice of the judgment by first-class United States mail to each party's attorney or attorneys of record or, if none, to an individual defendant at his or her usual place of residence, if known, and to a defendant not an individual to any proper recipient of summons for that party as designated by law.

Source: Laws 1976, LB 425, § 2; Laws 1984, LB 13, § 30; R.S.1943, (1985), § 24-585.01; Laws 1999, LB 43, § 14.

25-2720 Repealed. Laws 1998, LB 234, § 12.

25-2720.01 Power to set aside, vacate, or modify judgments or orders.

The county court, including the county court when sitting as a juvenile court, shall have the power to set aside default judgments and to vacate or modify its own judgments or orders during or after the term at which such judgments or orders were made in the same manner as provided for actions filed in the district court.

Source: Laws 1998, LB 234, § 10; Laws 2006, LB 1115, § 18.

25-2721 Judgment; filing in other court; execution; lien on real estate; conditions.

(1) Any person having a judgment rendered by a county court may cause a transcript of the judgment to be filed in the office of the clerk of the county

court in any county of this state. When the transcript is so filed, the clerk of such court may issue execution on the judgment in the same manner as execution is issued upon other judgments rendered in the county court.

(2) Any person having a judgment rendered by a county court may cause a transcript thereof to be filed in the office of the clerk of the district court in any county of this state. When the transcript is so filed and entered upon the judgment record, such judgment shall be a lien on real estate in the county where the same is filed, and when the same is so filed and entered upon such judgment record, the clerk of such court may issue execution thereupon in like manner as execution is issued upon judgments rendered in the district court.

Source: G.S.1873, c. 14, § 18, p. 267; R.S.1913, § 1221; C.S.1922, § 1144; C.S.1929, § 27-532; R.S.1943, § 24-532; Laws 1972, LB 1032, § 39; R.S.1943, (1985), § 24-539; Laws 1991, LB 422, § 3.

Under subsection (2) of this section, a judgment rendered by a county court does not automatically become a lien on real estate. A judgment rendered by a county court is only a personal judgment against the debtor. In order for a county court's judgment to become a lien on real estate, it must be transcribed to a district court. Mousel Law Firm, P.C. v. The Townhouse, Inc., 259 Neb. 113, 608 N.W.2d 571 (2000).

(e) RECORDS

25-2722 Record; certification required; effect.

Every record made in any county court, excepting original orders, judgments and decrees thereof, shall have attached thereto a certificate signed by the judge of such court, showing the date of such record and the county in which the same is made, and it shall not be necessary to call such judge or his successor in office to prove such record so certified.

Source: G.S.1873, c. 14, § 34, p. 270; R.S.1913, § 1234; C.S.1922, § 1157; C.S.1929, § 27-536; R.S.1943, § 24-540; Laws 1972, LB 1032, § 67; R.S.1943, (1985), § 24-567.

25-2723 Probate books, enumeration.

The probate books shall consist of a probate record, a fee book, a general index to probate records, an index to wills deposited, and such additional records as are needed to carry out the provisions of the Nebraska Probate Code.

Source: G.S.1873, c. 14, § 32, p. 270; Laws 1895, c. 31, § 1, p. 156; Laws 1909, c. 41, § 1, p. 228; R.S.1913, § 1233; C.S.1922, § 1156; C.S.1929, § 27-535; R.S.1943, § 24-535; Laws 1972, LB 1032, § 54; Laws 1975, LB 481, § 6; R.S.1943, (1985), § 24-554.

Cross References

Nebraska Probate Code, see section 30-2201.

25-2724 Probate record; retention.

The probate record shall be permanently retained on microfilm or in its original form in accordance with the Records Management Act. Evidence shall be retained as required by the Supreme Court.

Source: G.S.1873, c. 14, § 32, p. 270; Laws 1895, c. 31, § 1, p. 156; Laws 1909, c. 41, § 1, p. 228; R.S.1913, § 1233; C.S.1922,

§ 1156; C.S.1929, § 27-535; R.S.1943, § 24-536; Laws 1972, LB 1032, § 55; Laws 1989, LB 229, § 1; R.S.Supp.,1989, § 24-555.

Cross References

Records Management Act, see section 84-1220.

25-2725 Fee book; contents.

The fee book shall contain an entry of the title of all probate proceedings, the date of each paper issued or filed, and the date of all orders and judgments entered therein together with an exact amount of all fees allowed, taxed and paid in each proceeding, showing the names of the persons entitled to and receiving the same, and for what services such fees were taxed or paid.

Source: G.S.1873, c. 14, § 32, p. 270; Laws 1895, c. 31, § 1, p. 156; Laws 1909, c. 41, § 1, p. 228; R.S.1913, § 1233; C.S.1922, § 1156; C.S.1929, § 27-535; R.S.1943, § 24-537; Laws 1972, LB 1032, § 56; R.S.1943, (1985), § 24-556.

25-2726 General index; contents.

The general index to probate records shall contain an alphabetical list of all estate matters brought before the court, the file number of the estate, the name of each estate administered upon, or guardianship or other probate matter presented to the court for its determination, the number and page of the fee book in which the costs are taxed in each matter, and the book and page in the probate record where all such matters are recorded, sufficiently definite to enable the finding of such proceedings from the general index.

Source: G.S.1873, c. 14, § 33, p. 270; Laws 1909, c. 41, § 1, p. 228; R.S.1913, § 1233; C.S.1922, § 1156; C.S.1929, § 27-535; R.S. 1943, § 24-538; Laws 1972, LB 1032, § 57; R.S.1943, (1985), § 24-557.

25-2727 Index to wills deposited; contents.

The index to wills deposited shall contain a memorandum of the date of each will deposited with the county judge for safekeeping, the names of the testators in alphabetical order, the name of the party delivering each will to the county judge, and a column in which shall be noted the final disposition of such will, whether returned to the testator, filed for probate, or otherwise disposed of.

Source: G.S.1873, c. 14, § 33, p. 270; Laws 1895, c. 31, § 1, p. 156; Laws 1909, c. 41, § 1, p. 228; R.S.1913, § 1233; C.S.1922, § 1156; C.S.1929, § 27-535; R.S.1943, § 24-539; Laws 1972, LB 1032, § 58; R.S.1943, (1985), § 24-558.

(f) APPEALS

25-2728 Appeals; parties; applicability of sections.

(1) Any party in a civil case and any defendant in a criminal case may appeal from the final judgment or final order of the county court to the district court of the county where the county court is located. In a criminal case, a prosecuting attorney may obtain review by exception proceedings pursuant to sections 29-2317 to 29-2319.

(2) Sections 25-2728 to 25-2738 shall not apply to:

(a) Appeals in eminent domain proceedings as provided in sections 76-715 to 76-723;

(b) Appeals in proceedings in the county court sitting as a juvenile court as provided in sections 43-287.01 to 43-287.06, 43-2,106, and 43-2,106.01;

(c) Appeals in matters arising under the Nebraska Probate Code as provided in section 30-1601;

(d) Appeals in matters arising under the Nebraska Uniform Trust Code;

(e) Appeals in adoption proceedings as provided in section 43-112;

(f) Appeals in inheritance tax proceedings as provided in section 77-2023; and

(g) Appeals in domestic relations matters as provided in section 25-2739.

Source: Laws 1981, LB 42, § 1; Laws 1984, LB 13, § 19; Laws 1986, LB 529, § 11; Laws 1989, LB 182, § 8; R.S.Supp.,1989, § 24-541.01; Laws 1991, LB 732, § 69; Laws 1994, LB 1106, § 2; Laws 1995, LB 538, § 2; Laws 2000, LB 921, § 25; Laws 2003, LB 130, § 118.

Cross References

Nebraska Probate Code, see section 30-2201.
Nebraska Uniform Trust Code, see section 30-3801.

The method of obtaining district court review of decisions rendered by the county court is by appeal pursuant to this section. Miller v. Brunswick, 253 Neb. 141, 571 N.W.2d 245 (1997).

Under subsection (2) of this section, order of county court dismissing motion to remove personal representative was appealable. In re Estate of Snover, 233 Neb. 198, 443 N.W.2d 894 (1989).

Pursuant to subsections (1) and (4) of this section, an appeal from a determination by the county court, juvenile division, that a juvenile lacks proper parental care by reason of the fault or habits of his parent under the provisions of section 43-247(3), is properly taken to the district court; the Supreme Court has no authority to hear such an appeal which does not involve the termination of parental rights. In re Interest of J.S.O., 231 Neb. 529, 436 N.W.2d 837 (1989).

The right to appeal the final order or judgment of a county court grounded in this section and section 29-611 does not include a constitutionally grounded right to a speedy appeal. State v. Schroder, 218 Neb. 860, 359 N.W.2d 799 (1984).

The right to appeal from orders of a county court sitting as a juvenile court, insofar as that right is vested in the child's custodian, is vested only in individuals or entities having legal custody of such a child, and not in those persons having only possession of the child. In re Interest of S.R., 217 Neb. 528, 352 N.W.2d 141 (1984).

The docket fee requirement contained in section 25-2729 necessarily applies to appeal brought by a prosecuting attorney pursuant to sections 29-824 to 29-826, because this section does not expressly exclude sections 29-824 to 29-826 from the application of section 25-2729. State v. McArthur, 12 Neb. App. 657, 685 N.W.2d 733 (2004).

25-2729 Appeals; procedure.

(1) In order to perfect an appeal from the county court, the appealing party shall within thirty days after the entry of the judgment or final order complained of:

(a) File with the clerk of the county court a notice of appeal; and

(b) Deposit with the clerk of the county court a docket fee in the amount of the filing fee in district court.

(2) Satisfaction of the requirements of subsection (1) of this section shall perfect the appeal and give the district court jurisdiction of the matter appealed.

(3) The entry of a judgment or final order occurs when the clerk of the court places the file stamp and date upon the judgment or final order. For purposes of determining the time for appeal, the date stamped on the judgment or final order shall be the date of entry.

(4) In appeals from the Small Claims Court only, the appealing party shall also, within the time fixed by subsection (1) of this section, deposit with the clerk of the county court a cash bond or undertaking, with at least one good and sufficient surety approved by the court, in the amount of fifty dollars conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her.

(5) A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment or final order shall be treated as filed or deposited after the entry of the judgment or final order and on the day of entry.

(6) The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01, (b) by a timely motion to alter or amend a judgment under section 25-1329, or (c) by a timely motion to set aside the verdict or judgment under section 25-1315.02, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection. When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. A new notice of appeal shall be filed within the prescribed time from the entry of the order ruling on the motion. No additional fees are required for such filing. A notice of appeal filed after the court announces its decision or order on the terminating motion but before the entry of the order is treated as filed on the date of and after the entry of the order.

(7) The party appealing shall serve a copy of the notice of appeal upon all parties who have appeared in the action or upon their attorney of record. Proof of service shall be filed with the notice of appeal.

(8) If an appellant fails to comply with any provision of subsection (4) or (7) of this section, the district court on motion and notice may take such action, including dismissal of the appeal, as is just.

Source: Laws 1981, LB 42, § 2; Laws 1984, LB 13, § 20; Laws 1986, LB 529, § 12; R.S.Supp.,1988, § 24-541.02; Laws 1994, LB 1106, § 3; Laws 1995, LB 538, § 3; Laws 1995, LB 598, § 1; Laws 1999, LB 43, § 15; Laws 2000, LB 921, § 26.

Per subsection (3) of this section, a judge's signature and a court's seal reflect the court's act of rendering judgment. State v. Linn, 248 Neb. 809, 539 N.W.2d 435 (1995).

As an alternative to depositing a docket fee, a person who is unable to pay the required fee may file an affidavit of poverty and proceed with an appeal in forma pauperis. State v. Hunter, 234 Neb. 567, 451 N.W.2d 922 (1990).

To vest appellate jurisdiction in the district court from county court, all that is required is the timely filed notice of appeal and timely deposit of the district court docket fee. Rorick Partnership v. Haug, 228 Neb. 364, 422 N.W.2d 365 (1988).

An order that a juvenile is a juvenile within the meaning of section 43-202(3) is a final order. In order to appeal from a final order of a county court, notice of appeal must be filed within thirty days from the rendition of judgment. In re Interest of Aufenkamp, 214 Neb. 297, 333 N.W.2d 681 (1983).

The docket fee requirement contained in this section necessarily applies to appeals brought by a prosecuting attorney pursuant to sections 29-824 to 29-826, because section 25-2728 does not expressly exclude sections 29-824 to 29-826 from the application of this section. State v. McArthur, 12 Neb. App. 657, 685 N.W.2d 733 (2004).

Where the State is appealing an order of a county court granting a motion for the return of seized property or to suppress evidence pursuant to sections 29-824 to 29-826, the State must comply with the standard procedures for appeal as provided in this section, as well as with the requirements specified within sections 29-824 to 29-826; failure to do so deprives the district court of subject matter jurisdiction to review the order. State v. McArthur, 12 Neb. App. 657, 685 N.W.2d 733 (2004).

Pursuant to this section, a judgment is entered by the clerk of the court by placing the file stamp and date upon a rendered judgment. State v. Wahrman, 11 Neb. App. 101, 644 N.W.2d 572 (2002).

Pursuant to this section and section 25-1301, a judgment is entered when the clerk of the court places a file stamp and date upon it. State v. Wilcox, 9 Neb. App. 933, 623 N.W.2d 329 (2001).

To vest jurisdiction from the county court to the district court, a party must file a notice of appeal within 30 days of the final order. If no notice of appeal is timely filed, the district court does not obtain jurisdiction, and thus, a higher appellate court cannot obtain jurisdiction from the district court. State v. Mitchell, 8 Neb. App. 659, 600 N.W.2d 497 (1999).

25-2730 Appeal; operate as supersedeas; when; bond; criminal cases; appeal; effect.

(1) In cases involving a money judgment or a judgment for the possession of specified personal property, no appeal shall operate as a supersedeas unless the appellant within thirty days after the entry of the judgment deposits with the clerk of the county court a cash bond or an undertaking with at least one good and sufficient surety approved by the court. In cases involving a money judgment, the bond or undertaking shall be in the amount of the judgment, costs, and estimated interest pending appeal and conditioned that the appellant shall pay the judgment, interest, and costs adjudged against him or her on appeal. In cases involving a judgment for the possession of specified personal property, the bond or undertaking shall be in an amount at least double the value of the property and conditioned that the appellant shall pay all costs and damages adjudged against him or her on appeal and deliver the property in accordance with the judgment on appeal.

(2) In appeals in cases of forcible entry and detainer, no appeal shall operate as a supersedeas unless the party appealing shall deposit an undertaking or cash bond in accordance with section 25-21,234.

(3) In appeals in criminal cases, the execution of judgment and sentence, other than any sentence to a period of confinement, shall be suspended during the appeal. Execution of a sentence to a period of confinement shall be suspended only if (a) the county court, in its discretion, allows the defendant to continue at liberty under the prior recognizance or bail or (b) the defendant enters into a written recognizance to the State of Nebraska, with surety or sureties approved by the county court or with a cash bond, filed with the clerk of the county court. The condition of the recognizance shall be that the defendant will prosecute the appeal without delay and abide and perform the judgment and sentence of the district court. Upon the filing of the notice of appeal, the county court shall fix the amount of the recognizance or cash bond, which shall be a reasonable amount. The cash bond shall be returned upon the fulfillment of the conditions of the bond.

(4) In appeals in cases under the Uniform Residential Landlord and Tenant Act, no appeal shall operate as a supersedeas of any writ of restitution unless the defendant deposits an undertaking or cash bond in accordance with section 76-1447.

(5) In all other cases, perfection of an appeal shall not stay the proceedings.

(6) In any case, the district court, on motion after notice and hearing and upon such terms as justice shall require, may stay any order or judgment appealed from, order a renewal or additional surety of an undertaking, or order the amount of the undertaking or recognizance increased or decreased. The action of the district court shall be certified by the clerk to the clerk of the county court.

Source: Laws 1981, LB 42, § 3; Laws 1984, LB 13, § 21; Laws 1986, LB 529, § 13; R.S.Supp.,1988, § 24-541.03; Laws 1993, LB 782, § 1; Laws 1995, LB 538, § 4; Laws 1999, LB 43, § 16.

Cross References

Uniform Residential Landlord and Tenant Act, see section 76-1401.

Language in subsection (6) of this section authorizing the district court to order the amount of the bond undertaking increased or decreased permitted the reduction of the appeal bond to a recognizance bond secured by a signature. State v. Griffin, 270 Neb. 578, 705 N.W.2d 51 (2005).

In order to prove right to attorney fee, attorney for special administrator and successor personal representative must show services were performed when supersedeas was not in effect. In re Estate of Wagner, 222 Neb. 699, 386 N.W.2d 448 (1986).

25-2731 Appeal; transcript; contents; clerk; duties.

(1) Upon perfection of the appeal, the clerk of the county court shall transmit within ten days to the clerk of the district court a certified copy of the transcript and the docket fee, whereupon the clerk of the district court shall docket the appeal. A copy of any bond or undertaking shall be transmitted to the clerk of the district court within ten days of filing.

(2) The Supreme Court shall, by rule and regulation, specify the method of ordering the transcript and the form and content of the transcript.

Source: Laws 1981, LB 42, § 4; Laws 1984, LB 13, § 22; Laws 1986, LB 529, § 14; Laws 1988, LB 352, § 24; R.S.Supp.,1988, § 24-541.04.

25-2732 Testimony; preservation; bill of exceptions; cost.

(1) Testimony in all civil and criminal cases in county court shall be preserved by multi-track recorders, but the court may order the use of a court reporter in any case.

(2) Standards for equipment for recording testimony and rules for using such equipment shall be prescribed by the Supreme Court. Such standards shall require that the equipment be capable of multiple-track recording and of instantaneous monitoring by the clerk or other court employee operating the equipment.

(3) The transcription of such testimony, when certified to by the stenographer or court reporter who made it and settled by the court as such, shall constitute the bill of exceptions in the case. The cost of preparing the bill of exceptions shall be paid initially by the party for whom it is prepared

(4) The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of a bill of exceptions shall be governed by rules of practice prescribed by the Supreme Court.

Source: Laws 1981, LB 42, § 5; Laws 1984, LB 13, § 23; Laws 1986, LB 529, § 15; R.S.Supp.,1988, § 24-541.05; Laws 2007, LB213, § 2.

Revocation of probation need not be reversed solely on the ground that, through inadvertence, a complete record of the hearing resulting in the revocation was not preserved so long as a sufficient record exists to establish the grounds for revocation by clear and convincing evidence. State v. Schulz, 221 Neb. 473, 378 N.W.2d 165 (1985).

25-2733 Appeals; district court; review record; disposition; costs.

(1) In all cases the district court shall review the case for error appearing on the record made in the county court. The district court shall render a judgment which may affirm, affirm but modify, or reverse the judgment or final order of the county court. If the district court reverses, it may enter judgment in accordance with its findings or remand the case to the county court for further proceedings consistent with the judgment of the district court. Within two judicial days after the decision of the district court becomes final, the clerk of

the district court shall issue a mandate in appeals from the county court and transmit the mandate in appeals to the clerk of the county court on the form prescribed by the Supreme Court together with a copy of such decision.

(2) The ordering, preparing, signing, filing, correcting, and amending of the bill of exceptions shall be governed by the rules of practice prescribed by the Supreme Court.

(3) The judgment of the district court shall vacate the judgment in the county court. The taxation of costs in the district court shall include the costs in the county court. If a judgment of the county court is affirmed or affirmed but modified, interest on the amount of the judgment in the district court that does not exceed the amount of the judgment in the county court shall run from the date of entry of the judgment appealed from the county court.

Source: Laws 1981, LB 42, § 6; Laws 1984, LB 13, § 24; Laws 1988, LB 352, § 25; R.S.Supp.,1988, § 24-541.06; Laws 1994, LB 1106, § 4; Laws 1995, LB 538, § 5; Laws 2000, LB 921, § 27; Laws 2008, LB1014, § 13.
Operative date January 1, 2009.

1. Standard of review
2. Miscellaneous

1. Standard of review

Appeals in adoption proceedings are reviewed by the district court and Supreme Court for error appearing on the record. In re Guardianship of T.C.W., 235 Neb. 716, 457 N.W.2d 282 (1990).

Under subsection (1) of this section, on appeal of a county court's judgment rendered in a bench trial of a law action, the county court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous; as appellate courts reviewing a judgment in a bench trial of a law action in the county court, the Supreme Court and a district court do not reweigh evidence, but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. Dammann v. Litty, 234 Neb. 664, 452 N.W.2d 522 (1990).

On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court, and the factual findings made by the county court have the effect of a verdict and will not be set aside unless such findings are clearly erroneous. In re Estate of Goltl, 233 Neb. 53, 443 N.W.2d 884 (1989).

Under the provisions of subsection (1) of this section, the district court and the Nebraska Supreme Court review appeals from the municipal court, other than those arising from the small claims division thereof, for error appearing on the record. Kuehl v. Diesel Power Equip. Co., 228 Neb. 353, 422 N.W.2d 361 (1988).

Under the provisions of subsection (1) of this section the district court and the Nebraska Supreme Court generally shall review appeals from the municipal court (now merged with the county court) for error appearing on the record. If the district court determines to reverse the case, it may enter judgment in accordance with its findings. Communications Workers of America v. Abrahamson, 228 Neb. 335, 422 N.W.2d 547 (1988).

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or abuse of discretion. State v. Sock, 227 Neb. 646, 419 N.W.2d 525 (1988).

On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the case for error appearing on the record made in the county court. Holden v. Urban, 224 Neb. 472, 398 N.W.2d 699 (1987).

Matters involving appointments of personal representatives, on appeal to the district court and the Supreme Court, are reviewed for error appearing on the record. In re Estate of Casselman, 219 Neb. 653, 365 N.W.2d 805 (1985).

A district court, on criminal appeals from the county court, acts as an intermediate court of appeals reviewing the record for error. State v. Schroder, 218 Neb. 860, 359 N.W.2d 799 (1984).

Appeals in criminal matters from the county or municipal court to the district court are not reviewed de novo upon the record; they are reviewed for error appearing on the record in the county or municipal court. State v. Kaiser, 218 Neb. 556, 356 N.W.2d 890 (1984).

In probate proceedings, the Supreme Court's scope of review is limited to error appearing on the record. In re Estate of Massie, 218 Neb. 103, 353 N.W.2d 735 (1984).

Review of an order appointing a conservator is for error appearing on the record made in the county court. In re Estate of Oltmer, 214 Neb. 830, 336 N.W.2d 560 (1983).

2. Miscellaneous

An order of a district court becomes final for the purpose of issuing a mandate under this section only after the time for appeal has run. State v. Beyer, 260 Neb. 670, 619 N.W.2d 213 (2000).

Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court, and if not so raised, it will be considered to have been waived. State v. Moore, 235 Neb. 955, 458 N.W.2d 232 (1990).

A motion for a new trial is not properly presented to the district court when it sits as an intermediate appellate court. A motion for a new trial is proper only in the trial court. Collection Bureau of Lincoln v. Loos, 233 Neb. 30, 443 N.W.2d 605 (1989).

Except in the most unusual cases, to be considered on appeal a question of constitutionality must have been properly raised in the trial court. State v. Moore, 226 Neb. 347, 411 N.W.2d 345 (1987).

Review of an order appointing a guardian or a conservator is for error appearing on the record made in county court. In re

Guardianship and Conservatorship of Sim, 225 Neb. 181, 403 N.W.2d 721 (1987).

A motion for new trial based on newly discovered evidence is to be presented to the county court as the fact finder, not to the district court which sat as an appellate court. State v. Ferris, 216 Neb. 606, 344 N.W.2d 668 (1984).

In cases involving appeals from the county court to the district court prior to the effective date of this section, wherein it appears obvious from the record filed in this court that both the parties and the district judge considered the county court bill of exceptions as having been received in evidence, we will so consider it on appeal to this court. Blaha GMC-Jeep, Inc. v. Frerichs, 211 Neb. 103, 317 N.W.2d 894 (1982).

A statement of errors filed pursuant to Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1993) must be filed with the district court within 10 days of the filing of the bill of exceptions, rather than within 10 days of the filing of the notice of appeal. State v. Stuthman, 2 Neb. App. 317, 509 N.W.2d 410 (1993).

An appellant who has incorporated a properly drafted statement of errors directly into a notice of appeal from a judgment of the county court has satisfied the requirement in Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) concerning the timely filing of a statement of errors with the district court. State v. Nelson, 2 Neb. App. 289, 509 N.W.2d 232 (1993).

25-2734 Repealed. Laws 2008, LB 1014, § 80.
(Operative date January 1, 2009.)

25-2735 Appeal; surety; liability.

When an appeal shall be dismissed or when judgment shall be entered in the district court against the appellant, the sureties in the undertaking shall be liable to the appellee for the amount of the judgment, interest, and costs recovered against the appellant, but not to exceed the amount of the undertaking.

Source: Laws 1981, LB 42, § 8; R.S.1943, (1985), § 24-541.08.

25-2736 Appeal; procedural dismissal; effect.

If an appeal is dismissed for procedural reasons, the clerk of the district court shall certify the order without cost to the county court. Thereafter the proceedings in the county court shall continue as if no appeal had been taken.

Source: Laws 1981, LB 42, § 9; Laws 1984, LB 13, § 26; R.S.1943, (1985), § 24-541.09.

25-2737 Appeal; appellant; pay costs; when.

In all cases involving a money judgment, if any person appealing from a judgment rendered in his or her favor shall not recover a greater sum than the amount for which judgment was rendered, besides costs and the interest accruing thereon, such appellant shall pay the costs of such appeal.

Source: Laws 1981, LB 42, § 10; R.S.1943, (1985), § 24-541.10; Laws 1995, LB 538, § 6.

In all matters arising under the Nebraska Probate Code, if it shall appear to the district court that an appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an attorney fee, under subsection (2) of this section. In re Estate of Miller, 231 Neb. 723, 437 N.W.2d 793 (1989).

25-2738 Appeals; when not allowed.

No appeal shall be allowed from judgments rendered on confession.

Source: Laws 1929, c. 82, art. XI, § 116, p. 309; C.S.1929, § 22-1114; R.S.1943, § 26-1,117; Laws 1972, LB 1032, § 51; R.S.1943, (1985), § 24-551.

25-2739 Domestic relations judgment or final order; appeal.

A judgment rendered or final order made by a county court in a domestic relations matter as defined in section 25-2740 may be reversed, vacated, or modified by the Court of Appeals in the same manner as judgments and final orders of the district court under sections 25-1911 to 25-1929.

Source: Laws 1996, LB 1296, § 5; Laws 1997, LB 229, § 6.

(g) DOMESTIC RELATIONS MATTERS

25-2740 Domestic relations matters; district, county, and separate juvenile courts; jurisdiction; procedure.

(1) For purposes of this section:

(a) Domestic relations matters means proceedings under sections 28-311.09 and 28-311.10 (including harassment protection orders and valid foreign harassment protection orders), the Conciliation Court Law and sections 42-347 to 42-381 (including dissolution, separation, annulment, custody, and support), section 43-512.04 (including child support or medical support), section 42-924 (including domestic protection orders), sections 43-1401 to 43-1418 (including paternity determinations and parental support), and sections 43-1801 to 43-1803 (including grandparent visitation); and

(b) Paternity or custody determinations means proceedings to establish the paternity of a child under sections 43-1411 to 43-1418 or proceedings to determine custody of a child under section 42-364.

(2) Except as provided in subsection (3) of this section, in domestic relations matters, a party shall file his or her petition or complaint and all other court filings with the clerk of the district court. The party shall state in the petition or complaint whether such party requests that the proceeding be heard by a county court judge or by a district court judge. If the party requests the case be heard by a county court judge, the county court judge assigned to hear cases in the county in which the matter is filed at the time of the hearing is deemed appointed by the district court and the consent of the county court judge is not required. Such proceeding is considered a district court proceeding, even if heard by a county court judge, and an order or judgment of the county court in a domestic relations matter has the force and effect of a district court judgment. The testimony in a domestic relations matter heard before a county court judge shall be preserved as provided in section 25-2732.

(3) In addition to the jurisdiction provided for paternity or custody determinations under subsection (2) of this section, a county court or separate juvenile court which already has jurisdiction over the child whose paternity or custody is to be determined has jurisdiction over such paternity or custody determination.

Source: Laws 1997, LB 229, § 2; Laws 1998, LB 218, § 1; Laws 1998, LB 1041, § 2; Laws 2004, LB 1207, § 16; Laws 2008, LB280, § 2; Laws 2008, LB1014, § 14.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB280, section 2, with LB1014, section 14, to reflect all amendments.

Note: Changes made by LB280 became effective July 18, 2008. Changes made by LB1014 became operative January 1, 2009.

Cross References

Conciliation Court Law, see section 42-802.

ARTICLE 28
SMALL CLAIMS COURT

Section
25-2801. Designation.
25-2802. Jurisdiction.
25-2803. Parties; representation.
25-2804. Actions; how commenced; fee; hearing; notice; setoff or counterclaim; limitations.

Section
25-2805. Trial without jury; transfer to county court; fee.
25-2806. Pleadings required; informal disposition; judgment.
25-2807. Appeals.

25-2801 Designation.

Each county court shall have a Small Claims Department which shall be designated the Small Claims Court.

Source: Laws 1972, LB 1032, § 21; Laws 1984, LB 13, § 13; R.S.1943, (1985), § 24-521.

Small claims court is a department of county court, and as such, small claims court does not have general equity jurisdiction. Scherbak v. Kissler, 245 Neb. 10, 510 N.W.2d 318 (1994).

In an appeal to the district court from the Small Claims Court, a party has the right to appear by his own counsel. Simon v. Lieberman, 193 Neb. 321, 226 N.W.2d 781 (1975).

25-2802 Jurisdiction.

(1) The Small Claims Court shall have subject matter jurisdiction in all civil actions of any type when the amount of money or damages or the value of the personal property claimed does not exceed the jurisdictional amount specified in subsection (4) of this section, exclusive of interest and costs.

(2) The Small Claims Court shall have subject matter jurisdiction in civil matters when the plaintiff seeks to disaffirm, avoid, or rescind a contract or agreement for the purchase of goods or services not in excess of the jurisdictional amount specified in subsection (4) of this section, exclusive of interest and costs.

(3) The Small Claims Court shall have jurisdiction when the party defendant or his or her agent resides or is doing business within the county or when the cause of action arose within the county.

(4) The jurisdictional amount was one thousand five hundred dollars through June 30, 1990, one thousand eight hundred dollars from July 1, 1990, through June 30, 1995, and two thousand one hundred dollars from July 1, 1995, through June 30, 2000. The jurisdictional amount is two thousand four hundred dollars from July 1, 2000, through June 30, 2005.

The Supreme Court shall continue to adjust the jurisdictional limit for the Small Claims Court every fifth year commencing July 1, 2000. The adjusted jurisdictional amount shall be equal to the then current jurisdictional amount adjusted by the average percentage change in the unadjusted Consumer Price Index for All Urban Consumers published by the Federal Bureau of Labor Statistics for the five-year period preceding the adjustment date. The jurisdictional amount shall be rounded to the nearest one-hundred-dollar amount.

Source: Laws 1972, LB 1032, § 22; Laws 1976, LB 629, § 1; Laws 1979, LB 117, § 1; Laws 1985, LB 373, § 2; R.S.1943, (1985), § 24-522; Laws 1997, LB 3, § 1; Laws 2001, LB 9, § 1.

25-2803 Parties; representation.

(1) Parties in the Small Claims Court may be individuals, partnerships, limited liability companies, corporations, unions, associations, or any other kind of organization or entity.

(2) No party shall be represented by an attorney in the Small Claims Court except as provided in section 25-2805.

(3) An individual shall represent himself or herself in the Small Claims Court. A partnership shall be represented by a partner or one of its employees. A limited liability company shall be represented by a member, a manager, or one of its employees. A union shall be represented by a union member or union employee. A corporation shall be represented by one of its employees. An association shall be represented by one of its members or by an employee of the association. Any other kind of organization or entity shall be represented by one of its members or employees.

(4) Only a party, natural or otherwise, who has been a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim in the Small Claims Court.

(5) No party may file an assigned claim in the Small Claims Court.

(6) No party shall file more than two claims within any calendar week nor more than ten claims in any calendar year in the Small Claims Court. This subsection shall not apply to actions brought pursuant to section 25-21,194.

(7) Notwithstanding any other provision of this section, a personal representative of a decedent's estate, a guardian, or a conservator may be a party in the Small Claims Court.

Source: Laws 1972, LB 1032, § 23; Laws 1987, LB 77, § 1; Laws 1987, LB 536, § 2; R.S.Supp.,1988, § 24-523; Laws 1993, LB 121, § 174.

25-2804 Actions; how commenced; fee; hearing; notice; setoff or counterclaim; limitations.

(1) Actions in the Small Claims Court shall be commenced by the filing of a claim, personally or by mail, by the plaintiff on a form provided by the clerk of a county court. The claim form shall be executed by the plaintiff in the presence of a judge, a clerk or deputy or assistant clerk of a county court, or a notary public or other person authorized by law to take acknowledgments. If not filed in person, the claim form and appropriate fees shall be mailed by the plaintiff to the court of proper jurisdiction.

(2) At the time of the filing of the claim, the plaintiff shall pay a fee of six dollars and twenty-five cents to the clerk. One dollar and twenty-five cents of such fee shall be remitted to the State Treasurer for credit to the Nebraska Retirement Fund for Judges.

(3) Upon filing of a claim in the Small Claims Court, the court shall set a time for hearing and shall cause notice to be served upon the defendant. Notice shall be served not less than five days before the time set for hearing. Notice shall consist of a copy of the complaint and a summons directing the defendant to appear at the time set for hearing and informing the defendant that if he or she fails to appear, judgment will be entered against him or her. Notice shall be served in the manner provided for service of a summons in a civil action. If the notice is to be served by certified mail, the clerk shall provide the plaintiff with written instructions, prepared and provided by the State Court Administrator, regarding the proper procedure for service by certified mail. The cost of service shall be paid by the plaintiff, but such cost and filing fee shall be added to any judgment given the plaintiff.

(4) The defendant may file a setoff or counterclaim. Any setoff or counterclaim shall be filed and a copy delivered to the plaintiff at least two days prior

to the time of trial. If the setoff or counterclaim exceeds the jurisdictional limits of the Small Claims Court as established pursuant to section 25-2802, the court shall cause the entire matter to be transferred to the regular county court docket and set for trial.

(5) No prejudgment actions for attachment, garnishment, replevin, or other provisional remedy may be filed in the Small Claims Court.

(6) All forms required by this section shall be prescribed by the Supreme Court. The claim form shall provide for the names and addresses of the plaintiff and defendant, a concise statement of the nature, amount, and time and place of accruing of the claim, and an acknowledgment for use by the person in whose presence the claim form is executed and shall also contain a brief explanation of the Small Claims Court procedure and methods of appeal therefrom.

(7) Judgments rendered against a defendant in his or her absence may not be set aside but may only be appealed as governed by section 25-2807.

Source: Laws 1972, LB 1032, § 24; Laws 1973, LB 226, § 7; Laws 1975, LB 283, § 1; Laws 1979, LB 117, § 2; Laws 1980, LB 892, § 1; Laws 1982, LB 928, § 17; Laws 1983, LB 447, § 14; Laws 1984, LB 13, § 14; Laws 1985, LB 373, § 3; Laws 1986, LB 125, § 1; Laws 1987, LB 77, § 2; R.S.Supp.,1988, § 24-524; Laws 2000, LB 921, § 28; Laws 2005, LB 348, § 4.

A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof. Harris v. Eberhardt, 215 Neb. 240, 338 N.W.2d 53 (1983).

25-2805 Trial without jury; transfer to county court; fee.

All matters in the Small Claims Court shall be tried to the court without a jury. Except as provided in section 25-2618.01, any defendant in an action or such defendant's attorney may transfer the case to the regular docket of the county court by giving notice to the court at least two days prior to the time set for the hearing. Upon such notice the case shall be transferred to the regular docket of the county court. At the same time as such notice is given to transfer the case, any defendant or such defendant's attorney may demand trial by jury, and the Small Claims Court shall forward the demand to the county court. The party causing the transfer of a case from the Small Claims Court to the regular docket shall pay as a fee the difference between the fee for filing a claim in Small Claims Court and the fee for filing a claim on the regular docket.

In any action transferred to the regular docket there shall be no further pleadings, motions challenging pleadings, or discovery unless ordered by the court upon a showing that any such procedure is necessary to the prompt and just determination of the action.

Source: Laws 1972, LB 1032, § 25; Laws 1975, LB 283, § 2; Laws 1980, LB 892, § 2; Laws 1981, LB 42, § 11; Laws 1984, LB 13, § 15; Laws 1987, LB 77, § 3; R.S.Supp.,1988, § 24-525; Laws 1997, LB 151, § 10; Laws 2002, LB 876, § 58.

A suit brought in Small Claims Court and transferred to the regular docket of municipal court prior to the time set for hearing in Small Claims Court is subject to the provisions of law and rules of the court applicable to proceedings in municipal court. State ex rel. Simpson v. Vondrasek, 203 Neb. 693, 279 N.W.2d 860 (1979).

When a defendant transfers a case from small claims court to county court pursuant to this section, the plaintiff is not entitled to request a jury trial in the county court action. Dollison v. Mercy Servs. Corp., 7 Neb. App. 555, 584 N.W.2d 674 (1998).

25-2806 Pleadings required; informal disposition; judgment.

No formal pleadings other than the claim and notice, and the counterclaim or setoff and notice if appropriate, shall be required in the Small Claims Court and the hearing and disposition of all matters shall be informal so that the rules of evidence, except those relating to privileged communications, shall not apply, with the sole object of providing a prompt and just settlement of the issues. When a money judgment is entered, payment shall be made forthwith after time for appeal has run or execution may issue as in other cases in the county court. When a judgment for the return of personal property is entered, return shall be made forthwith after time for appeal has run or an order of delivery may issue as in other cases in the county court.

Source: Laws 1972, LB 1032, § 26; Laws 1984, LB 13, § 16; R.S.1943, (1985), § 24-526.

The entire matter in Small Claims Court is on a very informal basis, with a minimum of procedural requirements. Harris v. Eberhardt, 215 Neb. 240, 338 N.W.2d 53 (1983).

Because no formal pleadings are required in Small Claims Court, a decision of that court will be affirmed on appeal if it can be founded on any theory supported by the evidence. Fuchser v. Jacobson, 205 Neb. 786, 290 N.W.2d 449 (1980).

25-2807 Appeals.

Unless the controversy is subject to the Uniform Arbitration Act, any party may appeal to the district court as provided in sections 25-2728 to 25-2738. Parties may be represented by attorneys on appeal.

Source: Laws 1972, LB 1032, § 27; Laws 1975, LB 283, § 3; Laws 1980, LB 892, § 3; Laws 1981, LB 42, § 12; R.S.1943, (1985), § 24-527; Laws 1997, LB 151, § 11.

Cross References

Uniform Arbitration Act, see section 25-2601.

A party appealing a judgment entered in a small claims court may be assisted by an attorney in perfecting an appeal of the judgment from the small claims court to the district court. Gibbons v. Don Williams Roofing, Inc., 261 Neb. 470, 623 N.W.2d 662 (2001).

Because no formal pleadings are required in Small Claims Court, a decision of that court will be affirmed on appeal if it can be founded on any theory supported by the evidence. Fuchser v. Jacobson, 205 Neb. 786, 290 N.W.2d 449 (1980).

Filing a notice of appeal falls within the ''on appeal'' language in this section, and consequently, an attorney may sign a notice of appeal on behalf of a party appealing from a small claims court decision. Hayes v. Applegarth, 10 Neb. App. 351, 631 N.W.2d 547 (2001).

ARTICLE 29

DISPUTE RESOLUTION

(a) DISPUTE RESOLUTION ACT

Section
25-2901. Act, how cited.
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(a) DISPUTE RESOLUTION ACT

25-2901 Act, how cited.

Sections 25-2901 to 25-2921 shall be known and may be cited as the Dispute Resolution Act.

Source: Laws 1991, LB 90, § 1; Laws 1996, LB 922, § 1.

25-2902 Legislative findings.

The Legislature finds that:

(1) The resolution of certain disputes can be costly and time consuming in the context of a formal judicial proceeding;

(2) Mediation of disputes has a great potential for efficiently reducing the volume of matters which burden the court system in this state;

(3) Unresolved disputes of those who do not have the resources for formal resolution may be of small social or economic magnitude individually but are collectively of enormous social and economic consequences;

(4) Many seemingly minor conflicts between individuals may escalate into major social problems unless resolved early in an atmosphere in which the

disputants can discuss their differences through a private informal yet structured process;

(5) There is a need in our society to reduce acrimony and improve relationships between people in conflict which has a long-term benefit of a more peaceful community of people;

(6) There is a compelling need in a complex society for dispute resolution whereby people can participate in creating comprehensive, lasting, and realistic resolutions to conflicts;

(7) Mediation can increase access of the public to dispute resolution and thereby increase public regard and usage of the legal system; and

(8) Nonprofit dispute resolution centers can make a substantial contribution to the operation and maintenance of the courts of this state by preserving the court's scarce resources for those disputes which cannot be resolved by means other than litigation.

Source: Laws 1991, LB 90, § 2.

25-2903 Terms, defined.

For purposes of the Dispute Resolution Act:

(1) Approved center shall mean a center that has applied for and received approval from the director under section 25-2909;

(2) Center shall mean a nonprofit organization or a court-established program which makes dispute resolution procedures available;

(3) Council shall mean the Advisory Council on Dispute Resolution;

(4) Director shall mean the Director of the Office of Dispute Resolution;

(5) Dispute resolution process shall mean a process by which the parties involved in a dispute voluntarily agree to enter into informal discussion and negotiation with the assistance of a mediator;

(6) Mediation shall mean the intervention into a dispute by a third party who has no decisionmaking authority and is impartial to the issues being discussed;

(7) Mediator shall mean a person trained in the process of mediation who assists parties in dispute to reach a mutually acceptable resolution of their conflict; and

(8) Office shall mean the Office of Dispute Resolution.

Source: Laws 1991, LB 90, § 3.

25-2904 Office of Dispute Resolution; established; director; qualifications; duties.

The Office of Dispute Resolution is hereby established in the office of the State Court Administrator. The director of the office shall be hired by the Supreme Court. The director may but need not be an attorney and shall be hired on the basis of his or her training and experience in mediation. The director shall administer the Dispute Resolution Act and shall serve as staff to the council.

Source: Laws 1991, LB 90, § 4.

25-2905 Advisory Council on Dispute Resolution; created; members.

The Advisory Council on Dispute Resolution is hereby created. The council shall be comprised of individuals from a variety of disciplines who are trained and knowledgeable in mediation and selected to be representative of the geographical and cultural diversity of the state and to reflect gender fairness. The council shall consist of eleven voting members. The membership shall include a representative from the Nebraska District Court Judges Association, the Nebraska County Court Judges Association, and the Nebraska State Bar Association. The council shall be appointed by the Supreme Court or a designee. Nominations shall be solicited from the Nebraska District Court Judges Association, the Nebraska County Court Judges Association, the Nebraska State Bar Association, the Nebraska Mediation Coalition, the Public Counsel, social workers, mental health professionals, educators, and other interested groups or individuals. The Supreme Court or its designee shall not be restricted to the solicited list of nominees in making its appointments. Two nonvoting, ex officio members shall be appointed by the council from among the approved centers.

Source: Laws 1991, LB 90, § 5; Laws 1999, LB 315, § 2.

25-2906 Council; members; terms; vacancy; officers.

The initial members of the council shall be appointed for terms of one, two, or three years. All subsequent appointments shall be made for terms of three years. Any vacancy on the council shall be filled in the same manner in which the original appointment was made and shall last for the duration of the term vacated. Appointments to the council shall be made within ninety days after September 6, 1991. The council shall select a chairperson, a vice-chairperson, and such other officers as it deems necessary.

Source: Laws 1991, LB 90, § 6.

25-2907 Council; powers and duties; members; expenses.

(1) The council shall advise the director on the administration of the Dispute Resolution Act.

(2) The council shall meet at least four times per year and at other times deemed necessary to perform its functions. Members of the council shall be reimbursed for their actual and necessary expenses as provided in sections 81-1174 to 81-1177.

(3) The council may appoint task forces to carry out its work. Task force members shall have knowledge of, responsibility for, or interest in an area related to the duties of the council.

Source: Laws 1991, LB 90, § 7.

25-2908 Director; duties.

Consistent with the purposes and objectives of the Dispute Resolution Act and in consultation with the council, the director shall:

(1) Make information on the formation of centers available statewide and encourage the formation of centers;

(2) Approve centers which meet requirements for approval;

(3) Develop a uniform system of reporting and collecting statistical data from approved centers;

(4) Develop a uniform system of evaluating approved centers;

(5) Prepare a yearly budget for the implementation of the act and distribute funds to approved centers;

(6) Develop guidelines for a sliding scale of fees to be charged by approved centers;

(7) Develop curricula and initiate training sessions for mediators and staff of approved centers and of courts;

(8) Establish volunteer training programs;

(9) Promote public awareness of the dispute resolution process;

(10) Apply for and receive funds from public and private sources for carrying out the purposes and obligations of the act; and

(11) Develop a uniform system to create and maintain a roster of mediators for juvenile offender and victim mediation, as provided in section 43-245, and centers approved under section 25-2909. The roster shall be made available to courts and county attorneys.

Source: Laws 1991, LB 90, § 8; Laws 1998, LB 1073, § 7.

25-2909 Grants; application; contents; approved centers; reports.

(1) The office shall annually award grants to approved centers. It is the intent of the Legislature that centers be established and grants distributed statewide.

(2) A center or an entity proposing a center may apply to the office for approval to participate in the dispute resolution process pursuant to the Dispute Resolution Act by submitting an application which includes:

(a) A plan for the operation of the center;

(b) The center's objectives;

(c) The areas of population to be served;

(d) The administrative organization;

(e) Record-keeping procedures;

(f) Procedures for intake, for scheduling, and for conducting and terminating dispute resolution sessions;

(g) Qualifications for mediators for the center;

(h) An annual budget for the center; and

(i) Proof of 501(c)(3) status under the Internal Revenue Code or proof of establishment by a court.

The office may specify additional criteria for approval and for grants as it deems necessary.

(3) Annual reports shall be required of each approved center. The reports shall include the number and types of cases handled in the year and a showing of continued compliance with the act. Any programs existing on September 6, 1991, shall not be included in the act unless they apply and are approved under this section.

Source: Laws 1991, LB 90, § 9.

25-2910 Approved center; funding; fees.

An approved center may use sources of funds, both public and private, in addition to funds appropriated by the Legislature. An approved center may

require each party to pay a fee to help defray costs based upon ability to pay. A person shall not be denied services solely because of an inability to pay the fee.

Source: Laws 1991, LB 90, § 10.

25-2911 Dispute resolution; types of cases; referral of cases.

(1) The following types of cases may be accepted for dispute resolution at an approved center:

(a) Civil claims and disputes, including, but not limited to, consumer and commercial complaints, disputes between neighbors, disputes between business associates, disputes between landlords and tenants, and disputes within communities;

(b) Disputes concerning child custody, parenting time, visitation, or other access and other areas of domestic relations; and

(c) Juvenile offenses and disputes involving juveniles.

(2) An approved center may accept cases referred by a court, an attorney, a law enforcement officer, a social service agency, a school, or any other interested person or agency or upon the request of the parties involved. A case may be referred prior to the commencement of formal judicial proceedings or may be referred as a pending court case. In order for a referral to be effective, all parties involved must consent to such referral. If a court refers a case to an approved center, the center shall provide information to the court as to whether an agreement was reached. If the court requests a copy of the agreement, the center shall provide it.

Source: Laws 1991, LB 90, § 11; Laws 2007, LB554, § 25.

Cross References

Farm Mediation Act, see section 2-4801.

25-2912 Dispute resolution process; procedures.

Before the dispute resolution process begins, an approved center shall provide the parties with a written statement setting forth the procedures to be followed.

Source: Laws 1991, LB 90, § 12.

25-2913 Mediators; qualifications; compensation; powers and duties.

(1) Mediators of approved centers shall have completed at least thirty hours of training in conflict resolution techniques, neutrality, agreement writing, and ethics. For disputes involving marital dissolution, mediators of approved centers shall have an additional thirty hours in family mediation. An initial apprenticeship with an experienced mediator shall be required for at least three sessions for all mediators without prior mediation experience.

(2) An approved center may provide for the compensation of mediators or utilize the services of volunteer mediators or both.

(3) The mediator shall assist the parties in reaching a mutually acceptable resolution of their dispute through discussion and negotiation. The mediator shall be impartial, neutral, and unbiased and shall make no decisions for the parties.

(4) The mediator shall officially terminate the process if the parties are unable to agree or if, in the judgment of the mediator, the agreement would be

unconscionable. The termination shall be without prejudice to either party in any other proceeding.

(5) The mediator has no authority to make or impose any adjudicatory sanction or penalty upon the parties.

(6) The mediator shall be aware of and recommend outside resources to the parties whenever appropriate. The mediator shall advise participants to obtain legal review of agreements as necessary.

Source: Laws 1991, LB 90, § 13.

25-2914 Confidentiality; exceptions.

Any verbal, written, or electronic communication made in or in connection with matters referred to mediation which relates to the controversy or dispute being mediated and agreements resulting from the mediation, whether made to the mediator, the staff of an approved center, a party, or any other person attending the mediation session, shall be confidential. Mediation proceedings shall be regarded as settlement negotiations, and no admission, representation, or statement made in mediation, not otherwise discoverable or obtainable, shall be admissible as evidence or subject to discovery. A mediator shall not be subject to process requiring the disclosure of any matter discussed during mediation proceedings unless all the parties consent to a waiver. Confidential communications and materials are subject to disclosure when all parties agree in writing to waive confidentiality regarding specific verbal, written, or electronic communications relating to the mediation session or the agreement. This section shall not apply if a party brings an action against the mediator or center, if the communication was made in furtherance of a crime or fraud, or if this section conflicts with other legal requirements.

Source: Laws 1991, LB 90, § 14; Laws 1994, LB 868, § 1.

25-2915 Immunity; exceptions.

No mediator, staff member, or member of a governing board of an approved center may be held liable for civil damages for any statement or decision made in the process of dispute resolution unless such person acted in a manner exhibiting willful or wanton misconduct.

Source: Laws 1991, LB 90, § 15.

25-2916 Agreement; contents; enforceability.

If the parties involved in the dispute reach an agreement, the agreement may be reduced to writing and signed by the parties. The agreement shall set forth the settlement of the issues and the future responsibilities of each party. If a court referred the case, the agreement as signed and approved by the parties may be presented to the court as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

Source: Laws 1991, LB 90, § 16.

25-2917 Tolling of statute of limitations; when.

During the period of the dispute resolution process, any applicable statute of limitations shall be tolled as to the parties. The tolling shall commence on the date the approved center accepts the case and shall end on the date of the last

mediation session. This period shall be no longer than sixty days without consent of all the parties.

Source: Laws 1991, LB 90, § 17.

25-2918 Rules and regulations.

The Supreme Court, upon recommendation by the director in consultation with the council, shall adopt and promulgate rules and regulations to carry out the Dispute Resolution Act.

Source: Laws 1991, LB 90, § 18.

25-2919 Application of act.

The Dispute Resolution Act shall apply only to approved centers and mediators of such centers.

Source: Laws 1991, LB 90, § 19.

25-2920 Director; report.

The director shall report annually to the Chief Justice, the Governor, and the Legislature on the implementation of the Dispute Resolution Act. The report shall include the number and types of disputes received, the disposition of the disputes, any problems encountered, any recommendations to address problems, and a comparison of the cost of mediation and litigation.

Source: Laws 1991, LB 90, § 20.

25-2921 Dispute Resolution Cash Fund; created; use; investment.

The Dispute Resolution Cash Fund is created. The State Court Administrator shall administer the fund. The fund shall consist of proceeds received pursuant to subdivision (10) of section 25-2908 and section 33-155. The fund shall be used to supplement the administration of the office and the support of the approved centers. It is the intent of the Legislature that any General Fund money supplanted by the Dispute Resolution Cash Fund may be used for the support and maintenance of the State Library. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source: Laws 1996, LB 922, § 2; Laws 2003, LB 760, § 8.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

(b) SETTLEMENT ESCROW

25-2922 Settlement escrow; intent.

The Legislature finds that litigation commonly involves large costs for individuals because of resources devoted to discovery, attorney's fees, and the costs associated with uncertainty. Litigation involves large costs for courts because of the increased demand placed upon the time of the courts and the resources required to service that demand. Settlement escrow is an inexpensive, voluntary method designed to reduce delay in pretrial bargaining, thereby lowering costs to both individuals and the courts.

Source: Laws 2001, LB 46, § 1.
Termination date July 1, 2004.

25-2923 Settlement escrow; terms, defined.

For purposes of sections 25-2922 to 25-2928:

(1) Escrow agent means the Office of Dispute Resolution or the state mediation centers as delegated by the Office of Dispute Resolution; and

(2) Point-of-overlap means the midpoint between the settlement offers of a defendant who has offered more than a plaintiff has demanded and the demand of the plaintiff.

Source: Laws 2001, LB 46, § 2.
Termination date July 1, 2004.

25-2924 Settlement escrow; use; requirements.

(1) Settlement escrow is a one-time, voluntary process by which the parties to an action seek to resolve their dispute. The settlement escrow process may be initiated at any time before trial by either party. The use of a settlement escrow does not preclude the use of any other dispute resolution or settlement process to which the parties may agree.

(2) Settlement escrow may only be used in district court civil actions that involve only monetary remedies. Such remedies may include, but are not limited to, damages, court costs, and attorney's fees.

(3) If a settlement escrow is conducted and fails to result in a settlement, the parties may not initiate a second settlement escrow for the same action.

Source: Laws 2001, LB 46, § 3; Laws 2002, LB 876, § 59.
Termination date July 1, 2004.

25-2925 Settlement escrow; initiation; procedure.

Subsequent to the initial filing of a district court civil action involving only monetary remedies, a party to an action wishing to initiate a settlement escrow shall notify the escrow agent in writing. Upon receiving a written request from the initiating party, the escrow agent shall contact the responding party in writing to see whether or not the responding party also wishes to participate. If both parties agree in writing to participate, the escrow agent shall begin the settlement escrow.

Source: Laws 2001, LB 46, § 4; Laws 2002, LB 876, § 60.
Termination date July 1, 2004.

25-2926 Settlement escrow; escrow agent; settlement offers; duties.

The escrow agent shall solicit settlement offers from the parties on forms created for this purpose by the State Court Administrator's office. The escrow agent shall establish all timeframes within which the settlement escrow occurs so that the use of a settlement escrow does not cause delay in the normal processing of the action. Both parties shall submit settlement offers to the escrow agent. The escrow agent shall then, using a worksheet developed by the office, determine whether or not a point-of-overlap exists. If a point-of-overlap exists, the point-of-overlap becomes the settlement which both parties are required to accept. The escrow agent shall keep all settlement offers confiden-

tial, except that for cases in which a point-of-overlap exists, the worksheet shall become part of the court record.

Source: Laws 2001, LB 46, § 5.
Termination date July 1, 2004.

25-2927 Settlement escrow; escrow agent; fee.

The escrow agent may charge a fee for conducting the settlement escrow. The fee shall be established by the State Court Administrator's office and shall be divided equally between the parties.

Source: Laws 2001, LB 46, § 6.
Termination date July 1, 2004.

25-2928 Settlement escrow; State Court Administrator's office; duties.

The State Court Administrator's office shall create all forms and worksheets used by escrow agents. The office shall train all escrow agents on settlement escrow. Escrow agents shall complete settlement escrow training conducted by the office prior to conducting a settlement escrow.

Source: Laws 2001, LB 46, § 7; Laws 2002, LB 876, § 61.
Termination date July 1, 2004.

25-2929 Settlement escrow; termination of sections.

Sections 25-2922 to 25-2928 terminate on July 1, 2004.

Source: Laws 2002, LB 876, § 62.

(c) UNIFORM MEDIATION ACT

25-2930 Act, how cited.

Sections 25-2930 to 25-2942 shall be known and may be cited as the Uniform Mediation Act.

Source: Laws 2003, LB 255, § 1.

25-2931 Terms, defined.

For purposes of the Uniform Mediation Act:

(1) Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) Mediation communication means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(3) Mediator means an individual who conducts a mediation.

(4) Nonparty participant means a person, other than a party or mediator, that participates in a mediation.

(5) Mediation party means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(6) Person means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government,

governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(7) Proceeding means:

(A) a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(8) Record means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) Sign means:

(A) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(B) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

Source: Laws 2003, LB 255, § 2.

25-2932 Scope.

(a) Except as otherwise provided in subsection (b) or (c) of this section, the Uniform Mediation Act applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

(b) The Uniform Mediation Act does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective-bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective-bargaining agreement, except that the act applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties and the mediator are students; or

(B) a correctional institution for youths or a juvenile center if all the parties and the mediator are residents of that institution.

(c) If the parties agree in advance in a signed record or a record of proceeding so reflects that all or part of a mediation is not privileged, the privileges under sections 25-2933 to 25-2935 do not apply to the mediation or part agreed upon. However, such sections apply to a mediation communication

made by a person that has not received actual notice of the agreement before the communication is made.

Source: Laws 2003, LB 255, § 3.

25-2933 Privilege against disclosure; admissibility; discovery.

(a) Except as otherwise provided in section 25-2935, a mediation communication is privileged as provided in subsection (b) of this section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 25-2934.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Source: Laws 2003, LB 255, § 4.

25-2934 Waiver and preclusion of privilege.

(a) A privilege under section 25-2933 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under section 25-2933, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 25-2933.

Source: Laws 2003, LB 255, § 5.

25-2935 Exceptions to privilege.

(a) There is no privilege under section 25-2933 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under sections 84-712 to 84-712.09 or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c) of this section, sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party.

(b) There is no privilege under section 25-2933 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony; or

(2) except as otherwise provided in subsection (c) of this section, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subdivision (a)(6) or (b)(2) of this section.

(d) If a mediation communication is not privileged under subsection (a) or (b) of this section, only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) of this section does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Source: Laws 2003, LB 255, § 6.

25-2936 Prohibited mediator reports.

(a) Except as required in subsection (b) of this section, a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under section 25-2935; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(c) A communication made in violation of subsection (a) of this section may not be considered by a court, administrative agency, or arbitrator.

Source: Laws 2003, LB 255, § 7.

25-2937 Confidentiality.

Unless subject to the Open Meetings Act or sections 84-712 to 84-712.09, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.

Source: Laws 2003, LB 255, § 8; Laws 2004, LB 821, § 9.

Cross References

Open Meetings Act, see section 84-1407.

25-2938 Mediator's disclosure of conflicts of interest; background.

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subdivision (a)(1) of this section after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) An individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection (a), (b), or (g) of this section is precluded by the violation from asserting a privilege under section 25-2933.

(e) Subsections (a), (b), (c), and (g) do not apply to an individual acting as a judge.

(f) The Uniform Mediation Act does not require that a mediator have a special qualification by background or profession.

(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) of this section to be disclosed, the parties agree otherwise.

Source: Laws 2003, LB 255, § 9.

25-2939 Participation in mediation.

An attorney may represent, or other individual designated by a party may accompany the party to, and participate in a mediation. A waiver of representation or participation given before the mediation may be rescinded.

Source: Laws 2003, LB 255, § 10.

25-2940 Relation to federal Electronic Signatures in Global and National Commerce Act.

The Uniform Mediation Act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but the Uniform Mediation Act does not modify, limit, or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b).

Source: Laws 2003, LB 255, § 11.

25-2941 Uniformity of application and construction.

In applying and construing the Uniform Mediation Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Source: Laws 2003, LB 255, § 12.

25-2942 Application to existing agreements or referrals.

(a) The Uniform Mediation Act governs a mediation pursuant to a referral or an agreement to mediate made on or after August 31, 2003.

(b) On or after January 1, 2004, the Uniform Mediation Act governs an agreement to mediate whenever made.

(c) The Uniform Mediation Act is intended to address issues of privilege and does not diminish any other mediation requirements of the statutes of Nebraska.

Source: Laws 2003, LB 255, § 13.

(d) REFERRAL OF CIVIL CASES

25-2943 Referral of civil cases to mediation or alternative dispute resolution; rules of practice.

A court may refer a civil case to mediation or another form of alternative dispute resolution and, unless otherwise ordered following a hearing upon a motion to object to such referral, may state a date for the case to return to court. Such date shall be no longer than ninety days after the date the order was signed unless the court grants an extension upon request of the parties. Any agreement or resolution made in mediation or another form of alternative dispute resolution shall be voluntarily entered into by the parties. An individual trial court, an appellate court, or the Supreme Court on its own initiative may adopt rules of practice governing the procedures for referral of cases to mediation and other forms of dispute resolution. Such services may be provided by approved centers on a sliding scale of fees under the Dispute Resolution Act.

Source: Laws 2008, LB1014, § 9.
Operative July 18, 2008.

ARTICLE 30

CIVIL LEGAL SERVICES FOR LOW-INCOME PERSONS

(a) LEGAL AID AND SERVICES

(b) CIVIL LEGAL SERVICES PROGRAM

(a) LEGAL AID AND SERVICES

25-3001 Terms, defined.

For purposes of sections 25-3001 to 25-3004:

(1) Eligible low-income person means any person (a) whose income is less than one hundred twenty-five percent of the federal poverty level, (b) who is financially eligible under the service provider's eligibility guidelines, (c) who resides in one of the counties in the service provider's area, and (d) who has a civil legal problem that falls within the guidelines established by the Commission on Public Advocacy;

(2) Service area means the counties in Nebraska defined by the commission as the area to be served by a service provider; and

(3) Service provider means a nonprofit entity that is engaged in or desires to become engaged in the provision of free civil legal services to eligible low-income persons.

Source: Laws 1997, LB 729, § 4.

25-3002 Legal Aid and Services Fund; created; use; investment.

The Legal Aid and Services Fund is created. Money in the fund shall be used to provide civil legal services to eligible low-income persons. The Commission on Public Advocacy shall distribute all money in the fund periodically in the form of grants to service providers of civil legal services to eligible low-income persons as determined by the commission pursuant to section 25-3004. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. Any money left in the Legal Aid and Services Fund on December 31 of any year shall be distributed in the following year.

Source: Laws 1997, LB 729, § 3; Laws 1999, LB 759, § 1.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

25-3003 Commission on Public Advocacy; duties.

(1) The Commission on Public Advocacy shall establish eligibility criteria and guidelines to determine on an annual basis (a) the service areas, (b) the legal services to be provided and the priorities for providing the services, and (c) the service provider or providers for each service area. The commission shall annually certify one or more service providers for each service area. A single service provider may be certified for more than one service area. Such certification entitles the service provider to a distribution of funds as defined and determined by section 25-3004.

(2) The commission shall accept applications for certification on an annual basis from entities interested in providing free civil legal services to eligible low-income persons. In the application, each applicant shall certify to the commission that the applicant intends to provide free civil legal services to eligible low-income persons as determined by the commission.

Source: Laws 1997, LB 729, § 5.

25-3004 Service provider; receipt of funds; powers and duties.

(1) Each service provider certified by the Commission on Public Advocacy shall be eligible to receive funds from the Legal Aid and Services Fund to provide free civil legal services to eligible low-income persons in the service area for which it is certified. The funds granted to each service provider from the Legal Aid and Services Fund shall be determined by the commission.

(2) Each service provider is authorized to use funds received from the Legal Aid and Services Fund to provide legal services in civil matters to any eligible low-income person.

(3) A service provider which has received funds from the Legal Aid and Services Fund shall be audited annually.

Source: Laws 1997, LB 729, § 6; Laws 1999, LB 759, § 2.

(b) CIVIL LEGAL SERVICES PROGRAM

25-3005 Legislative intent.

It is the intent of the Legislature to expand the capacity to provide civil legal services to eligible low-income persons equally throughout the state.

Source: Laws 2006, LB 746, § 1.

25-3006 Definitions.

For purposes of sections 25-3005 to 25-3010, the definitions found in section 25-3001 apply.

Source: Laws 2006, LB 746, § 2.

25-3007 Civil Legal Services Program; created; use of appropriations; State Court Administrator; duties.

The Civil Legal Services Program is created. Appropriations to the program and money in the Civil Legal Services Fund shall be used to provide grants for civil legal services to eligible low-income persons. The State Court Administrator shall distribute grants pursuant to section 25-3008.

Source: Laws 2006, LB 746, § 3.

25-3008 Grant recipients; requirements; application; audit.

(1) The State Court Administrator shall establish guidelines for submission of applications for grants to provide civil legal services to eligible low-income persons. To be eligible for a grant under this section, a civil legal services provider shall:

(a) Be a nonprofit organization chartered in Nebraska;

(b) Employ or contract with attorneys admitted to practice before the Nebraska Supreme Court and the United States District Courts;

(c) Have offices located throughout the state;

(d) Have as its principal purpose and mission the delivery of civil legal services to eligible low-income persons who are residents of Nebraska;

(e) Distribute its resources equitably throughout the state;

(f) Be a recipient of financial assistance for the delivery of civil legal services from the Legal Services Corporation established by the federal Legal Services Corporation Act, 42 U.S.C. 2996 et seq.; and

(g) Certify that any grant funds received pursuant to this section will be used to supplement any existing funds used by the applicant and that such funds will not replace other funds appropriated or awarded by a state agency to provide civil legal services to any eligible low-income person.

(2) A civil legal services provider seeking a grant under this section shall file an application with the State Court Administrator on forms provided by the administrator. The application shall include a place for the provider to certify to the administrator that it will provide free civil legal services to eligible low-income persons upon receipt of a grant under this section.

(3) The State Court Administrator shall review the applications and determine which civil legal services providers shall receive grants under this section and the amount of the grants. Grant recipients shall use the grant funds to provide free civil legal services to eligible low-income persons.

(4) An independent certified public accountant shall annually audit the books and accounts of each grant recipient. The grant recipients shall provide the results of such audit to the State Court Administrator.

Source: Laws 2006, LB 746, § 4.

25-3009 Civil Legal Services Fund; created; investment.

The Civil Legal Services Fund is created. Any money remaining in the fund at the end of a calendar year shall be distributed in the following calendar year. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source: Laws 2006, LB 746, § 5.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

25-3010 Civil Legal Services Fund; how funded.

Beginning January 1, 2007, a fee of one dollar shall be taxed as costs in each criminal proceeding, including traffic infractions and misdemeanors, filed in all

courts of this state for violations of state law or city or village ordinances. No such fee shall be collected in any juvenile court proceeding or when waived under section 29-2709. Such fee shall be remitted to the State Treasurer on forms prescribed by the State Treasurer within ten days after the close of each calendar quarter. The State Treasurer shall credit the money to the Civil Legal Services Fund.

Source: Laws 2006, LB 746, § 6.

ARTICLE 31

STRUCTURED SETTLEMENTS TRANSFERS PROTECTION ACT

Section
25-3101. Act, how cited.
25-3102. Act; purpose; applicability.
25-3103. Terms, defined.
25-3104. Transfer of payment rights; court order; requirements.
25-3105. Jurisdiction; hearing; notice.
25-3106. Waiver prohibited; failure to meet conditions; effect.
25-3107. Act; applicability.

25-3101 Act, how cited.

Sections 25-3101 to 25-3107 shall be known and may be cited as the Structured Settlements Transfers Protection Act.

Source: Laws 2001, LB 55, § 1.

25-3102 Act; purpose; applicability.

The purpose of the Structured Settlements Transfers Protection Act is to protect structured settlement recipients involved in the process of transferring structured settlement payment rights. The act does not apply to structured settlements of claims for workers' compensation benefits.

Source: Laws 2001, LB 55, § 2.

25-3103 Terms, defined.

For purposes of the Structured Settlements Transfers Protection Act:

(1) Annuity issuer means an insurer that has issued a contract to be used to fund periodic payments under a structured settlement;

(2) Applicable federal rate means the most recently published applicable rate used to determine the present value of an annuity, as issued by the Internal Revenue Service pursuant to section 7520 of the Internal Revenue Code as defined in section 49-801.01;

(3) Dependent means a payee's spouse and minor children and any other family member and other person for whom the payee is legally obligated to provide support, including spousal maintenance;

(4) Discount or finance charge means the sum of all charges payable directly or indirectly from assigned structured settlement payments and imposed directly or indirectly by the transferee as an incident to a transfer of structured settlement payment rights. Discount or finance charge includes interest charges, discounts, and other compensation for the time value of money, all application, origination, processing, underwriting, closing, filing, and notary fees and all similar charges, and all charges for commissions or brokerage

services. Discount or finance charge does not include any fee or other obligation incurred by a payee to obtain independent professional advice concerning a transfer of structured settlement payment rights or any charges, commissions, costs, brokerage fees, or other fees which the payee has agreed to pay to a nonaffiliated third party in connection with the transfer;

(5) Discounted present value means, with respect to a proposed transfer of structured settlement payment rights, the fair present value of future payments, as determined by discounting the payments to the present using the most recently published applicable federal rate used to determine the present value of an annuity as the discount rate;

(6) Interested parties means, with respect to any structured settlement:

(a) The payee;

(b) Any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death or, if such designated beneficiary is a minor, the designated beneficiary's parent or guardian;

(c) The annuity issuer;

(d) The structured settlement obligor; and

(e) Any other party that has continuing rights or obligations under the structured settlement;

(7) Payee means a Nebraska resident who is receiving tax-free payments under a structured settlement and proposes to make a transfer of payment rights under the structured settlement. Payee does not include a Nebraska resident who is receiving payments under a structured settlement of a workers' compensation claim;

(8) Qualified assignment agreement means an agreement providing for a qualified assignment within the meaning of section 130 of the Internal Revenue Code as defined in section 49-801.01;

(9) Structured settlement means an arrangement for periodic payment of damages for personal injuries or sickness established by a settlement, agreement, or judgment in resolution of a tort claim;

(10) Structured settlement obligor means the party that has the obligation to make continuing periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement;

(11) Structured settlement payment rights means rights to receive periodic payments, including lump-sum payments under a structured settlement, whether from the settlement obligor or the annuity issuer if the payee is a resident in the state;

(12) Transfer means a sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made by a payee for consideration;

(13) Transfer agreement means the agreement providing for transfer of structured settlement payment rights from a payee to a transferee; and

(14) Transferee means a person who is receiving or will receive structured settlement payment rights resulting from a transfer.

Source: Laws 2001, LB 55, § 3.

25-3104 Transfer of payment rights; court order; requirements.

(1) No direct or indirect transfer of structured settlement payment rights is effective, and no structured settlement obligor or annuity issuer is required to make a payment directly or indirectly to a transferee of structured settlement payment rights, unless the transfer has been authorized in advance in a final order of a court of competent jurisdiction based on the court's written express findings that:

(a) The transfer complies with the requirements of the Structured Settlements Transfers Protection Act;

(b) The transferee has provided to the payee a disclosure statement in no smaller than fourteen-point type specifying:

(i) The amounts and due dates of the structured settlement payments to be transferred;

(ii) The aggregate amount of the payments;

(iii) The discounted present value of the payments, together with the discount rate used in determining the discounted present value;

(iv) The gross amount payable to the payee in exchange for the payments;

(v) An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, referral fees, administrative fees, legal fees, notary fees, and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

(vi) The net amount payable to the payee after deduction of all commissions, fees, costs, expenses, and charges described in subdivision (1)(b)(v) of this section;

(vii) The quotient, expressed as a percentage, obtained by dividing the net payment amount by the discounted present value of the payments. Such quotient shall be disclosed in the following statement ''The net amount that you will receive from us in exchange for your future structured settlement payments represents ....% of the estimated current value of the payments.'';

(viii) The effective annual interest rate. Such rate shall be disclosed in the following statement ''Based on the amount that you will receive from us and the amounts and timing of the structured settlement payments that you are turning over to us, you will, in effect, be paying interest to us at a rate of ....% per year.''; and

(ix) The amount of any penalty and the aggregate amount of any liquidated damages, including penalties, payable by the payee in the event of a breach of the transfer agreement by the payee;

(c) The transfer is in the best interests of the payee, taking into account the welfare and support of the payee's dependents, and the net amount payable to the payee is not unfair, unjust, or unreasonable under existing circumstances;

(d) The payee has received, or waived his or her right to receive, independent professional advice regarding the legal, tax, and financial implications of the transfer;

(e) The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court;

(f) The transfer agreement provides that any disputes between the parties will be governed by the laws of Nebraska and that Nebraska is the proper place of

venue to bring any cause of action arising out of a breach of the agreement; and

(g) The transfer does not contravene any applicable statute or order of any court or other government authority.

(2) The court may not authorize a transfer if the court makes an express written finding that the transfer contravenes the public policy of this state.

(3) The transfer agreement shall also provide that the parties agree to the jurisdiction of any Nebraska court of competent jurisdiction. If the transfer would contravene the terms of the structured settlement or the standards set forth in subsection (1) or (2) of this section, the court may grant, deny, or impose conditions upon the proposed transfer as the court deems just and proper under the facts and circumstances, upon the filing of a written objection by any interested party and after considering the objection and any response to it. Any order approving a transfer must require that the transferee indemnify the annuity issuer and the structured settlement obligor for any liability including reasonable costs and attorney's fees arising from compliance by the issuer or obligor with the order of the court.

(4) A provision in a transfer agreement giving a transferee power to confess judgment against a payee is unenforceable to the extent the amount of the judgment would exceed the amount paid by the transferee to the payee, less any payments received from the structured settlement obligor or the payee.

(5) With respect to a transfer of structured settlement payment rights a transferee may not contract for or receive a discount or finance charge that would result in an effective annual rate in excess of the maximum interest rate per year applicable in Nebraska to a consumer loan as set forth in section 45-101.03.

Source: Laws 2001, LB 55, § 4.

25-3105 Jurisdiction; hearing; notice.

(1) The Nebraska court that approved the structured settlement agreement has jurisdiction over an application for authorization of a transfer of structured settlement payment rights. If a Nebraska court did not approve the structured settlement agreement, a person shall file an application under section 25-3104 in the district court for the county in which the payee resides.

(2) Not less than twenty days before the scheduled hearing on an application for authorization of a transfer of structured settlement payment rights under section 25-3104, the transferee shall file with the court and all interested parties a notice of the proposed transfer and the application for its authorization. The notice shall include:

(a) A copy of the transferee's application to the court;

(b) A copy of the transfer agreement;

(c) A copy of the disclosure statement required under section 25-3104; and

(d) Notice that an interested party is entitled to support, oppose, or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing, and notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed in order to be considered by the court. Written responses to the

application shall be filed within fifteen days after service of the transferee's notice.

Source: Laws 2001, LB 55, § 5.

25-3106 Waiver prohibited; failure to meet conditions; effect.

The provisions of sections 25-3103 to 25-3105 may not be waived. No payee who proposes to make a transfer of structured settlement payment rights shall incur a penalty, forfeit an application fee or other payment, or otherwise incur any liability to the proposed transferee based on the failure of the transfer to satisfy the conditions of section 25-3104.

Source: Laws 2001, LB 55, § 6.

25-3107 Act; applicability.

The Structured Settlements Transfers Protection Act applies to any transfer of structured settlement payment rights under a transfer agreement entered into on or after January 1, 2002.

Source: Laws 2001, LB 55, § 7.

ARTICLE 32

UNIFORM CONFLICT OF LAWS LIMITATIONS ACT

Section
25-3201. Act, how cited.
25-3202. Terms, defined.
25-3203. Conflict of laws; limitation periods.
25-3204. Rules applicable to computation of limitation period.
25-3205. Unfairness.
25-3206. Future claims.
25-3207. Uniformity of application and construction.

25-3201 Act, how cited.

Sections 25-3201 to 25-3207 shall be known and may be cited as the Uniform Conflict of Laws Limitations Act.

Source: Laws 2006, LB 1115, § 1.

25-3202 Terms, defined.

For purposes of the Uniform Conflict of Laws Limitations Act:

(1) Claim means a right of action that may be asserted in a civil action or proceeding and includes a right of action created by statute;

(2) State means a state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country, or a political subdivision of any of them; and

(3) Resident means an individual who is domiciled in this state, a corporation that is either incorporated or has its principal place of business in this state, or an unincorporated entity that has its principal place of business in this state.

Source: Laws 2006, LB 1115, § 2.

25-3203 Conflict of laws; limitation periods.

(1)(a) Except as provided by section 25-3205 and subsection (2) of this section, if a claim is substantively based:

(i) Upon the law of one other state, the limitation period of that state applies; or

(ii) Upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this state applies.

(b) The limitation period of this state applies to all other claims.

(2) If a cause of action arises outside of this state and the action is barred under the applicable statute of limitations of the place where it arose, the action may be maintained in this state if the plaintiff is a resident of this state who has owned the cause of action since it accrued and the cause of action is not barred under the applicable statute of limitations of this state.

Source: Laws 2006, LB 1115, § 3.

25-3204 Rules applicable to computation of limitation period.

If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply.

Source: Laws 2006, LB 1115, § 4.

25-3205 Unfairness.

If the court determines that the limitation period of another state applicable under section 25-3203 or 25-3204 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this state applies.

Source: Laws 2006, LB 1115, § 5.

25-3206 Future claims.

The Uniform Conflict of Laws Limitations Act applies to claims accruing after July 14, 2006.

Source: Laws 2006, LB 1115, § 6.

25-3207 Uniformity of application and construction.

The Uniform Conflict of Laws Limitations Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the Uniform Conflict of Laws Limitations Act among states enacting it.

Source: Laws 2006, LB 1115, § 7.

CHAPTER 26
COURTS, MUNICIPAL; CIVIL PROCEDURE

Article.
1. Municipal Courts in Metropolitan and Primary Cities. Transferred or Repealed.
2. Municipal Courts in Cities of 9,000 to 40,000. Repealed.

ARTICLE 1
MUNICIPAL COURTS IN METROPOLITAN AND PRIMARY CITIES

Section
26-101. Repealed. Laws 1984, LB 13, § 90.
26-101.01. Repealed. Laws 1971, LB 12, § 7.
26-102. Repealed. Laws 1984, LB 13, § 90.
26-102.01. Repealed. Laws 1984, LB 13, § 90.
26-102.02. Repealed. Laws 1984, LB 13, § 90.
26-102.03. Repealed. Laws 1984, LB 13, § 90.
26-103. Repealed. Laws 1984, LB 13, § 90.
26-103.01. Repealed. Laws 1984, LB 13, § 90.
26-104. Repealed. Laws 1984, LB 13, § 90.
26-105. Repealed. Laws 1984, LB 13, § 90.
26-106. Repealed. Laws 1984, LB 13, § 90.
26-106.01. Repealed. Laws 1959, c. 266, § 1.
26-106.02. Repealed. Laws 1959, c. 266, § 1.
26-106.03. Repealed. Laws 1971, LB 12, § 7; Laws 1971, LB 33, § 1.
26-106.04. Repealed. Laws 1971, LB 33, § 1.
26-107. Repealed. Laws 1984, LB 13, § 90.
26-107.01. Repealed. Laws 1972, LB 1032, § 287.
26-108. Repealed. Laws 1984, LB 13, § 90.
26-109. Repealed. Laws 1984, LB 13, § 90.
26-110. Repealed. Laws 1984, LB 13, § 90.
26-111. Repealed. Laws 1984, LB 13, § 90.
26-112. Repealed. Laws 1984, LB 13, § 90.
26-113. Repealed. Laws 1984, LB 13, § 90.
26-114. Repealed. Laws 1984, LB 13, § 90.
26-115. Transferred to section 24-585.
26-116. Repealed. Laws 1984, LB 13, § 90.
26-116.01. Repealed. Laws 1972, LB 1032, § 287.
26-117. Repealed. Laws 1984, LB 13, § 90.
26-118. Repealed. Laws 1984, LB 13, § 90.
26-118.01. Repealed. Laws 1971, LB 12, § 7.
26-119. Repealed. Laws 1984, LB 13, § 90.
26-120. Repealed. Laws 1984, LB 13, § 90.
26-121. Repealed. Laws 1972, LB 1032, § 287.
26-122. Repealed. Laws 1984, LB 13, § 90.
26-123. Repealed. Laws 1972, LB 1032, § 287.
26-124. Repealed. Laws 1972, LB 1032, § 287.
26-125. Repealed. Laws 1972, LB 1032, § 287.
26-126. Repealed. Laws 1972, LB 1032, § 287.
26-127. Repealed. Laws 1972, LB 1032, § 287.
26-128. Repealed. Laws 1972, LB 1032, § 287.
26-129. Repealed. Laws 1972, LB 1032, § 287.
26-130. Repealed. Laws 1972, LB 1032, § 287.
26-131. Repealed. Laws 1972, LB 1032, § 287.
26-132. Repealed. Laws 1972, LB 1032, § 287.

Section
26-133. Repealed. Laws 1972, LB 1032, § 287.
26-134. Repealed. Laws 1972, LB 1032, § 287.
26-135. Repealed. Laws 1972, LB 1032, § 287.
26-136. Repealed. Laws 1972, LB 1032, § 287.
26-137. Repealed. Laws 1972, LB 1032, § 287.
26-138. Repealed. Laws 1972, LB 1032, § 287.
26-139. Repealed. Laws 1972, LB 1032, § 287.
26-140. Repealed. Laws 1972, LB 1032, § 287.
26-141. Repealed. Laws 1972, LB 1032, § 287.
26-142. Repealed. Laws 1972, LB 1032, § 287.
26-143. Repealed. Laws 1972, LB 1032, § 287.
26-144. Repealed. Laws 1972, LB 1032, § 287.
26-145. Repealed. Laws 1972, LB 1032, § 287.
26-146. Repealed. Laws 1972, LB 1032, § 287.
26-147. Repealed. Laws 1972, LB 1032, § 287.
26-148. Repealed. Laws 1972, LB 1032, § 287.
26-149. Repealed. Laws 1972, LB 1032, § 287.
26-150. Repealed. Laws 1972, LB 1032, § 287.
26-151. Repealed. Laws 1972, LB 1032, § 287.
26-151.01. Repealed. Laws 1972, LB 1032, § 287.
26-152. Repealed. Laws 1951, c. 67, § 15.
26-153. Repealed. Laws 1951, c. 67, § 15.
26-154. Repealed. Laws 1951, c. 67, § 15.
26-155. Repealed. Laws 1951, c. 67, § 15.
26-156. Repealed. Laws 1951, c. 67, § 15.
26-157. Repealed. Laws 1951, c. 67, § 15.
26-158. Repealed. Laws 1951, c. 67, § 15.
26-159. Repealed. Laws 1951, c. 67, § 15.
26-160. Repealed. Laws 1951, c. 67, § 15.
26-161. Repealed. Laws 1972, LB 1032, § 287.
26-162. Repealed. Laws 1972, LB 1032, § 287.
26-163. Repealed. Laws 1972, LB 1032, § 287.
26-164. Repealed. Laws 1972, LB 1032, § 287.
26-165. Repealed. Laws 1972, LB 1032, § 287.
26-166. Repealed. Laws 1972, LB 1032, § 287.
26-167. Repealed. Laws 1972, LB 1032, § 287.
26-168. Repealed. Laws 1972, LB 1032, § 287.
26-169. Repealed. Laws 1972, LB 1032, § 287.
26-170. Repealed. Laws 1972, LB 1032, § 287.
26-171. Repealed. Laws 1972, LB 1032, § 287.
26-172. Repealed. Laws 1972, LB 1032, § 287.
26-173. Repealed. Laws 1972, LB 1032, § 287.
26-173.01. Transferred to section 33-139.01.
26-174. Repealed. Laws 1972, LB 1032, § 287.
26-175. Repealed. Laws 1972, LB 1032, § 287.
26-176. Repealed. Laws 1972, LB 1032, § 287.
26-177. Repealed. Laws 1972, LB 1032, § 287.
26-178. Repealed. Laws 1972, LB 1032, § 287.
26-179. Repealed. Laws 1972, LB 1032, § 287.
26-180. Repealed. Laws 1972, LB 1032, § 287.
26-181. Repealed. Laws 1972, LB 1032, § 287.
26-182. Repealed. Laws 1972, LB 1032, § 287.
26-183. Repealed. Laws 1972, LB 1032, § 287.
26-184. Repealed. Laws 1972, LB 1032, § 287.
26-185. Repealed. Laws 1972, LB 1032, § 287.
26-186. Repealed. Laws 1972, LB 1032, § 287.
26-187. Repealed. Laws 1972, LB 1032, § 287.
26-188. Repealed. Laws 1972, LB 1032, § 287.
26-189. Repealed. Laws 1972, LB 1032, § 287.
26-190. Repealed. Laws 1972, LB 1032, § 287.
26-191. Repealed. Laws 1972, LB 1032, § 287.

Section
26-192. Repealed. Laws 1972, LB 1032, § 287.
26-193. Repealed. Laws 1972, LB 1032, § 287.
26-194. Repealed. Laws 1972, LB 1032, § 287.
26-195. Repealed. Laws 1972, LB 1032, § 287.
26-196. Repealed. Laws 1972, LB 1032, § 287.
26-197. Repealed. Laws 1972, LB 1032, § 287.
26-198. Repealed. Laws 1972, LB 1032, § 287.
26-199. Repealed. Laws 1972, LB 1032, § 287.
26-1,100. Transferred to section 24-537.
26-1,101. Repealed. Laws 1972, LB 1032, § 287.
26-1,102. Repealed. Laws 1972, LB 1032, § 287.
26-1,103. Transferred to section 24-538.
26-1,104. Transferred to section 24-541.
26-1,104.01. Transferred to section 24-542.
26-1,105. Transferred to section 24-543.
26-1,106. Transferred to section 24-544.
26-1,106.01. Repealed. Laws 1972, LB 1032, § 287.
26-1,107. Repealed. Laws 1972, LB 1032, § 287.
26-1,108. Repealed. Laws 1972, LB 1032, § 287.
26-1,109. Repealed. Laws 1972, LB 1032, § 287.
26-1,110. Repealed. Laws 1972, LB 1032, § 287.
26-1,111. Repealed. Laws 1972, LB 1032, § 287.
26-1,112. Transferred to section 24-547.
26-1,113. Repealed. Laws 1972, LB 1032, § 287.
26-1,114. Transferred to section 24-548.
26-1,115. Transferred to section 24-549.
26-1,116. Transferred to section 24-550.
26-1,117. Transferred to section 24-551.
26-1,118. Transferred to section 24-568.
26-1,119. Transferred to section 24-569.
26-1,120. Transferred to section 24-570.
26-1,121. Transferred to section 24-571.
26-1,122. Transferred to section 24-572.
26-1,123. Transferred to section 24-573.
26-1,124. Transferred to section 24-574.
26-1,125. Transferred to section 24-575.
26-1,126. Transferred to section 24-576.
26-1,127. Transferred to section 24-577.
26-1,128. Transferred to section 24-578.
26-1,129. Transferred to section 24-579.
26-1,130. Transferred to section 24-580.
26-1,131. Transferred to section 24-581.
26-1,132. Transferred to section 24-582.
26-1,133. Transferred to section 24-583.
26-1,134. Transferred to section 24-584.
26-1,135. Repealed. Laws 1972, LB 1032, § 287.
26-1,136. Repealed. Laws 1972, LB 1032, § 287.
26-1,137. Repealed. Laws 1972, LB 1032, § 287.
26-1,138. Repealed. Laws 1972, LB 1032, § 287.
26-1,139. Repealed. Laws 1972, LB 1032, § 287.
26-1,140. Repealed. Laws 1972, LB 1032, § 287.
26-1,141. Repealed. Laws 1972, LB 1032, § 287.
26-1,142. Repealed. Laws 1972, LB 1032, § 287.
26-1,143. Repealed. Laws 1972, LB 1032, § 287.
26-1,144. Repealed. Laws 1972, LB 1032, § 287.
26-1,145. Repealed. Laws 1972, LB 1032, § 287.
26-1,146. Repealed. Laws 1972, LB 1032, § 287.
26-1,147. Repealed. Laws 1972, LB 1032, § 287.
26-1,148. Repealed. Laws 1972, LB 1032, § 287.
26-1,149. Repealed. Laws 1972, LB 1032, § 287.
26-1,150. Repealed. Laws 1972, LB 1032, § 287.

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26-1,151. Repealed. Laws 1972, LB 1032, § 287.
26-1,152. Repealed. Laws 1972, LB 1032, § 287.
26-1,153. Repealed. Laws 1972, LB 1032, § 287.
26-1,154. Repealed. Laws 1972, LB 1032, § 287.
26-1,155. Repealed. Laws 1972, LB 1032, § 287.
26-1,156. Repealed. Laws 1972, LB 1032, § 287.
26-1,157. Repealed. Laws 1972, LB 1032, § 287.
26-1,158. Repealed. Laws 1972, LB 1032, § 287.
26-1,159. Repealed. Laws 1972, LB 1032, § 287.
26-1,160. Repealed. Laws 1972, LB 1032, § 287.
26-1,161. Repealed. Laws 1972, LB 1032, § 287.
26-1,162. Repealed. Laws 1972, LB 1032, § 287.
26-1,163. Repealed. Laws 1972, LB 1032, § 287.
26-1,164. Repealed. Laws 1972, LB 1032, § 287.
26-1,165. Repealed. Laws 1972, LB 1032, § 287.
26-1,166. Repealed. Laws 1972, LB 1032, § 287.
26-1,167. Repealed. Laws 1972, LB 1032, § 287.
26-1,168. Repealed. Laws 1972, LB 1032, § 287.
26-1,169. Repealed. Laws 1972, LB 1032, § 287.
26-1,170. Repealed. Laws 1972, LB 1032, § 287.
26-1,171. Repealed. Laws 1972, LB 1032, § 287.
26-1,172. Transferred to section 24-595.
26-1,173. Transferred to section 24-596.
26-1,174. Transferred to section 24-597.
26-1,175. Transferred to section 24-598.
26-1,176. Transferred to section 24-599.
26-1,177. Transferred to section 24-5,100.
26-1,178. Transferred to section 24-5,101.
26-1,179. Transferred to section 24-5,102.
26-1,180. Transferred to section 24-5,103.
26-1,181. Transferred to section 24-5,104.
26-1,182. Transferred to section 24-5,105.
26-1,183. Transferred to section 24-5,106.
26-1,184. Repealed. Laws 1972, LB 1032, § 287.
26-1,185. Repealed. Laws 1972, LB 1032, § 287.
26-1,186. Repealed. Laws 1972, LB 1032, § 287.
26-1,187. Repealed. Laws 1972, LB 1032, § 287.
26-1,188. Repealed. Laws 1972, LB 1032, § 287.
26-1,189. Repealed. Laws 1972, LB 1032, § 287.
26-1,190. Repealed. Laws 1972, LB 1032, § 287.
26-1,191. Repealed. Laws 1972, LB 1032, § 287.
26-1,192. Repealed. Laws 1972, LB 1032, § 287.
26-1,193. Repealed. Laws 1972, LB 1032, § 287.
26-1,194. Repealed. Laws 1972, LB 1032, § 287.
26-1,195. Repealed. Laws 1972, LB 1032, § 287.
26-1,196. Repealed. Laws 1972, LB 1032, § 287.
26-1,197. Repealed. Laws 1972, LB 1032, § 287.
26-1,198. Repealed. Laws 1972, LB 1032, § 287.
26-1,199. Repealed. Laws 1972, LB 1032, § 287.
26-1,200. Repealed. Laws 1972, LB 1032, § 287.
26-1,201. Repealed. Laws 1972, LB 1032, § 287.
26-1,202. Repealed. Laws 1984, LB 13, § 90.
26-1,203. Repealed. Laws 1984, LB 13, § 90.

26-101 Repealed. Laws 1984, LB 13, § 90.

26-101.01 Repealed. Laws 1971, LB 12, § 7.

26-102 Repealed. Laws 1984, LB 13, § 90.

26-102.01 Repealed. Laws 1984, LB 13, § 90.

26-102.02 Repealed. Laws 1984, LB 13, § 90.

26-102.03 Repealed. Laws 1984, LB 13, § 90.

26-103 Repealed. Laws 1984, LB 13, § 90.

26-103.01 Repealed. Laws 1984, LB 13, § 90.

26-104 Repealed. Laws 1984, LB 13, § 90.

26-105 Repealed. Laws 1984, LB 13, § 90.

26-106 Repealed. Laws 1984, LB 13, § 90.

26-106.01 Repealed. Laws 1959, c. 266, § 1.

26-106.02 Repealed. Laws 1959, c. 266, § 1.

26-106.03 Repealed. Laws 1971, LB 12, § 7; Laws 1971, LB 33, § 1.

26-106.04 Repealed. Laws 1971, LB 33, § 1.

26-107 Repealed. Laws 1984, LB 13, § 90.

26-107.01 Repealed. Laws 1972, LB 1032, § 287.

26-108 Repealed. Laws 1984, LB 13, § 90.

26-109 Repealed. Laws 1984, LB 13, § 90.

26-110 Repealed. Laws 1984, LB 13, § 90.

26-111 Repealed. Laws 1984, LB 13, § 90.

26-112 Repealed. Laws 1984, LB 13, § 90.

26-113 Repealed. Laws 1984, LB 13, § 90.

26-114 Repealed. Laws 1984, LB 13, § 90.

26-115 Transferred to section 24-585.

26-116 Repealed. Laws 1984, LB 13, § 90.

26-116.01 Repealed. Laws 1972, LB 1032, § 287.

26-117 Repealed. Laws 1984, LB 13, § 90.

26-118 Repealed. Laws 1984, LB 13, § 90.

26-118.01 Repealed. Laws 1971, LB 12, § 7.

26-119 Repealed. Laws 1984, LB 13, § 90.

26-120 Repealed. Laws 1984, LB 13, § 90.

26-121 Repealed. Laws 1972, LB 1032, § 287.

26-122 Repealed. Laws 1984, LB 13, § 90.

26-123 Repealed. Laws 1972, LB 1032, § 287.

26-124 Repealed. Laws 1972, LB 1032, § 287.

26-125 Repealed. Laws 1972, LB 1032, § 287.

26-126 Repealed. Laws 1972, LB 1032, § 287.

26-127 Repealed. Laws 1972, LB 1032, § 287.

26-128 Repealed. Laws 1972, LB 1032, § 287.

26-129 Repealed. Laws 1972, LB 1032, § 287.

26-130 Repealed. Laws 1972, LB 1032, § 287.

26-131 Repealed. Laws 1972, LB 1032, § 287.

26-132 Repealed. Laws 1972, LB 1032, § 287.

26-133 Repealed. Laws 1972, LB 1032, § 287.

26-134 Repealed. Laws 1972, LB 1032, § 287.

26-135 Repealed. Laws 1972, LB 1032, § 287.

26-136 Repealed. Laws 1972, LB 1032, § 287.

26-137 Repealed. Laws 1972, LB 1032, § 287.

26-138 Repealed. Laws 1972, LB 1032, § 287.

26-139 Repealed. Laws 1972, LB 1032, § 287.

26-140 Repealed. Laws 1972, LB 1032, § 287.

26-141 Repealed. Laws 1972, LB 1032, § 287.

26-142 Repealed. Laws 1972, LB 1032, § 287.

26-143 Repealed. Laws 1972, LB 1032, § 287.

26-144 Repealed. Laws 1972, LB 1032, § 287.

26-145 Repealed. Laws 1972, LB 1032, § 287.

26-146 Repealed. Laws 1972, LB 1032, § 287.

26-147 Repealed. Laws 1972, LB 1032, § 287.

26-148 Repealed. Laws 1972, LB 1032, § 287.

26-149 Repealed. Laws 1972, LB 1032, § 287.

26-150 Repealed. Laws 1972, LB 1032, § 287.

26-151 Repealed. Laws 1972, LB 1032, § 287.

26-151.01 Repealed. Laws 1972, LB 1032, § 287.

26-152 Repealed. Laws 1951, c. 67, § 15.

26-153 Repealed. Laws 1951, c. 67, § 15.

26-154 Repealed. Laws 1951, c. 67, § 15.

26-155 Repealed. Laws 1951, c. 67, § 15.

26-156 Repealed. Laws 1951, c. 67, § 15.

26-157 Repealed. Laws 1951, c. 67, § 15.

26-158 Repealed. Laws 1951, c. 67, § 15.

26-159 Repealed. Laws 1951, c. 67, § 15.

26-160 Repealed. Laws 1951, c. 67, § 15.

26-161 Repealed. Laws 1972, LB 1032, § 287.

26-162 Repealed. Laws 1972, LB 1032, § 287.

26-163 Repealed. Laws 1972, LB 1032, § 287.

26-164 Repealed. Laws 1972, LB 1032, § 287.

26-165 Repealed. Laws 1972, LB 1032, § 287.

26-166 Repealed. Laws 1972, LB 1032, § 287.

26-167 Repealed. Laws 1972, LB 1032, § 287.

26-168 Repealed. Laws 1972, LB 1032, § 287.

26-169 Repealed. Laws 1972, LB 1032, § 287.

26-170 Repealed. Laws 1972, LB 1032, § 287.

26-171 Repealed. Laws 1972, LB 1032, § 287.

26-172 Repealed. Laws 1972, LB 1032, § 287.

26-173 Repealed. Laws 1972, LB 1032, § 287.

26-173.01 Transferred to section 33-139.01.

26-174 Repealed. Laws 1972, LB 1032, § 287.

26-175 Repealed. Laws 1972, LB 1032, § 287.

26-176 Repealed. Laws 1972, LB 1032, § 287.

26-177 Repealed. Laws 1972, LB 1032, § 287.

26-178 Repealed. Laws 1972, LB 1032, § 287.

26-179 Repealed. Laws 1972, LB 1032, § 287.

26-180 Repealed. Laws 1972, LB 1032, § 287.

26-181 Repealed. Laws 1972, LB 1032, § 287.

26-182 Repealed. Laws 1972, LB 1032, § 287.

26-183 Repealed. Laws 1972, LB 1032, § 287.

26-184 Repealed. Laws 1972, LB 1032, § 287.

26-185 Repealed. Laws 1972, LB 1032, § 287.

26-186 Repealed. Laws 1972, LB 1032, § 287.

26-187 Repealed. Laws 1972, LB 1032, § 287.

26-188 Repealed. Laws 1972, LB 1032, § 287.

26-189 Repealed. Laws 1972, LB 1032, § 287.

26-190 Repealed. Laws 1972, LB 1032, § 287.

26-191 Repealed. Laws 1972, LB 1032, § 287.

26-192 Repealed. Laws 1972, LB 1032, § 287.

26-193 Repealed. Laws 1972, LB 1032, § 287.

26-194 Repealed. Laws 1972, LB 1032, § 287.

26-195 Repealed. Laws 1972, LB 1032, § 287.

26-196 Repealed. Laws 1972, LB 1032, § 287.

26-197 Repealed. Laws 1972, LB 1032, § 287.

26-198 Repealed. Laws 1972, LB 1032, § 287.

26-199 Repealed. Laws 1972, LB 1032, § 287.

26-1,100 Transferred to section 24-537.

26-1,101 Repealed. Laws 1972, LB 1032, § 287.

26-1,102 Repealed. Laws 1972, LB 1032, § 287.

26-1,103 Transferred to section 24-538.

26-1,104 Transferred to section 24-541.

26-1,104.01 Transferred to section 24-542.

26-1,105 Transferred to section 24-543.

26-1,106 Transferred to section 24-544.

26-1,106.01 Repealed. Laws 1972, LB 1032, § 287.

26-1,107 Repealed. Laws 1972, LB 1032, § 287.

26-1,108 Repealed. Laws 1972, LB 1032, § 287.

26-1,109 Repealed. Laws 1972, LB 1032, § 287.

26-1,110 Repealed. Laws 1972, LB 1032, § 287.

26-1,111 Repealed. Laws 1972, LB 1032, § 287.

26-1,112 Transferred to section 24-547.

26-1,113 Repealed. Laws 1972, LB 1032, § 287.

26-1,114 Transferred to section 24-548.

26-1,115 Transferred to section 24-549.

26-1,116 Transferred to section 24-550.

26-1,117 Transferred to section 24-551.

26-1,118 Transferred to section 24-568.

26-1,119 Transferred to section 24-569.

26-1,120 Transferred to section 24-570.

26-1,121 Transferred to section 24-571.

26-1,122 Transferred to section 24-572.

26-1,123 Transferred to section 24-573.

26-1,124 Transferred to section 24-574.

26-1,125 Transferred to section 24-575.

26-1,126 Transferred to section 24-576.

26-1,127 Transferred to section 24-577.

26-1,128 Transferred to section 24-578.

26-1,129 Transferred to section 24-579.

26-1,130 Transferred to section 24-580.

26-1,131 Transferred to section 24-581.

26-1,132 Transferred to section 24-582.

26-1,133 Transferred to section 24-583.

26-1,134 Transferred to section 24-584.

26-1,135 Repealed. Laws 1972, LB 1032, § 287.

26-1,136 Repealed. Laws 1972, LB 1032, § 287.

26-1,137 Repealed. Laws 1972, LB 1032, § 287.

26-1,138 Repealed. Laws 1972, LB 1032, § 287.

26-1,139 Repealed. Laws 1972, LB 1032, § 287.

26-1,140 Repealed. Laws 1972, LB 1032, § 287.

26-1,141 Repealed. Laws 1972, LB 1032, § 287.

26-1,142 Repealed. Laws 1972, LB 1032, § 287.

26-1,143 Repealed. Laws 1972, LB 1032, § 287.

26-1,144 Repealed. Laws 1972, LB 1032, § 287.

26-1,145 Repealed. Laws 1972, LB 1032, § 287.

26-1,146 Repealed. Laws 1972, LB 1032, § 287.

26-1,147 Repealed. Laws 1972, LB 1032, § 287.

26-1,148 Repealed. Laws 1972, LB 1032, § 287.

26-1,149 Repealed. Laws 1972, LB 1032, § 287.

26-1,150 Repealed. Laws 1972, LB 1032, § 287.

26-1,151 Repealed. Laws 1972, LB 1032, § 287.

26-1,152 Repealed. Laws 1972, LB 1032, § 287.

26-1,153 Repealed. Laws 1972, LB 1032, § 287.

26-1,154 Repealed. Laws 1972, LB 1032, § 287.

26-1,155 Repealed. Laws 1972, LB 1032, § 287.

26-1,156 Repealed. Laws 1972, LB 1032, § 287.

26-1,157 Repealed. Laws 1972, LB 1032, § 287.

26-1,158 Repealed. Laws 1972, LB 1032, § 287.

26-1,159 Repealed. Laws 1972, LB 1032, § 287.

26-1,160 Repealed. Laws 1972, LB 1032, § 287.

26-1,161 Repealed. Laws 1972, LB 1032, § 287.

26-1,162 Repealed. Laws 1972, LB 1032, § 287.

26-1,163 Repealed. Laws 1972, LB 1032, § 287.

26-1,164 Repealed. Laws 1972, LB 1032, § 287.

26-1,165 Repealed. Laws 1972, LB 1032, § 287.

26-1,166 Repealed. Laws 1972, LB 1032, § 287.

26-1,167 Repealed. Laws 1972, LB 1032, § 287.

26-1,168 Repealed. Laws 1972, LB 1032, § 287.

26-1,169 Repealed. Laws 1972, LB 1032, § 287.

26-1,170 Repealed. Laws 1972, LB 1032, § 287.

26-1,171 Repealed. Laws 1972, LB 1032, § 287.

26-1,172 Transferred to section 24-595.

26-1,173 Transferred to section 24-596.

26-1,174 Transferred to section 24-597.

26-1,175 Transferred to section 24-598.

26-1,176 Transferred to section 24-599.

26-1,177 Transferred to section 24-5,100.

26-1,178 Transferred to section 24-5,101.

26-1,179 Transferred to section 24-5,102.

26-1,180 Transferred to section 24-5,103.

26-1,181 Transferred to section 24-5,104.

26-1,182 Transferred to section 24-5,105.

26-1,183 Transferred to section 24-5,106.

26-1,184 Repealed. Laws 1972, LB 1032, § 287.

26-1,185 Repealed. Laws 1972, LB 1032, § 287.

26-1,186 Repealed. Laws 1972, LB 1032, § 287.

26-1,187 Repealed. Laws 1972, LB 1032, § 287.

26-1,188 Repealed. Laws 1972, LB 1032, § 287.

26-1,189 Repealed. Laws 1972, LB 1032, § 287.

26-1,190 Repealed. Laws 1972, LB 1032, § 287.

26-1,191 Repealed. Laws 1972, LB 1032, § 287.

26-1,192 Repealed. Laws 1972, LB 1032, § 287.

26-1,193 Repealed. Laws 1972, LB 1032, § 287.

26-1,194 Repealed. Laws 1972, LB 1032, § 287.

26-1,195 Repealed. Laws 1972, LB 1032, § 287.

26-1,196 Repealed. Laws 1972, LB 1032, § 287.

26-1,197 Repealed. Laws 1972, LB 1032, § 287.

26-1,198 Repealed. Laws 1972, LB 1032, § 287.

26-1,199 Repealed. Laws 1972, LB 1032, § 287.

26-1,200 Repealed. Laws 1972, LB 1032, § 287.

26-1,201 Repealed. Laws 1972, LB 1032, § 287.

26-1,202 Repealed. Laws 1984, LB 13, § 90.

26-1,203 Repealed. Laws 1984, LB 13, § 90.

ARTICLE 2
MUNICIPAL COURTS IN CITIES OF 9,000 TO 40,000

Section
26-201. Repealed. Laws 1969, c. 74, § 9.
26-202. Repealed. Laws 1969, c. 74, § 9.
26-203. Repealed. Laws 1969, c. 74, § 9.
26-204. Repealed. Laws 1969, c. 74, § 9.
26-205. Repealed. Laws 1969, c. 74, § 9.
26-206. Repealed. Laws 1969, c. 74, § 9.
26-207. Repealed. Laws 1969, c. 74, § 9.
26-208. Repealed. Laws 1969, c. 74, § 9.
26-209. Repealed. Laws 1969, c. 74, § 9.
26-210. Repealed. Laws 1969, c. 74, § 9.
26-211. Repealed. Laws 1969, c. 74, § 9.
26-212. Repealed. Laws 1969, c. 74, § 9.
26-213. Repealed. Laws 1969, c. 74, § 9.
26-214. Repealed. Laws 1969, c. 74, § 9.

26-201 Repealed. Laws 1969, c. 74, § 9.

26-202 Repealed. Laws 1969, c. 74, § 9.

26-203 Repealed. Laws 1969, c. 74, § 9.

26-204 Repealed. Laws 1969, c. 74, § 9.

26-205 Repealed. Laws 1969, c. 74, § 9.

26-206 Repealed. Laws 1969, c. 74, § 9.

26-207 Repealed. Laws 1969, c. 74, § 9.

26-208 Repealed. Laws 1969, c. 74, § 9.

26-209 Repealed. Laws 1969, c. 74, § 9.

26-210 Repealed. Laws 1969, c. 74, § 9.

26-211 Repealed. Laws 1969, c. 74, § 9.

26-212 Repealed. Laws 1969, c. 74, § 9.

26-213 Repealed. Laws 1969, c. 74, § 9.

26-214 Repealed. Laws 1969, c. 74, § 9.

CHAPTER 27
COURTS; RULES OF EVIDENCE

NEBRASKA EVIDENCE RULES

Sections 27-101 to 27-1103 constitute the Nebraska Evidence Rules enacted in 1975 by Legislative Bill 279, to become effective August 24, 1975. The catchline to each section contains a reference corresponding to the appropriate section in the Federal Rules of Evidence.

Article.

ARTICLE 1
GENERAL PROVISIONS

Section

27-101 Rule 101. Scope.

These rules govern proceedings in the courts of the State of Nebraska, except to the extent and with the exceptions stated in section 27-1101.

Source: Laws 1975, LB 279, § 1.

At a juvenile adjudication hearing, the admissibility of evidence is governed by the customary rules of evidence used in trials without a jury. The Nebraska Evidence Rules do not apply at a dispositional hearing. The requirements of due process control a dispositional hearing and the type of evidence which may be used by the State. In re Interest of O.L.D. and M.D.D., 1 Neb. App. 471, 499 N.W.2d 552 (1993).

27-102 Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Source: Laws 1975, LB 279, § 2.

Ruling on admissibility of evidence are discretionary with the trial judge. State v. King, 197 Neb. 729, 250 N.W.2d 655 (1977).

27-103 Rule 103. Rulings on evidence; effect of erroneous ruling; objection; offer of proof; record of offer and ruling; hearing of jury; plain error.

(1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context; or

(b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

(2) The judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. He may direct the making of an offer in question and answer form.

(3) In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

Source: Laws 1975, LB 279, § 3.

1. Offer of proof
2. Timely objection
3. Substantial rights
4. Miscellaneous

1. Offer of proof

Pursuant to subsection (1)(b) of this section, error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. Anderson by and through Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., 253 Neb. 813, 572 N.W.2d 362 (1998).

In order to preserve any error before the Supreme Court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context in which the questions were asked. Thrift Mart v. State Farm Fire & Cas. Co., 251 Neb. 448, 558 N.W.2d 531 (1997).

In order to preserve error before the Supreme Court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context within which the questions were asked. McCune v. Neitzel, 235 Neb. 754, 457 N.W.2d 803 (1990).

Where, on objection, a ruling excluding evidence is made, an offer of proof is generally a prerequisite to our review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent. Hulse v. Schelkopf, 220 Neb. 617, 371 N.W.2d 673 (1985); State v. Schroder, 218 Neb. 860, 359 N.W.2d 799 (1984).

In an offer of proof, only the substance of excluded testimony must be disclosed. If the substance of the evidence is apparent from the context in which the question is asked, an offer of proof is not necessary. Birkel v. Hassebrook Farm Serv., 219 Neb. 286, 363 N.W.2d 148 (1985).

Error may not be predicated on district court's failure to admit evidence if no offer of proof is made. Morris v. Laaker, 213 Neb. 868, 331 N.W.2d 807 (1983).

Where no offer of proof was made error cannot be predicated on a ruling excluding evidence. Schwartz v. Selvage, 203 Neb. 158, 277 N.W.2d 681 (1979).

Where evidence is excluded, an offer of proof is generally a prerequisite to review on appeal. State v. Fonville, 197 Neb. 220, 248 N.W.2d 27 (1976).

Pursuant to subsection (1)(b) of this section, a party's failure to make an offer of proof or ensure the record reflected the substance of excluded witnesses' testimony prevents appellate review of the trial court's exclusion of the testimony. Zuco v. Tucker, 9 Neb. App. 155, 609 N.W.2d 59 (2000).

2. Timely objection

The defendant failed to preserve for appellate review a challenge to the admission of exhibits reoffered at his second habitual criminal hearing following remand when counsel's only stated ground for the objection was that he was not the counsel of record at the original hearing and was not sure the proper objections were made to the exhibits at the original hearing. State v. Hall, 270 Neb. 669, 708 N.W.2d 209 (2005).

Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful

bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal. State v. Hall, 270 Neb. 669, 708 N.W.2d 209 (2005).

Under subsection (1)(a) of this section, when counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and, for that reason, not admissible. Jacobson v. Higgins, 243 Neb. 485, 500 N.W.2d 558 (1993).

The duty rests on defendant, after denial of a motion to suppress, to object at trial to the admission of the evidence and to state the specific grounds of the objection if a specific ground is not apparent from the context in which the objection was made. State v. Farrell, 242 Neb. 877, 497 N.W.2d 17 (1993).

In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress evidence, the defendant must perform the additional procedural step of objecting at trial to the admission of the evidence which was the subject of the suppression motion in order to preserve the question of admissibility for appeal. State v. Rodgers, 237 Neb. 506, 466 N.W.2d 537 (1991); State v. Mahlin, 236 Neb. 818, 464 N.W.2d 312 (1991); State v. Pointer, 224 Neb. 892, 402 N.W.2d 268 (1987).

Objection was not timely when it was made after the exhibit was received in evidence. Objection to the admission of evidence is not timely unless it is made at the earliest opportunity after the ground for the objection becomes apparent. State v. Rodgers, 237 Neb. 506, 466 N.W.2d 537 (1991).

If a party does not make a timely objection to evidence under subsection (1)(a) of this statute, the party waives the right on appeal to assert prejudicial error in the reception of such evidence. State v. Todd, 226 Neb. 906, 416 N.W.2d 13 (1987).

Defendant did not preserve, for appeal, alleged error in trial court's overruling his motion to suppress physical evidence, where defendant did not object at trial to the receipt of the evidence, but stipulated to its introduction. State v. Roggenkamp, 224 Neb. 914, 402 N.W.2d 682 (1987).

3. Substantial rights

In a civil case, to constitute reversible error, admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. Equitable Life v. Starr, 241 Neb. 609, 489 N.W.2d 857 (1992); Huffman v. Huffman, 236 Neb. 101, 459 N.W.2d 215 (1990); Alliance Nat. Bank v. State Surety Co., 223 Neb. 403, 390 N.W.2d 487 (1986).

Under subsection (1) of this section, alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterward, allowed to be given by the same witness. Rose v. City of Lincoln, 234 Neb. 67, 449 N.W.2d 522 (1989).

An error is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. State v. Lenz, 227 Neb. 692, 419 N.W.2d 670 (1988).

Error may be predicated on a ruling excluding evidence if a substantial right of the party is affected and the substance of the evidence is apparent from the context. Lincoln East Bancshares v. Rierden, 225 Neb. 440, 406 N.W.2d 337 (1987).

Exclusion of the statement of the insurance adjuster affected the plaintiff's substantial right to present reliable evidence on causation. Bump v. Firemen's Ins. Co., 221 Neb. 678, 380 N.W.2d 268 (1986).

With regard to the rule that error may not be predicated upon a ruling excluding evidence unless a substantial right of the party is affected and unless ''the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked'', it would be an unusual circumstance where an offer of proof would not be required in order to enable the trial court, and the appellate courts, to know what the evidence is which the questioner seeks to elicit. State v. Eldred, 5 Neb. App. 424, 559 N.W.2d 519 (1997).

Under subsection (1)(b) of this section, a substantial right of plaintiff was not affected by the trial court's refusal to admit plaintiff's alleged rebuttal evidence. Stern v. On Time Freight Sys., 1 Neb. App. 302, 493 N.W.2d 348 (1992).

4. Miscellaneous

While on rulings admitting evidence the focus is on the ground for exclusion urged at trial, on rulings excluding evidence, the focus is on whether the substance of the evidence was made known at trial. As a result, the rule that one may not on appeal assert a ground for excluding improperly admitted evidence that differs from that urged in the objection made to the trial court, State v. Bray, 243 Neb. 886, 503 N.W.2d 221 (1993), does not come into play when dealing with evidence which was improperly excluded. Cockrell v. Garton, 244 Neb. 359, 507 N.W.2d 38 (1993).

A true objection does not wander among the Nebraska Evidence Rules in the hope of eventually ending its odyssey at the doorstep of a particular rule of evidence; in seeking to exclude evidence, counsel must adhere to a basic and straightforward approach: tell the court the reason why the evidence is inadmissible. State v. Coleman, 239 Neb. 800, 478 N.W.2d 349 (1992).

To preserve a claimed error in the admission of evidence, a party must make a timely objection which specifies the ground of the objection to the offered evidence. State v. Cox, 231 Neb. 495, 437 N.W.2d 134 (1989).

A party is barred from asserting a different ground for his objection to the admission of evidence on appeal than was offered before the trier of fact. Rocek v. Department of Public Institutions, 225 Neb. 247, 404 N.W.2d 414 (1987).

27-104 Rule 104. Preliminary questions; questions of admissibility, generally; relevancy conditioned on fact; hearing of jury; testimony by accused; weight and credibility.

(1) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subsection (2) of this section.

(2) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, if he so requests.

(4) The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(5) This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Source: Laws 1975, LB 279, § 4.

1. Qualification of witness as expert
2. Miscellaneous

1. Qualification of witness as expert

Per subsection (1) of this section, a trial court's factual finding concerning a determination whether a witness qualifies as an expert under section 27-702 will be upheld on appeal unless clearly erroneous. State v. Lopez, 249 Neb. 634, 544 N.W.2d 845 (1996).

A trial court's ruling regarding a witness' qualification as an expert will be upheld unless such ruling is clearly erroneous. State v. Stahl, 240 Neb. 501, 482 N.W.2d 829 (1992); In re Interest of C.W. et al., 239 Neb. 817, 479 N.W.2d 105 (1992); State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990).

Whether a witness is qualified to testify as an expert under section 27-702 is a preliminary question of admissibility for a trial court under subsection (1) of this section. State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990).

Subsection (1) of this section serves as a guidepost under parental termination cases regarding whether a witness is qualified to testify as an expert. In re Interest of Phoebe S. and Rebekah S., 11 Neb. App. 919, 664 N.W.2d 470 (2003).

Under subsection (1) of this section, the trial court's admission of testimony by banker as expert witness regarding security agreement was not an abuse of discretion. Skiles v. Security State Bank, 1 Neb. App. 360, 494 N.W.2d 355 (1992).

2. Miscellaneous

A trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), motion during trial. State v. Aguilar, 268 Neb. 411, 683 N.W.2d 349 (2004).

A hearing on preliminary matters concerning admissibility of evidence shall be conducted when the interests of justice require, or when a defendant is a witness, if the defendant so requests. State v. Olsan, 231 Neb. 214, 436 N.W.2d 128 (1989).

At a hearing to suppress evidence, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. The Supreme Court will uphold the trial court's finding of fact in a suppression hearing unless those findings are clearly wrong. State v. Vann, 230 Neb. 601, 432 N.W.2d 810 (1988).

Whether the State has established a prima facie case of conspiracy, thereby constituting anything within execution or furtherance of the common purpose as the act of every coconspirator, is a preliminary question for the trial court. State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987).

Pursuant to subsection (3) of this section, the voluntariness of a statement is first determined by the trial court as a matter of law out of the presence of the jury. If the court finds the statement to be voluntary and admissible, the question of voluntariness is submitted to the jury which, by appropriate evidence, must be satisfied that the statement is voluntary. State v. Bodtke, 219 Neb. 504, 363 N.W.2d 917 (1985).

27-105 Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Source: Laws 1975, LB 279, § 5.

While the giving of a limiting instruction is mandatory when requested, it is within the trial court's discretion whether to give a limiting instruction contemporaneously with the testimony or in the general instructions to the jury. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

27-106 Rule 106. Remainder of or related writings or recorded statements; action of judge.

(1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.

Source: Laws 1975, LB 279, § 6.

When prior testimony of a witness is introduced out of context and leaves a false impression, additional evidence, even if otherwise inadmissible, may be introduced to qualify and explain the previous testimony. Nickell v. Russell, 260 Neb. 1, 614 N.W.2d 349 (2000).

Because this section is concerned with the danger of admitting a statement out of context, additional evidence is admissible only if it qualifies or explains the previous testimony. Under this section, when defense counsel leaves a false impression, the trial court may allow the use of otherwise inadmissible evidence to clarify or complete an issue opened up by defense counsel. Under this section, the trial court must determine whether the additional evidence which the proponent seeks to admit is relevant to the issues in the case and the trial court need admit only that part of the evidence which qualifies or explains the evidence offered by the opponent. In applying this section, once relevance of the additional evidence has been established, the trial court must address the second half of the test for admissibility, and should do so by asking: (1) Does it explain the admitted evidence? (2) Does it place the admitted evidence in context? (3) Will admitting it avoid misleading the trier of fact? (4) Will admitting it ensure a fair and impartial understanding of all the evidence? State v. Schrein, 244 Neb. 136, 504 N.W.2d 827 (1993).

Under this section the admission of evidence is not a matter of right, but rests with the sound discretion of the court. State v. Coffman, 227 Neb. 149, 416 N.W.2d 243 (1987).

Generally, the rule of completeness is concerned with the danger of admitting a statement out of context. When this danger is not present, it is not an abuse of discretion to fail to require the production of the remainder or, if it cannot be produced, to fail to exclude the evidence. Chirnside v. Lincoln Tel. & Tel. Co., 224 Neb. 784, 401 N.W.2d 489 (1987).

The general rule regarding admissibility of tape recordings is that they are admissible as evidence of such conversations and in corroboration of oral testimony, provided proper foundation is laid. The rule of completeness is concerned with danger of admitting a statement out of context. Where this danger is not present it is not an abuse of discretion to fail to require production of the entire statement. State v. Manchester, 213 Neb. 670, 331 N.W.2d 776 (1983).

ARTICLE 2
JUDICIAL NOTICE

Section
27-201. Rule 201. Judicial notice of adjudicative facts; kinds of facts; when discretionary; when mandatory; opportunity to be heard; time of taking notice; instructing jury.

27-201 Rule 201. Judicial notice of adjudicative facts; kinds of facts; when discretionary; when mandatory; opportunity to be heard; time of taking notice; instructing jury.

(1) This rule governs only judicial notice of adjudicative facts.

(2) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(3) A judge or court may take judicial notice, whether requested or not.

(4) A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

(5) A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(6) Judicial notice may be taken at any stage of the proceeding.

(7) In a civil action or proceeding, the judge shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the judge shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Source: Laws 1975, LB 279, § 7.

1. Adjudicative fact
2. Judicial notice
3. Miscellaneous

1. Adjudicative fact

Adjudicative facts within the meaning of this section are simply the facts as developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case

but apply universally. Hagelstein v. Swift-Eckrich, 257 Neb. 312, 597 N.W.2d 394 (1999).

A fact is adjudicative if the fact affects the determination of a controverted issue in litigation. State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (1989).

To be judicially noticed, a fact must be uniform and fixed with no doubt as to the fact itself or that it is a matter of common knowledge. Indoor Recreation Enterprises, Inc. v. Douglas, 194 Neb. 715, 235 N.W.2d 398 (1975).

2. Judicial notice

The formal introduction into evidence of a court's own prior proceedings should be done by individually noticing those elements considered relevant and competent for the issues presented. Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006).

A juvenile court has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined. In re Interest of Ty M. & Devon M., 265 Neb. 150, 655 N.W.2d 672 (2003).

When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Appellate courts in this state may take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court. Jessen v. Jessen, 259 Neb. 644, 611 N.W.2d 834 (2000).

A trial court cannot take judicial notice of disputed allegations. In re Interest of N.M. and J.M., 240 Neb. 690, 484 N.W.2d 77 (1992).

A trial court may use appropriate judicial notice in resolving a motion for summary judgment. Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443 (1990).

The existence of court records and certain judicial action reflected in a court's records are an appropriate subject for judicial notice. Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443 (1990).

An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in subsection (2) of this section. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

When a fact is neither generally known within the trial court's territorial jurisdiction nor capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, judicial notice of an adjudicative fact is improper. State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (1989).

In a suit on a promissory note, the trial court may take judicial notice of a security agreement signed by the parties contemporaneously with the note when the agreement had been attached as an exhibit to a petition in a separate subsequent action between the same parties and in the same court. State Security Savings Co. v. Pelster, 207 Neb. 158, 296 N.W.2d 702 (1980).

Defendant's claim that a city prosecutor is without authority to prosecute using wiretap evidence was rejected and court took judicial notice of the status and official positions of public officers in the court's jurisdiction. State v. Kolosseus, 198 Neb. 404, 253 N.W.2d 157 (1977).

When offering evidence from prior hearings in a proceeding to terminate parental rights, papers requested to be noticed must be marked, identified and made a part of the record. Testimony must be transcribed, properly certified, marked, and made a part of the record. In re Interest of Tabitha J., 5 Neb. App. 609, 561 N.W.2d 252 (1997).

3. Miscellaneous

Existence of court records and certain judicial action reflected in a court's record are, in accordance with this section, facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Hagelstein v. Swift-Eckrich, 257 Neb. 312, 597 N.W.2d 394 (1999); State v. Dandridge, 255 Neb. 364, 585 N.W.2d 433 (1998).

The existence of court records and certain judicial action reflected in a court's record are, in accordance with subsection (2)(b) of this section, facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A court may, therefore, judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata. Dairyland Power Co-op v. State Bd. of Equal. and Assessment, 238 Neb. 696, 472 N.W.2d 363 (1991).

Judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata. Gottsch v. Bank of Stapleton, 235 Neb. 816, 458 N.W.2d 443 (1990).

Judicial notice of an adjudicative fact is a species of evidence, which, if relevant as an ultimate fact or a fact from which an ultimate fact may be inferred, is received without adherence to the Nebraska Evidence Rules otherwise applicable to admissibility of evidence and establishes a fact without formal evidentiary proof. State v. Vejvoda, 231 Neb. 668, 438 N.W.2d 461 (1989).

When neither of the alternative tests prescribed in subsection (2) of this section is satisfied, judicial notice of an adjudicative fact is improper. Everson v. O'Kane, 11 Neb. App. 74, 643 N.W.2d 396 (2002).

ARTICLE 3

PRESUMPTIONS

Section
27-301. Rule 301. Presumptions in general.
27-302. Rule 302. Applicability of federal law in civil cases.
27-303. Rule 303. Presumptions in criminal cases; scope; submission to jury; instruction to jury.

27-301 Rule 301. Presumptions in general.

In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Source: Laws 1975, LB 279, § 8.

In all cases not otherwise provided for by statute or by such rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. This rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to section 48-162.01(3) is correct. Variano v. Dial Corp., 256 Neb. 318, 589 N.W.2d 845 (1999).

The regulatory presumption contained in Neb. Admin. Code tit. 469, ch. 2, section 2-009.07B4 (1985), that the gratuitous transfer of an applicant's home within two years before moving into a different facility is presumed to be the transfer of a resource to qualify for public assistance, does not come within the ambit of this section of the Nebraska Evidence Rules. Meier v. State, 227 Neb. 376, 417 N.W.2d 771 (1988).

The ''presumption of undue influence'' is not a presumption within the ambit and meaning of section 27-301. Anderson v. Claussen, 200 Neb. 74, 262 N.W.2d 438 (1978).

A presumption of undue influence in executing deeds is not a presumption contemplated by this section and the burden of proof on the issue of undue influence remains on the contestant. Golgert v. Smidt, 197 Neb. 667, 250 N.W.2d 628 (1977).

In contested will case, the ''presumption of undue influence'' is not a presumption within the ambit and meaning of this section. McGowan v. McGowan, 197 Neb. 596, 250 N.W.2d 234 (1977).

27-302 Rule 302. Applicability of federal law in civil cases.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with the federal law.

Source: Laws 1975, LB 279, § 9.

27-303 Rule 303. Presumptions in criminal cases; scope; submission to jury; instruction to jury.

(1) Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

(2) The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(3) Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Source: Laws 1975, LB 279, § 10.

References to ''presumptions'' in this section necessarily include ''inferences.'' Instructions as to presumptions in criminal cases must conform to the requirements of this section. State v. Parks, 245 Neb. 205, 511 N.W.2d 774 (1994).

Under subsection (3) of this section, whenever the jury in a criminal trial is instructed as to the presumption of possession found in section 28-1212, the jury must also be instructed that it is not required to accept the presumption. State v. Stalder, 231 Neb. 896, 438 N.W.2d 498 (1989).

ARTICLE 4
RELEVANCY AND ITS LIMITS

Section

27-401 Rule 401. Relevant evidence, defined.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Source: Laws 1975, LB 279, § 11.

1. Probative value
2. Relevancy determined
3. Admissibility
4. Miscellaneous

1. Probative value

Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under this section, the trial court's decision will not be reversed absent an abuse of discretion. For evidence to be relevant under this section, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence. Snyder v. Contemporary Obstetrics & Gyn., P.C., 258 Neb. 643, 605 N.W.2d 782 (2000).

If an expert's testimony lacks probative value, the testimony is irrelevant and is inadmissible. State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990).

Evidence is probative if it tends in any degree to alter the probability of a material fact. State v. Rowland, 234 Neb. 846, 452 N.W.2d 758 (1990).

This section requires only that the degree of probativeness be something more than nothing. State v. Hankins, 232 Neb. 608, 441 N.W.2d 854 (1989).

Evidence is probative if it tends in any degree to alter the probability of a material fact. State v. Oliva, 228 Neb. 185, 422 N.W.2d 53 (1988).

While prosecutorial need alone does not mean probative value outweighs prejudice, the more essential the evidence, the greater its probative value, and the less likely that a trial court should order the evidence excluded. State v. Bostwick, 222 Neb. 631, 385 N.W.2d 906 (1986).

Relevance, as used in the code, embraces concepts the court formerly referred to as competent or material. Jones v. Tranisi, 212 Neb. 843, 326 N.W.2d 190 (1982).

Relevant evidence is evidence having a tendency to make the existence of any fact of consequence in the action more probable or less probable than it would be without the evidence. Herman v. Midland Ag. Service, Inc., 200 Neb. 356, 264 N.W.2d 161 (1978).

2. Relevancy determined

In the absence of competent evidence establishing that merely possessing material dealing with adult heterosexual fellatio somehow leads to engaging in pedophilic homosexual fellatio, evidence of possession of such material is not relevant. Sexually explicit materials shown to a victim are relevant, if there is testimony that some of the materials in the exhibit were used in an attempt to arouse. In the absence of competent evidence establishing that possession of an advertisement for male homosexual videotapes somehow leads to engaging in pedophilia, the materials are not relevant to whether defendant committed the crime of first degree sexual assault. State v. Lee, 247 Neb. 83, 525 N.W.2d 179 (1994).

To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided. Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 468 N.W.2d 105 (1991).

Evidence of prior acts was relevant to the charge of trespassing, because it tended to show the defendant had notice he was not welcome to return. State v. Babajamia, 223 Neb. 804, 394 N.W.2d 289 (1986).

Witness' statement held relevant to show defendant's conduct, demeanor, statements, attitude, and relation toward the crime. State v. Martin, 198 Neb. 811, 255 N.W.2d 844 (1977).

3. Admissibility

A photograph is admissible in evidence if the photograph's subject matter or contents are depicted truly and accurately at a time pertinent to the inquiry and the photograph has probative value as relevant evidence. State v. Garza, 241 Neb. 256, 487 N.W.2d 551 (1992).

In order to admit a coconspirator's act as evidence against a defendant-coconspirator being tried for a crime other than the conspiracy itself, the trial court must first determine whether

the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy. State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987).

When the testimony sought to be impeached was cumulative, it was not error for the court to refuse to admit testimony on the reputation for truthfulness of one of four witnesses who testified to the same facts. Ocander v. B-K Corporation, 206 Neb. 287, 292 N.W.2d 567 (1980).

Admission of irrelevant evidence is harmless error unless, when with other evidence properly adduced, it affects substantial rights of the adverse party. State v. Rathburn, 195 Neb. 485, 239 N.W.2d 253 (1976).

4. Miscellaneous

Exercise of judicial discretion is implicit in determinations of relevancy and admissibility. Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., 269 Neb. 692, 695 N.W.2d 665 (2005).

Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under this section and section 27-403, the trial court's decision will not be reversed absent an abuse of discretion. Snyder v. Case and EMCASCO Ins. Co., 259 Neb. 621, 611 N.W.2d 409 (2000); Seeber v. Howlette, 255 Neb. 561, 586 N.W.2d 445 (1998); State v. Freeman, 253 Neb. 385, 571 N.W.2d 276 (1997).

It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion. State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (1994).

Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under this section, the trial court's decision will not be reversed absent an abuse of discretion. Wagner v. Union Pacific RR. Co., 11 Neb. App. 1, 642 N.W.2d 821 (2002).

27-402 Rule 402. Relevant evidence admissible; exceptions; irrelevant evidence inadmissible.

All relevant evidence is admissible except as otherwise provided by the Constitution of the United States or the State of Nebraska, by Act of Congress or of the Legislature of the State of Nebraska, by these rules, or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters. Evidence which is not relevant is not admissible.

Source: Laws 1975, LB 279, § 12.

Evidence of a prior accident was not admissible when the plaintiff failed to show how the prior accident was substantially similar to the accident at issue. Holden v. Wal-Mart Stores, Inc., 259 Neb. 78, 608 N.W.2d 187 (2000).

The injection of evidence into a trial that one party's losses may be covered by insurance may substantially outweigh any probative value of such evidence when the injection occurs merely to indicate the employment of a witness and when the injection of insurance could have been prevented by merely substituting for the injection of insurance a stipulation that the witness is an agent of the insured. Stumpf ex rel. Selzer Nintendo of America, Inc., 257 Neb. 920, 601 N.W.2d 735 (1999).

Pursuant to subsection (2) of this section, evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity to commit the act is admissible under subsection (2) of section 27-404. Subsection (2) of section 27-404 divides evidence of other bad acts into two categories according to the basis of relevance of the acts: (1) Relevant only to show propensity, which is not admissible, and (2) otherwise relevant (nonpropensity), which is admissible. If evidence of other bad acts is admitted into evidence, the court, if requested, must give a limiting instruction. On appeal, an analysis of subsection (2) of section 27-404 considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. State v. McManus, 257 Neb. 1, 594 N.W.2d 623 (1999).

Judicial discretion is a factor involved in admissibility of evidence under this section and section 27-403. State v. Jacob, 253 Neb. 950, 574 N.W.2d 117 (1998).

In an eminent domain action, an expert's use of the wrong measure of damages in formulating just compensation would not assist the jury either in understanding the evidence or in determining a fact in issue and, therefore, is not relevant. Lantis v. City of Omaha, 237 Neb. 670, 467 N.W.2d 649 (1991).

Rule 402 of the Nebraska Evidence Rules permits the admission of relevant evidence only. State v. Robertson, 219 Neb. 782, 366 N.W.2d 429 (1985).

Where a defendant has detailed a plan or scheme to commit a crime and ultimately carries out that plan or scheme, evidence concerning the same is admissible to show the defendant's plan and intent to commit the alleged crime. State v. Plymate, 216 Neb. 722, 345 N.W.2d 327 (1984).

An expert witness retained by one party may be compelled or will be allowed to testify to a matter of opinion upon request of the opposing party. IAFF Local 831 v. City of No. Platte, 215 Neb. 89, 337 N.W.2d 716 (1983).

27-403 Rule 403. Exclusion of relevant evidence; reasons.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Source: Laws 1975, LB 279, § 13.

1. Unfair prejudice
2. Cumulative testimony
3. Miscellaneous

1. Unfair prejudice

It is only the evidence that has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under this section. State v. Long, 264 Neb. 85, 645 N.W.2d 553 (2002).

In the context of this section, ''unfair prejudice'' means an undue tendency to suggest a decision based on an improper basis. State v. Canbaz, 259 Neb. 583, 611 N.W.2d 395 (2000); Seeber v. Howlette, 255 Neb. 561, 568 N.W.2d 445 (1998).

It is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under this section. Although evidence may be relevant, this section provides that it may be excluded if the evidence is more prejudicial than probative. Evidence admissible under section 27-404(2) may be excluded under this section if its probative value is substantially outweighed by other considerations. State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (1994).

While most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party, only evidence tending to suggest a decision on an improper basis is ''unfairly prejudicial'' and a concern under this section. State v. Perrigo, 244 Neb. 990, 510 N.W.2d 304 (1994); State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992); State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

Although it appears that the results of the DNA profile test are generally accepted in the relevant scientific communities, the probative value of population genetics probability must also be considered, and the trial judge must determine if the potentially prejudicial effect upon the jury exceeds the probative value of the evidence. State v. Houser, 241 Neb. 525, 490 N.W.2d 168 (1992).

In the context of this section, ''unfair prejudice'' means an undue tendency to suggest a decision on an improper basis. Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 468 N.W.2d 105 (1991).

Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only unfair prejudice with which this section is concerned. In the context of this section, such prejudice means a tendency to suggest a decision on an improper basis. State v. Yager, 236 Neb. 481, 461 N.W.2d 741 (1990).

The gruesome nature of photographs alone will not keep them from the trier of fact under this statute, so long as the probative value of the photographs is not outweighed by the prejudicial effect. State v. Hankins, 232 Neb. 608, 441 N.W.2d 854 (1989).

Section 27-404 is subject to the overriding protections of this section. Trial court in first degree murder case did not err in receiving testimony about a prior robbery in which the defendant was involved because it established a motive and also because its probative value outweighed the danger of unfair prejudice. State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

While prosecutorial need alone does not mean probative value outweighs prejudice, the more essential the evidence, the greater its probative value, and the less likely that a trial court should order the evidence excluded. State v. Bostwick, 222 Neb. 631, 385 N.W.2d 906 (1986).

Any relevance to witness' testimony concerning status of her husband's lawsuit and compromise settlement with plaintiff in current suit was outweighed by the danger of unfair prejudice, confusion, or misleading the jury. London v. Stewart, 221 Neb. 265, 376 N.W.2d 553 (1985).

In the context of this section, unfair prejudice means a tendency to suggest a decision on an improper basis. Lincoln Grain v. Coopers & Lybrand, 216 Neb. 433, 345 N.W.2d 300 (1984).

The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. Photographs of a homicide victim may be received upon proper foundation for purposes of identification, to show the condition of the body, the nature and extent of the wounds or injuries, and to establish malice or intent. State v. Rowe, 210 Neb. 419, 315 N.W.2d 250 (1982).

Where injured victim of defendant's assault with a gun was defendant's wife, she was competent to testify where the jury had prior knowledge of her condition. State v. Martin, 198 Neb. 811, 255 N.W.2d 844 (1977).

On question of witness' credibility, refusal of trial court to permit evidence as to whether or not he had beaten his niece was not abuse of discretion. State v. Fonville, 197 Neb. 220, 248 N.W.2d 27 (1976).

Even if statements made by the declarant while sleeping were relevant, their prejudicial nature outweighed their probative value. In re Interest of Jamie P., 12 Neb. App. 261, 670 N.W.2d 814 (2003).

Only evidence which has a tendency to suggest a decision on an improper basis is unfairly prejudicial under this section. State v. Dreimanis, 8 Neb. App. 362, 593 N.W.2d 750 (1999).

2. Cumulative testimony

A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. It must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct an analysis under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To aid the court in its evaluation, the judge may consider several factors, including, but not limited to, whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning and methodology has been found to be reliable, the court must determine whether the methodology can properly be applied to the facts in issue. In making this determination, the court may examine the evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative than prejudicial, as required under this section. State v. Tolliver, 268 Neb. 920, 689 N.W.2d 567 (2004).

When the testimony sought to be impeached was cumulative, it was not error for the court to refuse to admit testimony on the reputation for truthfulness of one of four witnesses who testified to the same facts. Ocander v. B-K Corporation, 206 Neb. 287, 292 N.W.2d 567 (1980).

3. Miscellaneous

Exercise of judicial discretion is implicit in determinations of relevancy and admissibility. Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., 269 Neb. 692, 695 N.W.2d 665 (2005).

Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under section 27-401 and this section, the trial court's decision will not be reversed absent an abuse of discretion. Snyder v. Case and EMCASCO Ins. Co., 259 Neb. 621, 611 N.W.2d 409 (2000).

It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under this section and subsection (2) of section 27-404. State v. McManus, 257 Neb. 1, 594 N.W.2d 623 (1999).

Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under section 27-401 and this section, the trial court's decision will not be reversed absent an abuse of discretion. Seeber v. Howlette, 255 Neb. 561, 586 N.W.2d 445 (1998).

For purposes of applying this section, probative value is a relative concept which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues

of the case. Seeber v. Howlette, 255 Neb. 561, 586 N.W.2d 445 (1998).

Judicial discretion is a factor involved in admissibility of evidence under this section and section 27-402. State v. Jacob, 253 Neb. 950, 574 N.W.2d 117 (1998).

For the purpose of this section, probative value is a relative concept. The probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case. State v. Williams, 247 Neb. 878, 530 N.W.2d 904 (1995).

If evidence of a prior conviction is relevant to establish elements of another crime, and if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, the State may prove a prior conviction in any permissible manner. State v. Perrigo, 244 Neb. 990, 510 N.W.2d 304 (1994).

The mere mention of the word ''polygraph,'' when the jury is informed that no such test was given, is not, by itself, sufficiently misleading or confusing that otherwise relevant evidence must be excluded. State v. Walker, 242 Neb. 99, 493 N.W.2d 329 (1992).

Trial court erred in admitting evidence of defendant's previous conviction for similar offense in trial for first degree sexual assault, requiring judgment to be reversed and cause remanded for new trial. State v. Welch, 241 Neb. 699, 490 N.W.2d 216 (1992).

The trial judge has broad discretion in determining the admissibility of evidence under this section, because he or she is in the best position to assess the impact and effect of evidence based upon what he or she perceives from the live proceedings of a trial, while an appellate court can only receive a cold record. State v. Dixon, 240 Neb. 454, 482 N.W.2d 573 (1992).

It is the duty of a trial court to expedite the trial as much as is possible without infringing upon the rights of the parties to a complete and orderly examination of all the facts and circumstances connected with the case. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

In order to preserve an objection to the admission of evidence, an objection must be made at the time the evidence is offered. State v. Blair, 227 Neb. 742, 419 N.W.2d 868 (1988).

Probative value is a relative concept and involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of that particular fact from the ultimate issue in the case. State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded. State v. Price, 202 Neb. 308, 275 N.W.2d 82 (1979).

Relevant evidence is to be excluded only if there is danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence. Herman v. Midland Ag. Service, Inc., 200 Neb. 356, 264 N.W.2d 161 (1978).

Admission of irrelevant evidence is harmless error unless, when with other evidence properly adduced, it affects substantial rights of the adverse party. State v. Rathburn, 195 Neb. 485, 239 N.W.2d 253 (1976).

For purposes of applying this section, probative value is a relative concept which involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the issues of the case. Wagner v. Union Pacific RR. Co., 11 Neb. App. 1, 642 N.W.2d 821 (2002).

A trial court is justified in taking an active role in enforcing this section in summary proceedings such as for protection orders. Zuco v. Tucker, 9 Neb. App. 155, 609 N.W.2d 59 (2000).

27-404 Rule 404. Character evidence; not admissible to prove conduct; exceptions; evidence of other crimes, wrongs, or acts; standard of proof.

(1) Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except:

(a) Evidence of a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same;

(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor. In the case of sexual assault, reputation or opinion evidence of the past sexual behavior of the victim of the sexual assault will not be admissible; or

(c) Evidence of the character of a witness as provided in sections 27-607 to 27-609.

(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and

convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

Source: Laws 1975, LB 279, § 14; Laws 1984, LB 79, § 2; Laws 1993, LB 598, § 1.

1. Character evidence
2. Prior bad act evidence
3. Probative value determination
4. Effect of remoteness
5. Miscellaneous

1. Character evidence

Although subsection (1)(a) of this section allows the accused to offer evidence of a pertinent trait of his or her character and allows the prosecution to rebut that evidence, section 27-405 limits the manner in which the evidence may be admitted. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003).

Subsections (a) and (b) of this section are mutually exclusive. When an accused couples a claim of self-defense with evidence that the victim was the first aggressor, the accused does not interject the issue of the accused's character. State v. Jackson, 258 Neb. 24, 601 N.W.2d 741 (1999).

Under subsection (1)(a) of this section, evidence of the character trait of honesty is admissible in a prosecution for bribery and conspiracy to commit bribery. State v. Vogel, 247 Neb. 209, 526 N.W.2d 80 (1995).

Where a defendant claims that the act of killing a victim was the result of a violent and overriding reaction to a homosexual approach by the victim, evidence of the victim's prior similar homosexual activities may be admissible under certain circumstances as corroborative of the defendant's claim that there was a lack of deliberation or premeditated malice on his or her part necessary to convict of first degree murder. State v. Escamilla, 245 Neb. 13, 511 N.W.2d 58 (1994).

Evidence of a murder victim's homosexuality may be admissible as corroborative of a defendant's claim of self-defense from a homosexual assault, provided such evidence as tendered is probative of that defense. State v. Lowe, 244 Neb. 173, 505 N.W.2d 662 (1993).

The trial court did not err in admitting evidence implying a romantic relationship between defendant and the female host of a party at which defendant broke the jaw of another man to rebut defendant's claimed motive of self-defense. State v. Stueben, 240 Neb. 170, 481 N.W.2d 178 (1992).

Subsection (1)(b) of this section allows the accused in a criminal case to offer evidence of a pertinent trait of character of the victim of the crime for the purpose of proving the victim acted in conformity therewith on a particular occasion. State v. Lewchuk, 4 Neb. App. 165, 539 N.W.2d 847 (1995).

2. Prior bad act evidence

Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), subsection (2) of this section. State v. Wisinski, 268 Neb. 778, 688 N.W.2d 586 (2004).

This section specifically prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003).

Pursuant to subsection (2) of this section, evidence admitted did not constitute Neb. Evid. R. 404 evidence of prior bad acts. The evidence introduced was part of the factual setting of the crime. State v. Aguilar, 264 Neb. 899, 652 N.W.2d 894 (2002).

Where uncharged misconduct is not evidence of prior bad acts, this section does not apply. State v. Pruett, 263 Neb. 99, 638 N.W.2d 809 (2002).

The defendant's statements to neighbors and coworkers prior to the murder that he wanted to hurt or kill the victim do not constitute prior bad act evidence. State v. Canbaz, 259 Neb. 583, 611 N.W.2d 395 (2000).

Pursuant to subsection (2) of this section, this is a rule of inclusion rather than exclusion. Pursuant to subsection (2) of this section, the evidence of other crimes need not be identical to the act charged to be admissible. State v. Freeman, 253 Neb. 385, 571 N.W.2d 276 (1997).

The mere fact a criminal defendant has been charged with previous crimes is not legal evidence of other crimes, wrongs, or acts, let alone clear and convincing evidence that the accused committed the alleged crimes, wrongs, or acts. State v. McBride, 250 Neb. 636, 550 N.W.2d 659 (1996).

Subsection (2) of this section is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. State v. Perrigo, 244 Neb. 990, 510 N.W.2d 304 (1994); State v. Kenny, 224 Neb. 638, 399 N.W.2d 821 (1987); State v. Robb, 224 Neb. 14, 395 N.W.2d 534 (1986); State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985); State v. Craig, 219 Neb. 70, 361 N.W.2d 206 (1985).

Subsection (2) of this section is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove character of a person in order to show that such a person acted in conformity with that character; it may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. State v. White, 244 Neb. 577, 508 N.W.2d 554 (1993); State v. Kern, 224 Neb. 177, 397 N.W.2d 23 (1986).

Under subsection (2) of this section, the acts of a third person are irrelevant and inadmissible for proof of motive or intent of an actor. The ''other crimes, wrongs, or acts'' must be those of the accused. State v. Thompson, 244 Neb. 375, 507 N.W.2d 253 (1993).

In prosecution for incest, testimony of both the victim and her brother was relevant and material to prove opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake, all legitimate purposes for admitting testimony of prior bad acts. State v. Martin, 242 Neb. 116, 493 N.W.2d 191 (1992).

Subsection (2) of this section is an inclusionary rule permitting the use of uncharged misconduct evidence if the evidence is relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. State v. Hernandez, 242 Neb. 78, 493 N.W.2d 181 (1992).

It is firmly established that subsection (2) of this section is a rule of inclusion which permits the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character. State v. Styskal, 242 Neb. 26, 495 N.W.2d 313 (1992); State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992).

Subsection (2) of this section permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show a defendant's propensity or disposition to commit the crime charged. State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992); State v. Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990); State v. Methe, 228 Neb. 468, 422 N.W.2d 803 (1988).

Evidence of other crimes is not admissible unless there is sufficient evidence that the crimes were actually committed and that defendant committed them to warrant submission to a jury if the other crimes had been charged. State v. Timmerman, 240 Neb. 74, 480 N.W.2d 411 (1992).

Under subsection (2) of this section, prior transactions involving defendant's acceptance of stolen property in exchange for drugs are relevant and admissible to establish defendant's knowledge that the property which is the subject of the prosecution is, in fact, stolen. State v. Messersmith, 238 Neb. 924, 473 N.W.2d 83 (1991).

In prosecution for first degree sexual assault of defendant's infant granddaughter, evidence of similar sexual conduct with stepdaughter 27 years earlier under extremely similar circumstances held admissible to show absence of mistake or accident. State v. Stephens, 237 Neb. 551, 466 N.W.2d 781 (1991).

Subsection (2) of this section allows the admission of evidence of other crimes, wrongs, or acts for the purpose of establishing identity or a particular method of operation. State v. Evans, 235 Neb. 575, 456 N.W.2d 739 (1990).

Under subsection (2) of this section, evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence, may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

It is well established that subsection (2) of this section is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes other than to prove the character of a person in order to show that such person acted in conformity with that character. Thus, this section permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show defendant's propensity or disposition to commit the crime charged. State v. Donhauser, 231 Neb. 114, 435 N.W.2d 186 (1989); State v. Stewart, 219 Neb. 347, 363 N.W.2d 368 (1985).

Evidence of prior bad acts is an attempt to show character contrary to subsection (1) of this section. State v. Lenz, 227 Neb. 692, 419 N.W.2d 670 (1988).

Subsection (2) of this section is an inclusionary rule of evidence permitting the use of relevant other crimes, wrongs, or acts for the purposes enumerated. Evidence of prior uncharged sexual assault was admissible to show location, scheme, plan, and motive. State v. Nesbitt, 226 Neb. 32, 409 N.W.2d 314 (1987).

This section is an inclusionary rule which permits the use of relevant other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged. Certain tape-recorded statements were admissible to show why witness failed to promptly report her accusations against the defendant. State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

Under this section, a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed, and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged. State v. Clancy, 224 Neb. 492, 398 N.W.2d 710 (1987).

The admissibility of evidence of other crimes lies largely within the discretion of the trial court. State v. Baker, 218 Neb. 207, 352 N.W.2d 894 (1984).

Evidence that the defendant was previously involved in a marijuana harvesting scheme is not admissible to prove a later, unconnected, possession charge. State v. Coca, 216 Neb. 76, 341 N.W.2d 606 (1983).

Past patterns of behavior are admissible in cases involving termination of parental rights, when relevant to motive, opportunity, intent, preparation, plan, knowledge, and absence of mistake or accident. In re Interest of Hollenbeck, 212 Neb. 253, 322 N.W.2d 635 (1982).

In trial on charges of assault where knife was used in assault, evidence that defendant had earlier the same day struck someone with his fists was not admissible under this section since it did not tend to prove intent, motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident as to assault with knife. State v. Stewart, 209 Neb. 719, 310 N.W.2d 706 (1981).

Evidence of prior shotgun assault of intended victim's family clearly admissible under this section. State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981).

Evidence of prior criminal acts was admissible to explain the circumstances of the crime charged, to explain the failure of the victim to make a prompt complaint, and to show a continuous pattern of sexual conduct by the defendant toward both his sons. State v. Hitt, 207 Neb. 746, 301 N.W.2d 96 (1981).

Evidence of prior similar offenses properly received in a nonjury child abuse action where an element of the crime involved motive and criminal intent. State v. Morosin, 200 Neb. 62, 262 N.W.2d 194 (1978).

Evidence of bank account shortages admissible to prove intent in forgery conviction. State v. Metzger, 199 Neb. 186, 256 N.W.2d 691 (1977).

Insufficient funds checks evidencing crimes other than one defendant charged with were admissible to show guilty knowledge and course of conduct. State v. Costello, 199 Neb. 43, 256 N.W.2d 97 (1977).

Evidence of defendant's prior conviction held admissible to confirm identity, motive, and method of operation. State v. Moore, 197 Neb. 294, 249 N.W.2d 200 (1976).

Pursuant to subsection (2) of this section, an absolute identity in every detail is not required for evidence of other bad acts to be admissible under this section for the proper purpose of establishing identity, and the question is whether the acts are so similar, unusual, and distinctive that it could reasonably be found that they bear the same signature. State v. Bockman, 11 Neb. App. 273, 648 N.W.2d 786 (2002).

Prior conduct which is inextricably intertwined with the charged crime is not considered extrinsic evidence of other crimes or bad acts and is not rendered inadmissable by this section. State v. Powers, 10 Neb. App. 256, 634 N.W.2d 1 (2001).

Pursuant to subsection (2) of this section, proof of a signature of a crime from other bad acts is a proper purpose. State v. Gray, 8 Neb. App. 973, 606 N.W.2d 478 (2000).

In a defendant's trial for sexual assault of a minor, evidence of the defendant's physical violence against the family was admissible under subsection (2) of this section because the evidence explained why the victim failed to report the defendant's abuse. State v. Egger, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

Pursuant to subsection (2) of this section, identity means a particular method of operation or little more than the logical conclusion which flows from other crimes evidence advanced in proof of plan, design, scheme, or modus operandi. State v. Wade, 7 Neb. App. 169, 581 N.W.2d 906 (1998).

The Nebraska Evidence Rules apply at a hearing conducted pursuant to subsection (3) of this section, and a criminal defendant is entitled to a full evidentiary hearing on the admissibility of prior bad acts evidence under subsection (3) of this section. State v. Wilson, 5 Neb. App. 125, 556 N.W.2d 643 (1996).

Pursuant to subsection (2) of this section, an accused may offer evidence of prior crimes, wrongs, or acts of a third party for a purpose other than proving the propensity of the person to commit the crime charged. State v. Gardner, 1 Neb. App. 450, 498 N.W.2d 605 (1993).

Under subsection (2) of this section, evidence regarding defendant's past drug dealings with informant was admissible to show knowledge and intent of defendant to commit the crime charged. State v. Benitez, 1 Neb. App. 310, 493 N.W.2d 353 (1992).

3. Probative value determination

Pursuant to subsection (2) of this section, the probative value of evidence of a prior shooting by the defendant was substantially outweighed by its prejudice when the shooting was an isolated act occurring 29 days before the present alleged crime and a jury acquitted the defendant of committing the shooting. State v. Kirksey, 254 Neb. 162, 575 N.W.2d 377 (1998).

Pursuant to subsection (2) of this section, evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. State v. Buechler, 253 Neb. 727, 572 N.W.2d 65 (1998).

If evidence of a prior conviction is relevant to establish elements of another crime, and if the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, the State may prove a prior conviction in any permissible manner. Subsection (2) of this section is subject to the overriding protection of section 27-403. State v. Perrigo, 244 Neb. 990, 510 N.W.2d 304 (1994).

In reviewing the admission of prior acts, the reviewing court should consider the relevance of the evidence, the purpose for its introduction, and the probative value balanced against its potential for unfair prejudice. State v. Farrell, 242 Neb. 877, 497 N.W.2d 17 (1993).

Where a police officer testified to an informant's drug purchase from a third party who went to defendant's home prior to completion of the transaction, the potential for unfair prejudice outweighs its probative value. However, the erroneously admitted evidence was cumulative and harmless beyond a reasonable doubt where there was other properly admitted evidence showing intent to deliver cocaine in accord with the circumstantial evidence of past delivery. State v. Hernandez, 242 Neb. 78, 493 N.W.2d 181 (1992).

Evidence admissible under subsection (2) of this section is limited by section 27-403, which provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice. For purposes of subsection (2) of this section, it is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value. State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992).

Under subsection (2) of this section, evidence of prior acts is admissible if relevant unless it is unfairly prejudicial in the sense that it tends to make the conviction of the defendant more probable for an incorrect reason. State v. Christian, 237 Neb. 294, 465 N.W.2d 756 (1991).

In reviewing the actions of a trial court in admitting evidence of other crimes under subsection (2) of this section to determine if there was unfair prejudice in the admission of the evidence, an appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. State v. Yager, 236 Neb. 481, 461 N.W.2d 741 (1990); State v. Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990); State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989); State v. Doremus, 2 Neb. App. 784, 514 N.W.2d 649 (1994).

Under subsection (2) of this section, evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. State v. Ruyle, 234 Neb. 760, 452 N.W.2d 734 (1990).

This section is subject to the overriding protections of section 27-403. Trial court in first degree murder case did not err in receiving testimony about a prior robbery in which the defendant was involved because it established a motive and also because its probative value outweighed the danger of unfair prejudice. State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

Subsection (2) of this section is subject to the overriding protection of section 27-403 which states that evidence of other acts must be excluded if, among other things, the probative value of the evidence of other acts is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985).

4. Effect of remoteness

The question of remoteness in time for the purposes of subsection (2) of this section is a matter within the discretion of the trial court. State v. Phelps, 241 Neb. 707, 490 N.W.2d 676 (1992); State v. Keithley, 218 Neb. 707, 358 N.W.2d 761 (1984).

The question of whether evidence of other conduct otherwise admissible under the provisions of subsection (2) of this section is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence. Remoteness, or the temporal span between a prior crime, wrong, or other act offered as evidence, goes to the weight to be given to such evidence and does not render the evidence of the other crime, wrong, or act irrelevant and inadmissible. State v. Yager, 236 Neb. 481, 461 N.W.2d 741 (1990); State v. Schaaf, 234 Neb. 144, 449 N.W.2d 762 (1989); State v. Rincker, 228 Neb. 522, 423 N.W.2d 434 (1988).

The admissibility of evidence concerning other conduct under subsection (2) of this section must be determined upon the facts of each case; no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. State v. Rincker, 228 Neb. 522, 423 N.W.2d 434 (1988).

5. Miscellaneous

Intent was not a fact of consequence and therefore cannot provide a basis for independent relevance of the other crimes evidence. Opportunity was not a fact of consequence and therefore cannot provide a basis for independent relevance of the other crimes evidence. No logical reason was articulated as to why motive was a fact of consequence, and therefore, motive cannot provide a basis for independent relevance of the other crimes evidence. While identity was a fact of consequence, evidence of identity lacked probative value and thus could not be admitted for a proper purpose. State v. Sanchez, 257 Neb. 291, 597 N.W.2d 361 (1999).

Pursuant to subsection (2) of this section, the admissibility of other crimes evidence must be determined upon the facts of each case and is within the discretion of the trial court. Clear and convincing evidence that the accused committed the crime is presented when there is sufficient evidence to warrant submission to a trier of fact if the accused had been charged with the crimes. Subsection (2) of this section considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. Henceforth, the proponent of evidence offered pursuant to subsection (2) of this section shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court shall similarly state the purpose or purposes for which such evidence is received. A limiting instruction given upon receipt of prior bad acts evidence shall state the purpose or purposes for which such evidence was received. State v. Sanchez, 257 Neb. 291, 597 N.W.2d 361 (1999).

Pursuant to subsection (3) of this section, because it was the victim's report, not the occurrence or nonoccurrence of the claimed events which provided the motive, a separate rule 404(3) hearing had no application. State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997).

Evidence admissible under subsection (2) of this section may be excluded under section 27-403 if its probative value is substantially outweighed by other considerations. This section is a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person to show that the person acted in conformity with that character. The admission of evidence of other acts under subsection (2) of this section is reviewed by considering whether the evidence was relevant, whether the evidence had a purpose, whether the probative value of the evidence outweighed its potential for unfair prejudice, and whether the trial court, if

requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. State v. Carter, 246 Neb. 953, 524 N.W.2d 763 (1994).

The purposes set forth in subsection (2) of this section are illustrative only and not intended to be exhaustive or mutually exclusive. State v. Perrigo, 244 Neb. 990, 510 N.W.2d 304 (1994).

In prosecution for possession of cocaine and methamphetamine, evidence as to whether defendant had ever used cocaine is improper. State v. Friend, 230 Neb. 765, 433 N.W.2d 512 (1988).

In order to preserve an objection to the admission of evidence under subsection (2) of this section, an objection must be made at the time the evidence is offered. State v. Blair, 227 Neb. 742, 419 N.W.2d 868 (1988).

Evidence of conviction of a crime is, in some respects, more limited than under former section, but is not restricted to felonies as such. State v. Lang, 197 Neb. 47, 246 N.W.2d 608 (1976).

A trial court is under no obligation to make express findings in rulings pursuant to this section. State v. Dreimanis, 8 Neb. App. 362, 593 N.W.2d 750 (1999).

This section does not prohibit the mention of prior convictions. State v. Dreimanis, 8 Neb. App. 362, 593 N.W.2d 750 (1999).

To determine if there was unfair prejudice in admitting evidence of other crimes under this section, an appellate court considers (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. State v. Dreimanis, 8 Neb. App. 362, 593 N.W.2d 750 (1999).

An appellate court reviews the admission of other acts under subsection (2) of this section by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. State v. Wade, 7 Neb. App. 169, 581 N.W.2d 906 (1998).

Subsection (2) of this section is a rule of inclusion, rather than exclusion, and it permits the use of evidence of prior activity except to prove the character of a person in order to show that the person acted in conformity with that character. State v. Wade, 7 Neb. App. 169, 581 N.W.2d 906 (1998).

27-405 Rule 405. Method of proving character; reputation or opinion; specific instances of conduct.

(1) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(2) In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Source: Laws 1975, LB 279, § 15.

Although subsection (1)(a) of section 27-404 allows the accused to offer evidence of a pertinent trait of his or her character and allows the prosecution to rebut that evidence, this section limits the manner in which the evidence may be admitted. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003).

This section limits the defendant's evidence of character to evidence of opinion or reputation. But even when a defendant improperly offers specific instances of his or her good conduct, the prosecution may not counter by offering evidence of specific instances of bad conduct. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003).

Under this section, the prosecution's rebuttal witnesses may testify only to reputation or opinion. The witnesses may not be used to prove that specific instances of conduct occurred. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003).

When character is not an element of the crime or a defense, this section dictates that the only inquiry that can be made into specific instances of conduct is through cross-examination of the defendant's character witnesses, and during cross-examination, the prosecutor is limited to an inquiry whether the witness has heard of a given fact, misdeed, or criminal conviction. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003).

The language of this section changes the prior case law rule, that evidence of a homicide victim's propensity for violence ordinarily is admissible only in the form of reputation testimony, so that when character is an essential element of a charge, claim, or defense, it will also be admissible. State v. Sims, 213 Neb. 708, 331 N.W.2d 255 (1983).

Defendant's character witness was properly cross-examined on specific instances of defendant's prior convictions. State v. Eynon, 197 Neb. 734, 250 N.W.2d 658 (1977).

Under subsection (2) of this section, the accused in a criminal case may offer evidence of specific instances of conduct of the victim of the crime for the purpose of proving the victim was the first aggressor to substantiate the accused's self-defense claim. State v. Lewchuk, 4 Neb. App. 165, 539 N.W.2d 847 (1995).

The type of character evidence admissible under this section and section 27-608 does not include the opinion of an expert witness regarding the truthfulness of another witness based upon purported scientific studies. State v. Maggard, 1 Neb. App. 529, 502 N.W.2d 493 (1993).

27-406 Rule 406. Habit; routine practice; admissibility; method of proof.

(1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

Source: Laws 1975, LB 279, § 16.

The precise contours of how frequently and consistently a behavior must occur to rise to the level of habit cannot be easily defined or formulated, and as with other areas of relevancy, admissibility depends on the judge's evaluation of the particular facts of the case. The exercise of judicial discretion is implicit in determinations of relevancy and admissibility under this section, and as a result, the trial court's decision will not be reversed absent an abuse of discretion. Under this section, the trial court determines whether the predicate evidence necessary to prove conduct by habit has been introduced. Habit may be shown by opinion or specific instances of conduct. It is within the trial court's discretion to determine if there is sufficient foundation for a witness to give his or her opinion about an issue in question. Habit evidence is relevant because such evidence makes it more probable that the person acted in a manner consistent with that habit. Hoffart v. Hodge, 9 Neb. App. 161, 609 N.W.2d 397 (2000).

27-407 Rule 407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. Negligence or culpable conduct, as used in this rule, shall include, but not be limited to, the manufacture or sale of a defective product.

Source: Laws 1975, LB 279, § 17; Laws 1978, LB 665, § 7.

The determination of feasibility includes a consideration of whether an action would have been effective and practical. McDermott v. Platte Cty. Ag. Socy., 245 Neb. 698, 515 N.W.2d 121 (1994).

This section does not require exclusion of evidence concerning subsequent repairs, alterations, or precautions, when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached. Rahmig v. Mosley Machinery Co., 226 Neb. 423, 412 N.W.2d 56 (1987).

Evidence of subsequent acts is admissible on the issue of feasibility of precautionary measures, if controverted. In this case, testimony to the effect that erection of snow fences would not have been a feasible precautionary measure could properly be rebutted by evidence that, subsequent to the incident giving rise to this action, snow fences were erected. Kurz v. Dinklage Feed Yard, Inc., 205 Neb. 125, 286 N.W.2d 257 (1979).

''Feasibility'' as used in this section includes effectiveness and practicality as well as possibility. Kurz v. Dinklage Feed Yard, Inc., 205 Neb. 125, 286 N.W.2d 257 (1979).

27-408 Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Source: Laws 1975, LB 279, § 18.

A notice of acquisition sent to a landowner prior to beginning condemnation proceedings constitutes a privileged communication during statutorily required negotiations and, thus, may be excluded pursuant to this section. In re Application of SID No. 384 of Douglas County, 259 Neb. 351, 609 N.W.2d 679 (2000).

Although evidence of insurance is admissible for some other purposes under section 27-411, where evidence is directed solely at showing the amount for which a party settled with its insurer and where there is no showing that they had represented the value of the damaged and discarded products to be less than was claimed in the suit or for which it obtained judgment, the evidence is an inadmissible compromise or settlement pursuant to this section. Delicious Foods Co. v. Millard Warehouse, 244 Neb. 449, 507 N.W.2d 631 (1993).

Any relevance to witness' testimony concerning status of her husband's lawsuit and compromise settlement with plaintiff in current suit was outweighed by the danger of unfair prejudice, confusion, or misleading the jury. London v. Stewart, 221 Neb. 265, 376 N.W.2d 553 (1985).

Agreement on less than all issues of a dispute that is being negotiated will normally be treated as an offer to compromise

under this section. Pribil v. Koinzan, 11 Neb. App. 199, 647 N.W.2d 110 (2002).

27-409 Rule 409. Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Source: Laws 1975, LB 279, § 19.

27-410 Rule 410. Guilty plea; nolo contendere; offered plea; withdrawn plea; inadmissible; exceptions.

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers when offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

Source: Laws 1975, LB 279, § 20.

The evidentiary rule provided in this section, that a withdrawn guilty plea is not admissible in any civil or criminal action or proceeding against the person who made it, does not apply to the sentencing stage of a criminal proceeding. State v. Klappal, 218 Neb. 374, 355 N.W.2d 221 (1984).

Under some circumstances a plea of guilty entered by the defendant in a criminal action may be used against him as an admission in a subsequent action involving the same subject matter; a violation of a statute or ordinance enacted in the interest of public safety, while not negligence per se, is evidence of negligence. Schaefer v. McCreary, 216 Neb. 739, 345 N.W.2d 821 (1984).

27-411 Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Source: Laws 1975, LB 279, § 21.

The remote potential for bias of a witness on the basis of sharing the same insurance carrier as the defendant must be balanced against the prejudicial effect of its admission. Reimer v. Surgical Servs. of the Great Plains, P.C., 258 Neb. 671, 605 N.W.2d 777 (2000).

Although evidence of insurance is admissible for some other purposes under this section, where evidence is directed solely at showing the amount for which a party settled with its insurer and where there is no showing that they had represented the value of the damaged and discarded products to be less than was claimed in the suit or for which it obtained judgment, the evidence is an inadmissible compromise or settlement pursuant to section 27-408. Delicious Foods Co. v. Millard Warehouse, 244 Neb. 449, 507 N.W.2d 631 (1993).

Where the existence of insurance coverage is not relevant to any issue in the case, evidence of such coverage is inadmissible. Kresha v. Kresha, 216 Neb. 377, 344 N.W.2d 906 (1984).

Inadvertent mention of plaintiff's lack of health insurance is not prejudicial error requiring mistrial where it is not shown that jury inferred that plaintiff was incapable of paying expenses. Where indemnification of defendants does not logically follow from the fact that plaintiff lacked health insurance, it cannot be said that defendants were prejudiced. Bailey v. AMI-SUB, 1 Neb. App. 56, 489 N.W.2d 323 (1992).

ARTICLE 5
PRIVILEGES

Section
27-501. Rule 501. Privileges recognized only as provided.
27-502. Omitted. See Note.
27-503. Rule 503. Lawyer-client privilege; definitions; general rule of privilege; who may claim privilege; exceptions to the privilege.

27-501 Rule 501. Privileges recognized only as provided.

Except as otherwise required by the Constitution of the United States or the State of Nebraska or provided by Act of Congress, or the Legislature of the State of Nebraska, by these rules or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters, no person has the privilege to:

(1) Refuse to be a witness; or

(2) Refuse to disclose any matter; or

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Source: Laws 1975, LB 279, § 22.

An expert witness retained by one party may be compelled or will be allowed to testify to a matter of opinion upon request of the opposing party. IAFF Local 831 v. City of No. Platte, 215 Neb. 89, 337 N.W.2d 716 (1983).

27-502 Omitted.

Note: Reference to Federal Rule 502 ''Required reports privileged by statute'' has been omitted. Nebraska Evidence Rules have no corresponding section and for that reason the Nebraska citation of section 27-502 has also been omitted.

27-503 Rule 503. Lawyer-client privilege; definitions; general rule of privilege; who may claim privilege; exceptions to the privilege.

(1) As used in this rule:

(a) A client is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;

(b) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;

(c) A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services; and

(d) A communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

(3) The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this rule:

(a) If the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Source: Laws 1975, LB 279, § 23.

The party asserting a lawyer-client privilege has impliedly waived it through his or her own affirmative conduct where (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his or her defense. State v. Roeder, 262 Neb. 951, 636 N.W.2d 870 (2001).

If the district court determines a party asserting the attorney-client privilege has made out a prima facie claim, it shall (1) order the alleged protected material produced to the court, (2) order the asserting party to submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material, (3) privately review the material outside the presence of all counsel, (4) make a determination of whether the material is protected, and (5) seal the material for purposes of appellate review. Greenwalt v. Wal-Mart Stores, Inc., 253 Neb. 32, 567 N.W.2d 560 (1997).

In response to a motion to compel production, a party asserting the attorney-client privilege must make out a prima facie claim that the privilege applies by submitting a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege, which must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected. Greenwalt v. Wal-Mart Stores, Inc., 253 Neb. 32, 567 N.W.2d 560 (1997).

A communication concerning the date, time, and place of a scheduled trial is not confidential in nature and is not protected from disclosure by this section. State v. Hawes, 251 Neb. 305, 556 N.W.2d 634 (1996).

A litigant is not permitted to thrust his lack of knowledge into litigation as a foundation or condition necessary to sustain his claim against another while simultaneously retaining the lawyer-client privilege to frustrate proof of knowledge negating the very foundation or condition necessary to prevail on the claim

asserted. League v. Vanice, 221 Neb. 34, 374 N.W.2d 849 (1985).

Under the provisions of this section, a communication between a lawyer and a client is not privileged if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a fraud. Doyle v. Union Ins. Co., 202 Neb. 599, 277 N.W.2d 36 (1979).

27-504 Rule 504. Physician-patient privilege; professional counselor-client privilege; definitions; general rule of privilege; who may claim privilege; exceptions to the privilege.

(1) As used in this rule:

(a) A patient is a person who consults or is examined or interviewed by a physician for purposes of diagnosis or treatment of his or her physical, mental, or emotional condition;

(b) A physician is (i) a person authorized to practice medicine in any state or nation or who is reasonably believed by the patient so to be or (ii) a person licensed as a psychologist under the laws of any state or nation who devotes all or a part of his or her time to the practice of psychology;

(c) A client is a person who consults or is interviewed by a professional counselor for professional counseling as defined in section 38-2118;

(d) A professional counselor is a person certified as a professional counselor pursuant to section 38-2132; and

(e) A communication is confidential if not intended to be disclosed to third persons other than those present to further the interest of (i) the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family, or (ii) the client participating in professional counseling by a professional counselor.

(2)(a) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his or her physical, mental, or emotional condition among himself or herself, his or her physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(b) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made during counseling between himself or herself, his or her professional counselor, or persons who are participating in the counseling under the direction of the professional counselor, including members of the client's family.

(3) The privilege may be claimed by the patient or client, by his or her guardian or conservator, or by the personal representative of a deceased patient or client. The person who was the physician or professional counselor may claim the privilege but only on behalf of the patient or client. His or her authority so to do is presumed in the absence of evidence to the contrary.

(4)(a) There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for physical, mental, or emotional illness if the physician, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization or if a professional counselor deems it necessary to refer a client to determine if there is need for hospitalization.

(b) If the judge orders an examination of the physical, mental, or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(c) There is no privilege under this rule as to communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.

(d) There is no privilege under this rule in any judicial proceedings under the Nebraska Juvenile Code regarding injuries to children, incompetents, or disabled persons or in any criminal prosecution involving injury to any such person or the willful failure to report any such injuries.

(e) There is no privilege under this rule in any judicial proceeding regarding unlawfully obtaining or attempting to obtain (i) a controlled substance, (ii) a written or oral prescription for a controlled substance, or (iii) the administration of a controlled substance from a practitioner. For purposes of this subdivision, the definitions found in section 28-401 shall apply.

Source: Laws 1975, LB 279, § 24; Laws 1988, LB 273, § 1; Laws 1988, LB 790, § 1; Laws 1990, LB 571, § 1; Laws 1992, LB 1019, § 29; Laws 1993, LB 130, § 1; Laws 1994, LB 1210, § 2; Laws 2007, LB463, § 1117.

Cross References

Nebraska Juvenile Code, see section 43-2,129.

Under subsection (4)(c) of this section, when plaintiff files a personal injury claim, he waives the physician-patient privilege as to all the information concerning the health and medical history relevant to the matters which plaintiff has put at issue. Vredeveld v. Clark, 244 Neb. 46, 504 N.W.2d 292 (1993).

A party attempting to exclude evidence on the basis of the physician-patient privilege has the burden of proving that the information obtained by the physician falls within the strict ambit of that rule of evidence. To be privileged, information obtained during the existence of a physician-patient relationship must be necessary for the physician to properly discharge his duties. A patient's privilege to prevent any other person from disclosing confidential communications extends only to communications made for the purposes of diagnosis or treatment of his physical, mental, or emotional condition. State v. Irish, 223 Neb. 578, 391 N.W.2d 137 (1986).

When mental condition is in issue, the physician-patient privilege is waived. Clark v. Clark, 220 Neb. 771, 371 N.W.2d 749 (1985).

Under the terms of this provision, when the mental condition of a parent is in issue, evidence from the parent's treating psychiatrist is admissible in a juvenile court proceeding to determine child custody. In re Interest of Spradlin, 210 Neb. 734, 317 N.W.2d 59 (1982).

Results of blood alcohol test conducted on blood sample taken from unconscious driver in hospital were inadmissible, under physician-patient privilege, in wrongful death action against driver. Branch v. Wilkinson, 198 Neb. 649, 256 N.W.2d 307 (1977).

The neglect of a child is an injury to the child's welfare and rights, and it constitutes one of the exceptions to the physician-patient privilege recognized in this section. Exception to physician-patient privilege in juvenile proceedings is not restricted to actions which occur inside the walls of the courtroom. In re Interest of J.S., 1 Neb. App. 518, 499 N.W.2d 89 (1993).

27-505 Rule 505. Husband-wife privilege; general rule of privilege; definitions; waiver; criminal cases; exceptions to the privilege.

(1) Neither husband nor wife can be examined in any case as to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication while the marriage subsisted except as otherwise provided by law. This privilege may be waived only with the consent of both spouses. After the death of one, it may be waived by the survivor.

For purposes of this section (a) a confidential communication shall mean a communication which is made privately by any person to his or her spouse with no intention that such communication be disclosed to any other person

and (b) communication shall include any action on the part of a spouse if the action reasonably appears to have been intended to communicate a message from one spouse to the other.

(2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.

(3) These privileges may not be claimed:

(a) In any criminal case where the crime charged is a crime of violence, bigamy, incest, or any crime committed by one against the person or property of the other or of a child of either or in any criminal prosecution against the husband for wife or child abandonment;

(b) In any case brought by either husband or wife against a third person relating to their marriage relationship or the interruption of or interference with such relationship; or

(c) In any case brought by either husband or wife against the other for divorce or annulment of the marriage or for support.

Source: Laws 1975, LB 279, § 25; Laws 1984, LB 696, § 1.

1. Scope
2. Constitutionality

1. Scope

Subdivision (3)(a) of this statutory section, as amended in 1984, now permits a spouse to testify against the other spouse in any criminal case where the crime charged is a crime of violence. State v. Keithley, 227 Neb. 402, 418 N.W.2d 212 (1988).

In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. State v. Burchett, 224 Neb. 444, 399 N.W.2d 258 (1986).

In a criminal case, a spouse may not testify when motion for new trial is still pending and when the testimony would occur during the time period during which the parties are barred from remarriage. State v. Palmer, 215 Neb. 273, 338 N.W.2d 281 (1983).

Spousal privilege may not be asserted in a case of sexual assault under section 28-319, R.R.S.1943, even though that statute does not use the term rape. State v. Vicars, 207 Neb. 325, 299 N.W.2d 421 (1980).

2. Constitutionality

The phrase ''crime of violence'' as used in this section is not unconstitutionally vague. The privilege against spousal testimony in a criminal case may be waived with the consent of both parties, and may not be claimed in any criminal case where the crime charged is a crime of violence. State v. Williams, 239 Neb. 985, 480 N.W.2d 390 (1992).

Statute as amended in 1984 determined not to be ex post facto as applied to the defendant. State v. Burchett, 224 Neb. 444, 399 N.W.2d 258 (1986).

Amendment to section was neither unconstitutionally vague nor an ex post facto law. The clear meaning of statute is that the privilege may not be claimed where the crime charged is a crime of violence, bigamy, incest, or any crime committed by one against the person or property of another. Murder is a crime of violence under this section, and this section applies to all crimes of violence regardless of who the victim may be. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Abolition of the privilege preventing a spouse from testifying about any confidential communications made by one spouse to the other in crimes of violence does not constitute special legislation and does not grant a special privilege in violation of Neb. Const., Art. III, sec. 18, nor does it offend concepts of due process and equal protection. State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985).

27-506 Rule 506. Communications to clergyman; definitions; general rule of privilege; who may claim privilege.

(1) As used in this rule:

(a) A clergyman is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him; and

(b) A communication is confidential if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual advisor.

(3) The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

Source: Laws 1975, LB 279, § 26.

27-507 Rule 507. Political vote; privilege.

Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot unless the vote was cast illegally.

Source: Laws 1975, LB 279, § 27.

27-508 Rule 508. Trade secrets; privilege; protective measures.

A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Source: Laws 1975, LB 279, § 28.

Procedure established for use by the Nebraska Public Service Commission when deciding whether to publicly disclose information which it has found to be relevant and necessary for its proceedings and which a party contends to be in the nature of a trade secret or confidential research, development, or commercial information. In re Application of Northwestern Bell Telephone Co., 223 Neb. 415, 390 N.W.2d 495 (1986).

Some factors to be considered in determining whether given information is one's trade secret are (1) the extent to which the information is known outside of his business, (2) the extent to which it is known by employees and others involved in his business, (3) the extent of measures taken by him to guard the secrecy of the information, (4) the value of the information to him and his competitors, (5) the amount of effort or money expended by him in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. In re Application of Northwestern Bell Tel. Co., 223 Neb. 415, 390 N.W.2d 495 (1986).

27-509 Rule 509. Secrets of state and other official information; general rule of privilege; who may claim privilege; procedure; effect of sustaining claim.

(1) The government has a privilege to refuse to give evidence and to prevent any public officer from giving evidence as to communications made by or to such public officer in official confidence when the public interest would suffer by the disclosure.

(2) The privilege may be claimed by the public officer sought to be examined, or by the chief officer of the department of government administering the subject matter which the evidence concerned. The required showing may be made in whole or in part in the form of a written statement. The judge may hear the matter in chambers, but all counsel are entitled to inspect the claim and showing and be heard thereon. The judge may take any protective measure which the interest of the government and the furtherance of justice may require.

(3) If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

(4) If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice

require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action.

Source: Laws 1975, LB 279, § 29.

27-510 Rule 510. Identity of informer; rule of privilege; who may claim; exceptions; informer appearing as a witness; procedure; orders; legality of obtaining evidence.

(1) The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(2) The privilege may be claimed by an appropriate representative of the government, regardless of whether the information was furnished to an officer of the government, or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the government objects.

(3)(a) No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness.

(b) If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing may be in the form of affidavits or testimony, as the judge directs. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on his own motion. In civil cases, he may make any order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without an order of court. All counsel shall be permitted to be present at any stage at which counsel for any party is permitted to be present.

(c) If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available

to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.

Source: Laws 1975, LB 279, § 30.

Under this section, the trial judge, after determining that the evidence of an informer may be relevant (''necessary to a fair determination of the issue of guilt or innocence''), holds an in camera hearing to determine whether ''there is a reasonable probability that the informer can give the testimony''; if it is determined that the informer would be unable to give the testimony, the judge need not require that the informer's identity be disclosed. State v. Hankins, 232 Neb. 608, 441 N.W.2d 854 (1989).

The State has a limited privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law. State v. Wade, 7 Neb. App. 169, 581 N.W.2d 906 (1998).

Whether dismissal is required under this section in the case of an unknown informant depends upon the facts of each case. State v. Brown, 5 Neb. App. 889, 567 N.W.2d 307 (1997).

A sufficient showing was made pursuant to subsection (3)(b) of this section to mandate an in camera showing by the government as to whether an informer disclosed in a separate case was the informer in the present case, since the defendant had shown that such an in camera review was necessary to determine whether the State had waived the privilege of the informer's identity under subsection (3)(a) of this section. State v. Lomack, 4 Neb. App. 465, 545 N.W.2d 455 (1996).

27-511 Rule 511. Waiver of privilege by voluntary disclosure.

A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if he or his predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

Source: Laws 1975, LB 279, § 31.

27-512 Rule 512. Privileged matter disclosed under compulsion or without opportunity to claim privilege.

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

Source: Laws 1975, LB 279, § 32.

27-513 Rule 513. Comment on or inference from claim of privilege improper; jury instruction.

(1) The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

Source: Laws 1975, LB 279, § 33.

Pursuant to subsection (1) of this section, although the trial judge's comments were certainly unnecessary and ill advised, they did not permit the jury to draw an unfavorable inference from the defendant's failure to testify and adduce evidence. State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997).

A prosecutor's reference to the defendant's failure to make an exculpatory statement before the defendant is in custody does not violate the defendant's right to remain silent. State v. Gregory, 220 Neb. 778, 371 N.W.2d 754 (1985).

ARTICLE 6
WITNESSES

Section
27-601. Rule 601. General rule of competency.

27-601 Rule 601. General rule of competency.

Every person is competent to be a witness except as otherwise provided in these rules.

Source: Laws 1975, LB 279, § 34.

The question of the competency of a child witness rests largely within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion. State v. Guy, 227 Neb. 610, 419 N.W.2d 152 (1988).

No abuse of discretion to allow 5-year-old's testimony when conflicting testimony was caused by nature of defense counsel's questions, which created question of credibility and not competency. State v. Miner, 216 Neb. 309, 343 N.W.2d 899 (1984).

Except as specifically provided otherwise by the rules of evidence, every person is competent to be a witness about those things of which he has personal knowledge. Tuch v. Tuch, 210 Neb. 601, 316 N.W.2d 304 (1982).

Where injured victim of defendant's assault with a gun was defendant's wife, she was competent to testify where the jury had prior knowledge of her condition. State v. Martin, 198 Neb. 811, 255 N.W.2d 844 (1977).

27-602 Rule 602. Lack of personal knowledge; witness may not testify; evidence.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of section 27-703, relating to opinion testimony by expert witnesses.

Source: Laws 1975, LB 279, § 35.

Inadequate foundation for personal knowledge was cured on cross-examination when opposing counsel questioned witness regarding matter for own purposes beyond explaining or rebutting the original evidence. State v. Rieger, 260 Neb. 519, 618 N.W.2d 619 (2000).

It was not necessary for a police officer to remember the name of a person to whom he administered a photographic array in order to have personal knowledge of that person's photographic identification. State v. Rieger, 260 Neb. 519, 618 N.W.2d 619 (2000).

In establishing foundation for test results, a witness may not testify as to whether laboratory protocols were followed unless the witness has personal knowledge of the matter, i.e., the witness performed the test or witnessed the test being performed. State v. Jackson, 255 Neb. 68, 582 N.W.2d 317 (1998).

A witness testifying to objective facts must have had means of knowing the facts from the witness' personal knowledge. State v. Kirksey, 254 Neb. 162, 575 N.W.2d 377 (1998).

A witness may not testify about the custody procedures used by a police department unless evidence is introduced to show that he or she has personal knowledge of the matter. State v. Smith, 238 Neb. 111, 469 N.W.2d 146 (1991).

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. The record supported a conclusion

that the deponent did not possess or could not articulate personal knowledge. State v. Irish, 223 Neb. 578, 391 N.W.2d 137 (1986).

Testimony concerning observations of conduct, behavior in terms of false perceptions, or mistaken ideas, is controlled by the personal knowledge provision of this section. State v. Norfolk, 221 Neb. 810, 381 N.W.2d 120 (1986).

27-603 Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Source: Laws 1975, LB 279, § 36.

27-604 Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Source: Laws 1975, LB 279, § 37.

27-605 Rule 605. Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Source: Laws 1975, LB 279, § 38.

1. Judge as witness
2. Applicability
3. Objection
4. Miscellaneous

1. Judge as witness

The trial judge may not assume the role of a witness, and comments made by the trial judge in such a capacity are not evidence. State v. Baird, 259 Neb. 245, 609 N.W.2d 349 (2000).

A judge presiding at a trial may not testify at that trial to establish the content of the court's record. Everson v. O'Kane, 11 Neb. App. 74, 643 N.W.2d 396 (2002).

This section does not prohibit a judge who presided over a defendant's plea and sentencing from later testifying at an evidentiary hearing on a defendant's motion for postconviction relief where the judge is not the presiding judge at the evidentiary hearing on postconviction relief. State v. Stevenson, 9 Neb. App. 316, 611 N.W.2d 126 (2000).

2. Applicability

The rule prohibiting the presiding judge from testifying as a witness in that trial applies not only to formal testimony but also to whenever the judge assumes the role of a witness. State v. Livingston, 244 Neb. 757, 509 N.W.2d 205 (1993).

This section does not apply to only formal testimony; it applies also whenever the judge assumes the role of a witness. State v. Rodriguez, 244 Neb. 707, 509 N.W.2d 1 (1993).

Statutory prohibition against a presiding judge's testifying at trial as a witness applies not only to formal testimony but applies whenever the judge assumes the role of a witness, and no objection need be made in order to preserve the point. State v. Rhoads, 11 Neb. App. 731, 660 N.W.2d 181 (2003).

3. Objection

Although the defendant did not object to the judge's comments, the timely objection requirement was inapplicable because the trial judge had assumed the role of a witness. Krusemark v. Thurston Cty. Bd. of Equal., 10 Neb. App. 35, 624 N.W.2d 328 (2001).

4. Miscellaneous

When the Nebraska Evidence Rules apply to an administrative hearing, those persons performing adjudicative functions are presumptively incompetent to testify. However, there are limits to an agency's power to shield its employees from a subpoena. An employee with unique knowledge indispensable to the adjudication may be subject to a subpoena. Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994).

Parties may not waive the disqualification of the judge presiding at the trial when he is a material witness or has personal knowledge of disputed evidentiary facts concerning the proceeding. Cline v. Franklin Pork, Inc., 210 Neb. 238, 313 N.W.2d 667 (1981).

This section prohibits appellate courts from treating statements of a trial judge as evidence of the condition of the trial court's docket. State v. Soltis, 11 Neb. App. 61, 644 N.W.2d 160 (2002).

27-606 Rule 606. Competency of juror as witness; at the trial; inquiry into the validity of verdict or indictment.

(1) A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

Source: Laws 1975, LB 279, § 39.

1. Scope

Subsection (2) of this section does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations. State v. Thomas, 262 Neb. 985, 637 N.W.2d 632 (2002).

Subsection (2) of this section provides two exceptions to the general prohibition against juror testimony regarding any effect on the juror's mental state. A juror may testify regarding (1) whether extraneous prejudicial information was brought to the jury's attention or (2) whether any outside influence was improperly brought to bear upon any juror. State v. Bjorklund, 258 Neb. 432, 604 N.W.2d 169 (2000).

Subsection (2) of this section prohibits admission of a juror's affidavit to impeach a verdict on the basis of the jury's motives, methods, misunderstanding, thought processes, or discussions during deliberations which enter into the verdict. Kopecky v. National Farms, Inc., 244 Neb. 846, 510 N.W.2d 41 (1994).

Subsection (2) of this section prohibits inquiry into a jury's votes. State v. Boppre, 243 Neb. 908, 503 N.W.2d 526 (1993).

Under the provisions of subsection (2) of this section, a juror may testify as to whether ''extraneous prejudicial information was improperly brought'' to his or her attention, but no evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith. State v. McDonald, 230 Neb. 85, 430 N.W.2d 282 (1988); Simants v. State, 202 Neb. 828, 277 N.W.2d 217 (1979).

Subsection (2) of this section controls inquiries into the validity of a verdict reached by a jury. State v. Roberts, 227 Neb. 489, 418 N.W.2d 246 (1988).

Juror's misconduct does not irrebuttably presume prejudice; this section inquires into validity of verdict when extraneous prejudicial information may have been brought to jury's attention. Ellis v. Far-Mar-Co, 215 Neb. 736, 340 N.W.2d 423 (1983).

2. Juror testimony permitted

At hearing on motion for new trial, affidavits of jurors were admissible only to show that presubmission discussions took place over 5 days of 7-day trial. Other comments in the affidavits were inadmissible. Hunt v. Methodist Hospital, 240 Neb. 838, 485 N.W.2d 737 (1992).

Subsection (2) of this section does not bar the use of a juror affidavit to establish that a jury made a transpositional error in completing verdict forms in the consolidated trial of cases against multiple defendants. Harmon Cable Communications v. Scope Cable Television, 237 Neb. 871, 468 N.W.2d 350 (1991).

Subsection (2) of this section permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial. Zeeb v. Delicious Foods, 231 Neb. 358, 436 N.W.2d 190 (1989); Rahmig v. Mosley Machinery Co., 226 Neb. 423, 412 N.W.2d 56 (1987).

3. Juror testimony not permitted

A juror who failed to disclose during voir dire that he had an uncle who had been murdered did not bring in extraneous information. Juror statement asserting that the jury did not follow instructions during deliberations was properly excluded under subsection (2) of this section because it did not involve extraneous information. State v. Thomas, 262 Neb. 985, 637 N.W.2d 632 (2002).

A juror's intradeliberational statements, when based on personal knowledge not directly related to the litigation at issue, do not constitute extraneous information within the meaning of subsection (2) of this section. Leavitt ex rel. Leavitt v. Magid, 257 Neb. 440, 598 N.W.2d 722 (1999).

Under subsection (2) of this section, juror's intradeliberational statements, when based on juror's personal knowledge not directly related to the litigation at issue, do not constitute ''extraneous'' information. Under subsection (2) of this section, juror's statements regarding experiences with inflated insurance claims and the juror's cousin's accident were not ''extraneous'' information. Information that has been excluded from jury consideration by a motion to strike does not constitute ''extraneous'' information under subsection (2) of this section. Nichols v. Busse, 243 Neb. 811, 503 N.W.2d 173 (1993).

While pursuant to subsection (2) of this section a juror's affidavit may be used to show that in reaching its verdict the jury considered prejudicial information emanating from a source other than the evidence presented at trial, such an affidavit may not be used to show a jury's misunderstanding of the law as such misunderstanding inheres in the verdict. State v. Meyer, 236 Neb. 253, 460 N.W.2d 656 (1990).

This section prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstandings, thought processes, or discussions during deliberations, which enter into the verdict. Rahmig v. Mosley Machinery Co., 226 Neb. 423, 412 N.W.2d 56 (1987).

A juror's understanding of the instructions constitutes neither extraneous, prejudicial information nor outside influence improperly brought to the jury's attention. In re Estate of Haddix, 211 Neb. 814, 320 N.W.2d 745 (1982).

The trial court properly refused to admit affidavits of jurors dealing with their understanding of their instructions or the way they reached their verdict. Such matters inhere in the verdict and the proffered testimony is inadmissible under this section. Lambertus v. Buckley, 206 Neb. 440, 293 N.W.2d 110 (1980).

4. Miscellaneous

In the absence of a timely objection pursuant to subsection (2) of this section, a court may apply the rule sua sponte. State v. Williams, 253 Neb. 111, 568 N.W.2d 246 (1997).

Under subsection (2) of this section, extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant. Loving v. Baker's Supermarkets, 238 Neb. 727, 472 N.W.2d 695 (1991).

The defendant bears the burden of proving jury misconduct, and the inability to inquire as to how evidence affected a juror's mind does not require that the burden be shifted to the state as the defendant may inquire as to whether any extraneous prejudicial information was improperly brought to the attention of the jury. State v. Woodward, 210 Neb. 740, 316 N.W.2d 759 (1982).

27-607 Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling him.

Source: Laws 1975, LB 279, § 40.

Although under this section ''(t)he credibility of a witness may be attacked by any party, including the party calling him (or her),'' a party may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible. State v. Boppre, 243 Neb. 908, 503 N.W.2d 526 (1993).

A party does not vouch for the credibility of its witness. State v. Joy, 220 Neb. 535, 371 N.W.2d 113 (1985).

The credibility of a witness may be attacked by any party, including the party who called the witness. State v. Marco, 220 Neb. 96, 368 N.W.2d 470 (1985).

The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made. State v. Brehmer, 211 Neb. 29, 317 N.W.2d 885 (1982).

Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded. State v. Price, 202 Neb. 308, 275 N.W.2d 82 (1979).

27-608 Rule 608. Evidence of character and conduct of witness; opinion and reputation evidence of character; specific instances of conduct; privilege against self-incrimination.

(1) The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (a) The evidence may refer only to character for truthfulness or untruthfulness, and (b) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness, or (b) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Source: Laws 1975, LB 279, § 41.

Testimony of deputy sheriff was improper under this section. State v. Beermann, 231 Neb. 380, 436 N.W.2d 499 (1989).

Once a witness' character for truthfulness has been attacked, the prosecution may, under this section, adduce rebuttal evidence on that issue. State v. Gregory, 220 Neb. 778, 371 N.W.2d 754 (1985).

A prostitution offense does not substantially impugn credibility, since such conduct does not necessarily entail dishonesty or false statement and, therefore, it is not probative of untruthfulness. State v. Williams, 219 Neb. 587, 365 N.W.2d 414 (1985).

It is within the discretion of the trial court to admit character evidence to support the credibility of a witness whose credibility has been attacked by opinion or reputation evidence or otherwise. State v. Steinmark, 201 Neb. 200, 266 N.W.2d 751 (1978).

Whether a showing of inconsistent statements by a witness is an attack on credibility entitling the witness to present evidence of veracity is a matter for the discretion of the trial court. State v. King, 197 Neb. 729, 250 N.W.2d 655 (1977).

Specific instances of conduct of witness relative to credibility, other than conviction of crime, may not be proved by extrinsic

evidence, but in discretion of court may be inquired into on cross-examination concerning character for truthfulness or untruthfulness. State v. Fonville, 197 Neb. 220, 248 N.W.2d 27 (1976).

Evidence of conviction of a crime is, in some respects, more limited than under former section, but is not restricted to felonies as such. State v. Lang, 197 Neb. 47, 246 N.W.2d 608 (1976).

A therapist's testimony that she observed the defendant look astonished when he explained to the therapist he had been charged with sexually abusing a minor and that the defendant denied the abuse to the therapist was inadmissible under subsection (2) of this section. State v. Egger, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

The type of character evidence admissible under this section and section 27-405 does not include the opinion of an expert witness regarding the truthfulness of another witness based upon purported scientific studies. State v. Maggard, 1 Neb. App. 529, 502 N.W.2d 493 (1993).

27-609 Rule 609. Impeachment by evidence of conviction of crime; general rule; time limit; effect of pardon, annulment, or equivalent procedure; juvenile adjudications; pendency of appeal.

(1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.

(2) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date.

(3) Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure which was based on innocence.

(4) Evidence of juvenile adjudications is not admissible under this rule.

(5) Pendency of an appeal renders evidence of a conviction inadmissible.

Source: Laws 1975, LB 279, § 42.

1. Prior convictions
2. Miscellaneous

1. Prior convictions

For the purposes of this section, one has been convicted of a crime only after a finding of guilt, an imposition of a sentence, and the expiration of the time for appeal. Ipock v. Union Ins. Co., 242 Neb. 448, 495 N.W.2d 905 (1993).

Under subsection (2) of this section, cross-examination of a witness regarding the witness' previous felony convictions and the number thereof is proper, but only if 10 or fewer years have elapsed since the date of conviction or the release of the witness from confinement. State v. Kramer, 238 Neb. 252, 469 N.W.2d 785 (1991).

Prosecutor's further inquiry as to the nature of the defendant's previous conviction of false information after the defendant admitted his conviction was clearly improper and constituted reversible error. State v. Garza, 236 Neb. 202, 459 N.W.2d 739 (1990).

When a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received. State v. Whiteley, 234 Neb. 693, 452 N.W.2d 290 (1990).

For proper impeachment under this section, although the State may elicit information concerning the number of a defendant's convictions within the last ten years, the State is prohibited from naming or identifying the crime underlying defendant's conviction and from inquiring into details surrounding the conviction. Whether a defendant's prior conviction is admissible for the defendant's impeachment is a preliminary question of admissibility to be determined in accordance with Neb. Evid. R. 104. State v. Olsan, 231 Neb. 214, 436 N.W.2d 128 (1989).

In attacking the credibility of a witness under this section by establishing that such witness has previously committed a felony or a crime involving dishonesty or a false statement, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof. State v. Johnson, 226 Neb. 618, 413 N.W.2d 897 (1987).

A conviction for the offense of issuing a bad check in violation of section 28-611 is, as a matter of law, a crime involving dishonesty or false statement. State v. Fleming, 223 Neb. 169, 388 N.W.2d 497 (1986).

If, upon questioning, a witness admits to a prior conviction, the inquiry should end there, and thereafter it is improper to inquire into the nature of the crime or the details of the offense. State v. Daugherty, 215 Neb. 45, 337 N.W.2d 128 (1983).

In the absence of something other than ordinary stealing, petit larceny is not a crimen falsi as contemplated by the phrase in this section; if such special circumstances exist, it is incumbent upon the prosecution to bring them to the court's attention. State v. Williams, 212 Neb. 860, 326 N.W.2d 678 (1982).

Evidence of conviction of a crime is, in some respects, more limited than under former section, but is not restricted to felonies as such. State v. Lang, 197 Neb. 47, 246 N.W.2d 608 (1976).

The fact of a felony conviction is properly used for impeachment under this section. Burke v. Harman, 6 Neb. App. 309, 574 N.W.2d 156 (1998).

Once a prior conviction has been established, the inquiry must end, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a

result thereof. State v. Edwards, 2 Neb. App. 149, 507 N.W.2d 506 (1993).

2. Miscellaneous

The prosecutor's improper further inquiry into codefendant's prior conviction was not unfairly prejudicial to defendant because such conduct and the trial court's failure to declare a mistrial did not materially influence the jury in a verdict adverse to a substantial right of the defendant. State v. Garza, 236 Neb. 215, 459 N.W.2d 747 (1990).

Evidence of juvenile adjudication is not admissible for purpose of impeachment. State v. Beach, 215 Neb. 213, 337 N.W.2d 772 (1983); State v. Caradori, 199 Neb. 691, 260 N.W.2d 617 (1977).

Where a criminal defendant testified in his own behalf, he was subject to the same rules of cross-examination as any other witness. State v. Pitts, 212 Neb. 295, 322 N.W.2d 443 (1982).

A conviction will not be set aside unless the defendant meets his burden of showing that the claimed error created not merely a possibility of prejudice but, rather, that it worked to his actual prejudice. State v. Gore, 212 Neb. 287, 322 N.W.2d 438 (1982).

Specific instances of conduct of witness relative to credibility, other than conviction of crime, may not be proved by extrinsic evidence, but in discretion of court may be inquired into on cross-examination concerning character for truthfulness or untruthfulness. State v. Fonville, 197 Neb. 220, 248 N.W.2d 27 (1976).

27-610 Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Source: Laws 1975, LB 279, § 43.

27-611 Rule 611. Mode and order of interrogation and presentation; control by judge; scope of cross-examination; leading questions.

(1) The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.

(2) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Source: Laws 1975, LB 279, § 44.

Pursuant to subsection (2) of this section, courts limit cross-examination of witnesses to the subject matter of direct examination and matters affecting the credibility of the witness. State v. McLemore, 261 Neb. 452, 623 N.W.2d 315 (2001).

Pursuant to subsection (2) of this section, courts limit cross-examination of witnesses to the subject matter of the direct examination and matters affecting the credibility of the witness. Pursuant to this section, the scope of cross-examination is necessarily limited by the scope of direct examination. State v. Bjorklund, 258 Neb. 432, 604 N.W.2d 169 (2000).

When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions; however, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so, the record should contain evidence supporting such hostility. Turner v. Welliver, 226 Neb. 275, 411 N.W.2d 298 (1987).

The extent, scope, and course of cross-examination rest within trial court's discretion, and rulings will not be disturbed on appeal absent an abuse of discretion. Fremont Nat. Bank & Trust Co. v. Beerbohm, 223 Neb. 657, 392 N.W.2d 767 (1986).

Judge may use discretion to allow leading questions in direct examination of witness who has a speech disability. State v. Brown, 220 Neb. 849, 374 N.W.2d 28 (1985).

Where a request for a physical examination of the injured party is made during the course of the trial, it rests within the sound discretion of the court whether such request is to be granted, and the ruling thereon will not be disturbed on appeal unless from all circumstances an abuse of discretion appears. Hoegerl v. Burt, 215 Neb. 752, 340 N.W.2d 428 (1983).

27-612 Rule 612. Writing used to refresh memory; rights of adverse party; matters unrelated; preservation for appeal; orders.

If a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced

at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires.

Source: Laws 1975, LB 279, § 45.

A party seeking access to a document used to refresh a witness' recollection bears the burden of establishing that the document sought was actually used by the witness to refresh recollection. State v. Schroder, 232 Neb. 65, 439 N.W.2d 489 (1989).

A precondition to the production and use by an adverse party of a witness' prior written statement is that the statement has been used by the witness to refresh his recollection. Rawlings v. Andersen, 195 Neb. 686, 240 N.W.2d 568 (1976).

The purpose of the phrase ''for the purpose of testifying'' is to safeguard against wholesale exploration of an opposing party's files and to ensure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness. State v. Jones, 6 Neb. App. 647, 577 N.W.2d 302 (1998).

27-613 Rule 613. Prior statements of witnesses; examining witness concerning prior statement; extrinsic evidence of prior inconsistent statement by witness.

(1) In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(2) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in subdivision (4)(b) of section 27-801.

Source: Laws 1975, LB 279, § 46.

This statute permits the introduction of evidence concerning prior inconsistent statements by a witness, subject to the limitation that the witness being impeached must be given an opportunity to explain or deny the prior inconsistent statement, and the opposite party must have an opportunity to interrogate the witness about the prior inconsistent statement. Further, the statement sought to be impeached cannot be about a collateral or immaterial matter. State v. Owens, 257 Neb. 832, 601 N.W.2d 231 (1999).

The foundational requirement of this section, that a witness to be impeached be given an opportunity to explain or deny an apparent inconsistent statement, does not apply to admissions or statements offered against a party to the action, if the admissions or statements were made by that party. Howard v. State Farm Mut. Auto. Ins. Co., 242 Neb. 624, 496 N.W.2d 862 (1993); Hyde v. Cleveland, 203 Neb. 420, 279 N.W.2d 105 (1979).

Trial court's initial error in not allowing the letter's author, which letter was introduced to impeach the author's trial testimony, to explain the letter's contents was corrected when counsel, through persistent questioning, was able to elicit explanatory testimony from the author. Harmon Cable Communications v. Scope Cable Television, 237 Neb. 871, 468 N.W.2d 350 (1991).

The victim is not a ''party'' to a criminal case for the purposes of impeachment by a prior inconsistent statement. State v. Antillon, 229 Neb. 348, 426 N.W.2d 533 (1988).

If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic evidence is neither necessary nor generally allowed. State v. Johnson, 220 Neb. 392, 370 N.W.2d 136 (1985).

While proof of contradictory statements of a witness may be received in evidence for the purpose of aiding the jury in estimating the credibility of the witness, a party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines. A mere refusal to testify or testimony negative in nature indicating a lack of testimonial information does not present grounds for impeaching the witness that affirmative testimony in favor of the opposite party gives for inquiry concerning prior statements contradictory of the testimony under oath at trial. State v. Brehmer, 211 Neb. 29, 317 N.W.2d 885 (1982).

Difference between this section and prior rule explained. State v. Packett, 206 Neb. 548, 294 N.W.2d 605 (1980).

The foundational requirement of this section, that a witness to be impeached be given an opportunity to explain or deny an apparently inconsistent statement, may be met either before or after the introduction of the impeaching evidence. State v. Price, 202 Neb. 308, 275 N.W.2d 82 (1979).

The requirement in subsection (2) of this section that a witness sought to be impeached by an alleged prior inconsistent statement must be afforded an opportunity to explain or deny

the alleged prior inconsistent statement may be met either before or after the introduction of the extrinsic impeaching evidence. State v. Owens, 8 Neb. App. 109, 589 N.W.2d 867 (1999).

27-614 Rule 614. Calling and interrogation of witnesses by judge; objections.

(1) The judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(2) The judge may interrogate witnesses, whether called by himself or by a party.

(3) Objections to the calling of witnesses by the judge or to interrogation by him may be made at the time or at the next available opportunity when the jury is not present.

Source: Laws 1975, LB 279, § 47.

Subsection (2) of this section provides that the trial judge may interrogate witnesses, whether called by the judge or by a party; however, the trial judge should use this right sparingly. State v. Bjorklund, 258 Neb. 432, 604 N.W.2d 169 (2000).

Under the provisions of this section, the trial judge may interrogate witnesses, whether called by himself or by a party; objections to questions propounded by the court must be made at the time of trial. State v. Fix, 219 Neb. 674, 365 N.W.2d 471 (1985).

The right of a judge to interrogate a witness should be very sparingly exercised because, generally, counsel for the parties should be relied on and allowed to manage and bring out their own case, and at no time should the actions of the judge in this respect be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause. State v. Brehmer, 211 Neb. 29, 317 N.W.2d 885 (1982).

Trial court did not err in failing to allow party to cross-examine witness following interrogation by judge where that party made no objection to record as made, and that party made no request to further interrogate witness. Baltes v. Hodges, 207 Neb. 740, 301 N.W.2d 92 (1981).

A trial court may, on its own motion, call witnesses and interrogate witnesses pursuant to this section. Scudder v. Haug, 201 Neb. 107, 266 N.W.2d 232 (1978).

Pursuant to subsection (1) of this section, a trial court must act impartially and not prejudicially in exercising the discretionary power given to judges under this section to call and to interrogate witnesses. Gernstein v. Allen, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

27-615 Rule 615. Exclusion of witnesses; exceptions.

At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Source: Laws 1975, LB 279, § 48.

It is permissible for a law enforcement officer, who will also be called to testify, to be present during a trial, even where a sequestration order has been entered. State v. Freeman, 267 Neb. 737, 677 N.W.2d 164 (2004).

In an attorney disciplinary proceeding, the attorney's client who was also the complaining witness in the proceeding was an essential witness under subsection (3) of this section. State ex rel. NSBA v. Miller, 258 Neb. 181, 602 N.W.2d 486 (1999).

Sequestration order not violated by presence of State's psychiatrist who was not to be called as a witness at trial. State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989).

A psychiatrist or psychologist may be present in the courtroom in contravention of a sequestration order upon a showing that his or her presence is essential to the presentation of a party's case. State v. Jackson, 231 Neb. 207, 435 N.W.2d 893 (1989).

Defendant's request to sequester a witness who was the prosecutrix and victim, held properly denied under exception in subsection (3) hereof. State v. Eynon, 197 Neb. 734, 250 N.W.2d 658 (1977).

ARTICLE 7

OPINION AND EXPERT TESTIMONY

Section
27-701. Rule 701. Opinion testimony by lay witnesses; when.
27-702. Rule 702. Testimony by experts; when.
27-703. Rule 703. Bases of opinion testimony by experts; when revealed; admissibility.
27-704. Rule 704. Opinion on ultimate issue.
27-705. Rule 705. Disclosure of facts or data underlying expert opinion.
27-706. Rule 706. Judge appointed experts; procedure; compensation; disclosure of appointment; parties may call experts of own selection.

27-701 Rule 701. Opinion testimony by lay witnesses; when.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Source: Laws 1975, LB 279, § 49.

1. Scope
2. Testimony permitted
3. Testimony not permitted
4. Miscellaneous

1. Scope

Lay testimony should be excluded whenever the point is reached at which the trier of fact is being told that which it is entirely equipped to determine. State v. Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990).

Opinion testimony by a lay witness is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. Jershin v. Becker, 217 Neb. 645, 351 N.W.2d 48 (1984).

2. Testimony permitted

Pursuant to this section, lay opinion is admissible to identify the substances in question in a drug prosecution. State v. Watson, 231 Neb. 507, 437 N.W.2d 142 (1989).

A person who is familiar with a signature may testify as to the validity of that signature. In re Estate of Villwok, 226 Neb. 693, 413 N.W.2d 921 (1987).

Parents and student may testify as to their opinion of best educative interest if rationally based on the perception of the witness and helpful to the determination of a fact in issue. In re Freeholder Petition, 213 Neb. 633, 330 N.W.2d 907 (1983).

A nonexpert with an intimate personal acquaintance may be allowed to testify as to the mental condition of a defendant pleading insanity. The jury may weigh and determine the credibility of the opinion testimony of a nonexpert witness as to the mental state of a defendant pleading insanity but the mere fact that the testimony is given by a nonexpert does not make it inadmissible if the witness had the necessary acquaintance with the defendant. State v. Myers, 205 Neb. 867, 290 N.W.2d 660 (1980).

3. Testimony not permitted

This section does not permit a lay witness to render an opinion based upon obvious speculation or conjecture. Childers v. Phelps County, 252 Neb. 945, 568 N.W.2d 463 (1997).

Testimony of deputy sheriff was improper lay expert opinion regarding credibility of witness. State v. Beermann, 231 Neb. 380, 436 N.W.2d 499 (1989).

Opinion evidence by lay witness as to whether defendant in motor vehicle homicide case caused the collision was intended to decide the issue of causation for the jury, and thus was inadmissible under this section. The lay witness' function is only to describe what he or she has observed, and the trier of fact will draw a conclusion from the facts observed and reproduced by the witness. State v. William, 231 Neb. 84, 435 N.W.2d 174 (1989).

The mere odor of alcohol, standing alone, is not sufficient to justify either a lay witness or an expert rendering an opinion as to whether one is intoxicated in violation of law. State v. Johnson, 215 Neb. 391, 338 N.W.2d 769 (1983).

Opinion of police officer witness as to speed of vehicles involved in collision, where opinion based solely on fact of collision, and where witness did not see the collision and was not qualified as an expert, not admissible under this section because not rationally based on the perception of the witness. Belitz v. Suhr, 208 Neb. 280, 303 N.W.2d 284 (1981).

4. Miscellaneous

The trial court is given discretion in determining whether a sufficient basis for a lay witness' opinion testimony has been established and such determination will not ordinarily be disturbed on appeal absent an abuse of that discretion. Harmon Cable Communications v. Scope Cable Television, 237 Neb. 871, 468 N.W.2d 350 (1991).

Any error in allowing a police technician to give a lay opinion as to what substances were located in the area of an assault victim was harmless in light of victim's eyewitness identification of the defendant. State v. Broomhall, 221 Neb. 27, 374 N.W.2d 845 (1985).

A trial court has great discretion to determine the qualification of a witness to state an opinion and will be reversed only for an abuse of that discretion. A witness may be qualified to give an opinion based upon managerial experience even without practical, personal experience. Schmidt v. J. C. Robinson Seed Co., 220 Neb. 344, 370 N.W.2d 103 (1985).

27-702 Rule 702. Testimony by experts; when.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Source: Laws 1975, LB 279, § 50.

1. When evidence is admissible
2. Evidence allowed
3. Trial court discretion
4. Miscellaneous

1. When evidence is admissible

In a bench trial, an expert's testimony will be admitted under Neb. Evid. R. 702 and given the weight to which it is entitled. City of Lincoln v. Realty Trust Group, 270 Neb. 587, 705 N.W.2d 432 (2005).

A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. It must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct an analysis under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To aid the court in its evaluation, the judge may consider several factors, including, but not limited to, whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology can properly be applied to the facts in issue. In making this determination, the court may examine the evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative than prejudicial, as required under Neb. Evid. R. 403, section 27-403. State v. Tolliver, 268 Neb. 920, 689 N.W.2d 567 (2004).

An expert does not need to have additional expertise in the science or theory underlying instruments used in his or her field; that the expert is trained to operate a device is sufficient foundation for admitting evidence produced by the device. State v. Aguilar, 268 Neb. 411, 683 N.W.2d 349 (2004).

Expert testimony is admissible if it assists the trier of fact to understand the evidence or to determine a fact in issue. State v. Buechler, 253 Neb. 727, 572 N.W.2d 65 (1998).

In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) Whether the witness qualifies as an expert pursuant to this section; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under section 27-403 because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. Robinson v. Bleicher, 251 Neb. 752, 559 N.W.2d 473 (1997).

There are four questions a court considers to determine the admissibility of expert testimony: (1) Does the witness qualify as an expert pursuant to this section? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or to determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in light of section 27-403? State v. Lopez, 249 Neb. 634, 544 N.W.2d 845 (1996).

Expert testimony which may be of assistance to the trier of fact is admissible even in areas where laypersons have competence to determine the facts. Coppi v. West Am. Ins. Co., 247 Neb. 1, 524 N.W.2d 804 (1994).

Expert testimony concerning a question of law is generally not admissible in evidence. Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 515 N.W.2d 756 (1994).

If an expert's testimony lacks probative value, the testimony is irrelevant and is inadmissible. In determining admissibility of an expert's testimony, a court considers four questions: (1) Does the witness qualify as an expert? (2) Is the testimony relevant? (3) Will the testimony assist the trier of fact to understand the evidence or determine a controverted factual issue? (4) Should the testimony, even if relevant and admissible, be excluded in light of section 27-403? Relevance of an opinion is among the initial questions for a trial court in determining admissibility of an expert's opinion under this section. Reliability of an expert's testimony which is based on a scientific principle or on a technique or process which applies a scientific principle depends on general acceptance of the principle, technique, or process in the relevant scientific community. Under the standard of helpfulness required by this section, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact. When an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by the trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue. Whether a witness is an expert depends on the factual basis or reality behind a witness' title or underlying a witness' claim to expertise. Whether a witness is qualified to testify as an expert under this section is a preliminary question of admissibility for a trial court under section 27-104(1). State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990).

The first question to be answered by a court considering admissibility of expert testimony under this section is whether the testimony is likely to assist the trier of fact; if the testimony will not be of assistance to the jury in its deliberations and relates to an area within the competency of ordinary citizens, the expert testimony is not admissible. Getzschman v. Miller Chemical Co., 232 Neb. 885, 443 N.W.2d 260 (1989).

Evidence of a test result cannot be characterized as ''scientific'' or qualify as ''technical or other specialized knowledge,'' and thus within the purview of this provision, unless and until it is established that the test result demonstrates what it is claimed to demonstrate. State v. Borchardt, 224 Neb. 47, 395 N.W.2d 551 (1986).

Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. Priest v. McConnell, 219 Neb. 328, 363 N.W.2d 173 (1985).

Expert testimony which may be of assistance to the trier of fact is admissible even in areas where laymen have competence to determine the facts. Hegarty v. Campbell Soup Co., 214 Neb. 716, 335 N.W.2d 758 (1983).

The general rule is that expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. State v. Ammons, 208 Neb. 812, 305 N.W.2d 812 (1981).

Before an expert opinion can be rendered, it must be shown that such an opinion is based upon scientific, technical, or other specialized knowledge which would assist the trier of fact to understand the evidence or to determine a fact in issue, and that the witness qualifies as an expert by reason of knowledge, skill, experience, training, or education. Northern Nat. Gas Co. v. Beech Aircraft Corp., 202 Neb. 300, 275 N.W.2d 77 (1979).

Whether one qualifies as an expert depends on the factual basis or reality underlying the witness' title or claim to expertise. The standard of care is not based on the title of the physician, but, rather, on the substance of the treatment. Testimony of qualified medical doctors cannot be excluded simply because they are not specialists in a particular school of medical practice. Instead, experts or skilled witnesses will be considered qualified if, and only if, they possess special skill or knowledge respecting the subject matter involved so superior to that of persons in general as to make the expert's formation of a judgment a fact of probative value. Hoffart v. Hodge, 9 Neb. App. 161, 609 N.W.2d 397 (2000).

2. Evidence allowed

In a trial for attempted murder, assault, and other crimes, the State's forensic expert was qualified to testify regarding gunshot residue found on the defendant's clothing, despite the fact that the expert did not have personal knowledge regarding the manner in which calibration substances or standards were

manufactured; rather, it was enough that the expert was trained on gunshot residue testing and was qualified to accurately perform the tests. State v. Aguilar, 268 Neb. 411, 683 N.W.2d 349 (2004).

The testimony of a guardian ad litem in a custody modification proceeding was erroneously admitted as expert testimony when there was no showing she possessed any scientific, technical, or other specialized knowledge which would assist the trier of fact to understand the evidence or determine a fact in issue. Heistand v. Heistand, 267 Neb. 300, 673 N.W.2d 541 (2004).

Trial court did not err in allowing police officer to testify as to how long THC remains in a person's system where the officer possessed extensive experience in the area of illegal narcotics and had received specific training in drug testing processes from a qualified examiner. Trial court did not err in allowing police officer to testify that a substance was marijuana where the officer had received approximately 20 hours of training in drug identification and illegal drugs and 100 hours of additional instruction in criminal investigation and evidence, the officer was experienced in undercover drug investigations and other drug control efforts, and his testimony was corroborated by a forensic chemist. State v. Stahl, 240 Neb. 501, 482 N.W.2d 829 (1992).

An architect's assessment that sidewalks are safer to walk on than grass is not the kind of determination which requires special skill, knowledge, or experience to make, as contemplated by this provision. Johannes v. McNeil Real Estate Fund VIII, 225 Neb. 283, 404 N.W.2d 424 (1987).

Testimony by a criminal investigator concerning fingerprints found at the scene of the crime is admissible, when relevant, as expert testimony. State v. Birge, 223 Neb. 761, 393 N.W.2d 713 (1986).

Remarks by the treating physician to the effect that the causes of aneurysmal bone cyst recurrences were largely unknown did not make his expert opinion as to the cause underlying plaintiff's recurrence inadmissible; the remarks were available for impeachment and were properly weighed by the trier of fact. Goers v. Bud Irons Excavating, 207 Neb. 579, 300 N.W.2d 29 (1980).

For a qualified expert to give an opinion of the speed of a vehicle, all necessary factors needed to establish an opinion should be supported by evidence. Nickal v. Phinney, 207 Neb. 281, 298 N.W.2d 360 (1980).

Self-styled retired burglar permitted to testify for State as expert for opinion on utility of articles in possession of defendant when apprehended. State v. Briner, 198 Neb. 766, 255 N.W.2d 422 (1977).

Auto manufacturer's expert witness entitled to present illustrative experiment and to testify regarding an ultimate issue of fact. Shover v. General Motors Corp., 198 Neb. 470, 253 N.W.2d 299 (1977).

The trial court's admission of testimony by banker as expert witness regarding security agreement was not an abuse of discretion. Skiles v. Security State Bank, 1 Neb. App. 360, 494 N.W.2d 355 (1992).

3. Trial court discretion

A trial court, when faced with an objection under Schafersman v. Agland Coop, 262 Neb. 215, 631 N.W.2d 862 (2001), must adequately demonstrate by specific findings on the record that it has performed the gatekeeping duty imposed by this section. A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. Zimmerman v. Powell, 268 Neb. 422, 684 N.W.2d 1 (2004).

An appellate court reviews the record de novo to determine whether a trial court has abdicated the gatekeeping function imposed by this section; when the trial court has not abdicated its gatekeeping function, an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion. Zimmerman v. Powell, 268 Neb. 422, 684 N.W.2d 1 (2004).

In performing its gatekeeping duty, the trial court's discretion extends to deciding what factors are reasonable measures of reliability in each case. Zimmerman v. Powell, 268 Neb. 422, 684 N.W.2d 1 (2004).

The trial court does not have the discretion to abdicate its gatekeeping duty imposed by this section. Zimmerman v. Powell, 268 Neb. 422, 684 N.W.2d 1 (2004).

In performing its gatekeeping duty, the trial court has considerable discretion in deciding what procedures to use in determining if an expert's testimony satisfies. Schafersman v. Agland Coop, 262 Neb. 215, 631 N.W.2d 862 (2001).

When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to this section, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. Schafersman v. Agland Coop, 262 Neb. 215, 631 N.W.2d 862 (2001).

The trial court initially determines whether expert testimony will assist the trier of fact. Ketteler v. Daniel, 251 Neb. 287, 556 N.W.2d 623 (1996).

When a trial court is faced with an offer of a novel form of expertise, the trial court must determine whether the new technique or principle is sufficiently reliable. Evidence of a test result cannot be characterized as ''scientific'' or ''technical'' until it is established that the test result demonstrates what it claimed to demonstrate. State v. Dean, 246 Neb. 869, 523 N.W.2d 681 (1994).

A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. McDonald v. Miller, 246 Neb. 144, 518 N.W.2d 80 (1994).

No exact standard is possible for fixing the qualifications of an expert or skilled witness, who will be deemed qualified if, and only if, he or she possesses special skill or knowledge respecting the subject matter involved so superior to that of men in general as to make his or her formation of a judgment a fact of probative value. A trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 468 N.W.2d 105 (1991).

A trial court's factual finding pursuant to section 27-104(1) concerning a determination whether a witness qualifies as an expert under this section will be upheld on appeal unless clearly erroneous. The determination whether an expert's testimony or opinion will be helpful to a jury or assist the trier of fact involves the discretion of a trial court, whose ruling will be upheld on appeal unless the court abused its discretion. State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990).

Absent an abuse of discretion, a trial judge's ruling regarding the admissibility of expert testimony will not be reversed. Palmer v. Forney, 230 Neb. 1, 429 N.W.2d 712 (1988).

There is no exact standard for determining when one qualifies as an expert, and a trial court's factual finding that a witness qualifies as an expert will be upheld on appeal unless clearly erroneous. It is within the trial court's discretion to determine if there is sufficient foundation for a witness to give his or her opinion about an issue in question. A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion. Hoffart v. Hodge, 9 Neb. App. 161, 609 N.W.2d 397 (2000).

4. Miscellaneous

Neb. Evid. R. 702 is part of a statutory scheme that governs the admissibility at trial of expert opinion testimony regarding the value of real estate. City of Lincoln v. Realty Trust Group, 270 Neb. 587, 705 N.W.2d 432 (2005).

The objective of the gatekeeping responsibility imposed by this section is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Schafersman v. Agland Coop, 268 Neb. 138, 681 N.W.2d 47 (2004).

It is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner. Carlson v. Okerstrom, 267 Neb. 397, 675 N.W.2d 89 (2004).

It is not enough that a witness is qualified as an expert. The trial court must also act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion. Carlson v. Okerstrom, 267 Neb. 397, 675 N.W.2d 89 (2004).

For trials commencing on or after October 1, 2001, in trial proceedings, the admissibility of expert opinion testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). Schafersman v. Agland Coop, 262 Neb. 215, 631 N.W.2d 862 (2001).

This section provides the requirements for admission of expert opinion testimony. Gittins v. Scholl, 258 Neb. 18, 601 N.W.2d 765 (1999).

The trial court erred in admitting the expert testimony of an economist on the issue of hedonic damages, as the economist did not qualify as an expert pursuant to this section. Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., 248 Neb. 651, 538 N.W.2d 732 (1995).

Trial court erred in permitting police officer to testify as to administration of his various interrogation techniques. State v. Welch, 241 Neb. 699, 490 N.W.2d 216 (1992).

All conflicts in the evidence, expert or lay, and the credibility of the witnesses are for the jury and not the Supreme Court on review. Palmer v. Forney, 230 Neb. 1, 429 N.W.2d 712 (1988).

An allegation that an expert offered false testimony will not be sustained on a mere difference of expert opinion, and where opinion evidence of experts is in conflict, it becomes a question for the jury. Palmer v. Forney, 230 Neb. 1, 429 N.W.2d 712 (1988).

The determination of the truthfulness or accuracy of an expert's conclusions is for the jury. Palmer v. Forney, 230 Neb. 1, 429 N.W.2d 712 (1988).

Under these provisions, it is no longer necessary to have formal training in order to be considered as an expert witness; actual practical experience in the field can also qualify one as an expert in that field. State v. Hoxworth, 218 Neb. 647, 358 N.W.2d 208 (1984).

Under sections 27-702 and 27-705, an expert witness, qualified to be such, may testify in terms of opinion or inference without prior disclosure of underlying facts or data, the weight of such evidence being for the trier of facts. State v. Journey, 201 Neb. 607, 271 N.W.2d 320 (1978).

Possible modification of rule relating to opinion of investigator as to point of impact discussed but not applied retrospectively. Rawlings v. Andersen, 195 Neb. 686, 240 N.W.2d 568 (1976).

A person appointed as guardian ad litem is not necessarily an expert on child welfare. The primary function of a guardian ad litem's report is for the guardian to demonstrate to the judge that the guardian has performed his or her duty. When a guardian ad litem's report does not contain objectionable hearsay, it is an efficient means of communicating the facts that the guardian has learned to the parties and to the judge, if properly admitted into evidence, but a report is not somehow made admissible because it was prepared by a guardian ad litem appointed by a court pursuant to a statute. Hearsay within such reports remains hearsay. Joyce S. v. Frank S., 6 Neb. App. 23, 571 N.W.2d 801 (1997).

In a prosecution for sexual assault of a child, an expert witness may not give testimony which directly or indirectly expresses an opinion that the child is believable, that the child is credible, or that the witness' account has been validated. State v. Doan, 1 Neb. App. 484, 498 N.W.2d 804 (1993).

27-703 Rule 703. Bases of opinion testimony by experts; when revealed; admissibility.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Source: Laws 1975, LB 279, § 51.

1. Scope
2. Miscellaneous

1. Scope

This section contemplates admission of an expert's opinion based on hearsay supplying the facts or data for that opinion, rather than requiring firsthand knowledge as the only source of information for an expert's opinion. State v. Pruett, 263 Neb. 99, 638 N.W.2d 809 (2002).

Under this section, an expert may rely on hearsay facts or data reasonably relied upon by experts in that field. The admission into evidence of an expert's appraisal report was prejudicial error. State Dept. of Roads v. Whitlock, 262 Neb. 615, 634 N.W.2d 480 (2001).

An expert is allowed to base his or her opinion on data obtained before the hearing at which the expert is to testify. Gittins v. Scholl, 258 Neb. 18, 601 N.W.2d 765 (1999).

An expert medical witness may base an opinion on the medical records of another treating doctor when the records are of a type reasonably relied upon by experts in the particular field. The mere fact that an expert relied on medical records, however, does not transform those records from inadmissible hearsay to admissible evidence. Vacanti v. Master Electronics Corp., 245 Neb. 586, 514 N.W.2d 319 (1994).

Experts may rely on hearsay facts or data reasonably relied upon by experts in the field as a basis for their opinion. Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 468 N.W.2d 105 (1991).

An expert may express an opinion in answering a hypothetical question, if the question and the opinion are based upon facts ''perceived by or made known to him.'' Bernadt v. Suburban Air, Inc., 221 Neb. 537, 378 N.W.2d 852 (1985).

Generally, an expert witnesses' firsthand knowledge is a factor which may affect such witness' credibility and weight given to the testimony from such expert, but presence or absence of firsthand knowledge does not, by itself, necessarily establish preference or priority in evidentiary value. Gibson v. City of Lincoln, 221 Neb. 304, 376 N.W.2d 785 (1985).

An expert may base an opinion upon the otherwise inadmissible patient records of another treating doctor since the records

are a type reasonably relied upon by experts in the particular field. Clark v. Clark, 220 Neb. 771, 371 N.W.2d 749 (1985).

Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. State v. Johnson, 215 Neb. 391, 338 N.W.2d 769 (1983).

2. Miscellaneous

In a hearing concerning an evaluation and treatment plan in a commitment proceeding, a report by a doctor did not constitute inadmissible hearsay. State v. Hayden, 233 Neb. 211, 444 N.W.2d 317 (1989).

The mere odor of alcohol, standing alone, is not sufficient to justify either a lay witness or an expert rendering an opinion as to whether one is intoxicated in violation of law. State v. Johnson, 215 Neb. 391, 338 N.W.2d 769 (1983).

Possible modification of rule relating to opinion of investigator as to point of impact discussed but not applied retrospectively. Rawlings v. Andersen, 195 Neb. 686, 240 N.W.2d 568 (1976).

27-704 Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Source: Laws 1975, LB 279, § 52.

An otherwise admissible expert's opinion is not objectionable because the opinion embraces an ultimate issue to be decided by the trier of fact. State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990); State v. Rotella, 196 Neb. 741, 246 N.W.2d 74 (1976).

This section must be read in conjunction with sections 27-702, and 27-401 to 27-403, for this section does not render all expert testimony admissible. Under this section, the test is not whether the expert's opinion or inference invades the province of the jury, but whether the opinion or inference is otherwise admissible and will assist the trier of fact to understand the evidence or determine a fact in issue under section 27-702. State v. Reynolds, 235 Neb. 662, 457 N.W.2d 405 (1990).

Auto manufacturer's expert witness entitled to present illustrative experiment and to testify regarding an ultimate issue of fact. Shover v. General Motors Corp., 198 Neb. 470, 253 N.W.2d 299 (1977).

Possible modification of rule relating to opinion of investigator as to point of impact discussed but not applied retrospectively. Rawlings v. Andersen, 195 Neb. 686, 240 N.W.2d 568 (1976).

27-705 Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Source: Laws 1975, LB 279, § 53; Laws 1982, LB 716, § 2.

1. Testimony admissible
2. Testimony not admissible
3. Miscellaneous

1. Testimony admissible

This section permits admission of an expert opinion without prior disclosure of the underlying facts upon which the expert's opinion is based. An expert's opinion is ordinarily admissible if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. Gittins v. Scholl, 258 Neb. 18, 601 N.W.2d 765 (1999).

Under this section, an expert can be required to disclose on cross-examination the facts or data underlying his or her opinion; thus, an expert may be cross-examined for the purposes of testing and inquiring into the basis for his or her opinion. State v. Hankins, 232 Neb. 608, 441 N.W.2d 854 (1989).

Statute requires expert to disclose underlying facts and data if required by court but does not require court to allow testimony of all such facts and data. Expert may rely on factors not otherwise admissible, but such reliance will not affect their admissibility. Clearwater Corp. v. City of Lincoln, 207 Neb. 750, 301 N.W.2d 328 (1981).

A witness with experience in testing the type of metal from which a surgical instrument was made but not in testing surgical instruments as such, was qualified to give an opinion as an expert witness about the cause of a break in the surgical instrument. Danielsen v. Richards Mfg. Co., Inc., 206 Neb. 676, 294 N.W.2d 858 (1980).

Under this section, an expert witness may render an opinion without first disclosing the underlying data upon which that opinion is based. Northern Nat. Gas Co. v. Beech Aircraft Corp., 202 Neb. 300, 275 N.W.2d 77 (1979).

Under sections 27-702 and 27-705, an expert witness, qualified to be such, may testify in terms of opinion or inference without prior disclosure of underlying facts or data, the weight of such evidence being for the trier of facts. State v. Journey, 201 Neb. 607, 271 N.W.2d 320 (1978).

2. Testimony not admissible

Where cross-examination of an expert witness discloses there is no adequate factual basis for an expert's opinion, such opinion is irrelevant, is inadmissible, and should be stricken from consideration by a jury on proper motion of the party adversely affected by such irrelevant evidence. Sorensen v. Lower Niobrara Nat. Resources Dist., 221 Neb. 180, 376 N.W.2d 539 (1985).

Expert testimony should not be received, or if received should be stricken, if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Fletcher v. State, 216 Neb. 342, 344 N.W.2d 899 (1984).

Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Clearwater Corp. v. City of Lincoln, 202 Neb. 796, 277 N.W.2d 236 (1979).

The valuation testimony of a landowner's expert witness should have been stricken where his testimony as to the value of

the land has no adequate basis. Clearwater Corp. v. City of Lincoln, 202 Neb. 796, 277 N.W.2d 236 (1979).

3. Miscellaneous

An expert is not required to testify to the underlying facts or data before stating his or her opinion. Boyle v. Welsh, 256 Neb. 118, 589 N.W.2d 118 (1999).

A trial court may, either on its own motion or in response to an objection, require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion. Forehead v. Galvin, 220 Neb. 578, 371 N.W.2d 271 (1985).

Although this rule substantially liberalizes the requirements for an expert witness, it does not mean that such a witness is no longer required to disclose the basis of an opinion if asked to do so by the court or on cross-examination, nor is the jury entitled to consider an opinion with no adequate basis. Dawson v. Papio Nat. N.R.D., 206 Neb. 225, 292 N.W.2d 42 (1980).

27-706 Rule 706. Judge appointed experts; procedure; compensation; disclosure of appointment; parties may call experts of own selection.

(1) The judge may on his own motion or on the motion of any party enter an order to show why expert witnesses should not be appointed, and may request the parties to submit nominations. The judge may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of his own selection. An expert witness shall not be appointed by the judge unless he consents to act. A witness so appointed shall be informed of his duties by the judge in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the judge or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(2) Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the judge may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and by the opposing parties in equal portions to the clerk of the court in civil cases at a time fixed by the court and thereafter charged in like manner as other costs.

(3) In the exercise of his discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(4) Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Source: Laws 1975, LB 279, § 54.

ARTICLE 8
HEARSAY

Section

27-801 Rule 801. Definitions; statement, declarant, hearsay; statements which are not hearsay.

The following definitions apply under this article:

(1) A statement is (a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion;

(2) A declarant is a person who makes a statement;

(3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted; and

(4) A statement is not hearsay if:

(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(b) The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity, or (ii) a statement of which he has manifested his adoption or belief in its truth, or (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant within the scope of his agency or employment, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Source: Laws 1975, LB 279, § 55.

Cross References

Electronic recordation of statements in custodial interrogation, admissibility, see sections 29-4501 to 29-4508.

1. Hearsay
2. Not hearsay
3. Miscellaneous

1. Hearsay

Pursuant to subsection (3) of this section, written summaries of the trial testimony of witnesses that contain statements that are offered to prove the truth of the matters asserted therein constitute hearsay and are inadmissible. Westgate Rec. Assn. v. Papio-Missouri River NRD, 250 Neb. 10, 547 N.W.2d 484 (1996).

Report made at request of defendant in regard to condition of waste disposal system was not admissible under subsection (4)(b)(iv) of this section, where person authorized to make report was employed for the purpose of giving technical advice to defendant. Kliment v. National Farms, Inc., 245 Neb. 596, 514 N.W.2d 315 (1994).

A witness' pretrial statement identifying a defendant as the perpetrator of a crime was hearsay pursuant to subsection (3) of this section and, therefore, was inadmissible. State v. Salamon, 241 Neb. 878, 491 N.W.2d 690 (1992).

An insurer's estimate of the cost of repairing damage to a vehicle, without further testimony by the insurer or the person making the repairs, is inadmissible hearsay testimony. State v. Larkin, 222 Neb. 398, 383 N.W.2d 804 (1986).

It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay. State v. Marco, 220 Neb. 96, 368 N.W.2d 470 (1985).

Taped interviews of an accused while under the influence of an inhibition-reducing drug did not relate to the mental state of the accused at the time of the acts charged and were, therefor, hearsay and inadmissible. State v. Rowe, 210 Neb. 419, 315 N.W.2d 250 (1982).

Where testimony of an out-of-court assertion made by someone other than the testifier is offered to prove the truth of the out-of-court assertion, and is partly damaging and partly helpful to the interests of the person who made the out-of-court assertion, it is hearsay and its admission is barred by this section. Belitz v. Suhr, 208 Neb. 280, 303 N.W.2d 284 (1981).

An exculpatory statement made by an accused to police one day after arrest is hearsay and inadmissible at trial before the accused testifies. State v. Pelton, 197 Neb. 412, 249 N.W.2d 484 (1977).

A therapist's testimony that she observed the defendant look astonished when he explained to the therapist he had been charged with sexually abusing a minor and that the defendant denied the abuse to the therapist was inadmissible as hearsay. State v. Egger, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

A prior consistent statement has no value as substantive evidence of the truth of its contents, nor as rehabilitation of the credibility of the witness, if it is made at the time when the witness clearly has a motive to fabricate; such statements are not admissible unless the statement has significant probative force bearing on credibility apart from mere repetition. State v. Anderson, 1 Neb. App. 914, 511 N.W.2d 174 (1993).

2. Not hearsay

Where autopsy photographs are not oral or written assertions, nor are nonverbal conduct of a person, the photographs are demonstrative evidence and are not hearsay. State v. Pruett, 263 Neb. 99, 638 N.W.2d 809 (2002).

Pursuant to subsection (4)(b) of this section, in a suit instituted by the conservator of an estate of a protected person, statements made by the protected person are not hearsay. Ochs v. Makousky, 249 Neb. 960, 547 N.W.2d 136 (1996).

Prior inconsistent sworn statements previously characterized as hearsay available for the purpose of impeachment only are now substantive evidence of fact contained in the statement, provided the requirements prescribed by subsection (4)(a)(i) of this section are satisfied. Behm v. Northwestern Bell Tel. Co., 241 Neb. 838, 491 N.W.2d 334 (1992).

In an action against an estate, a statement made by the decedent constitutes a party admission, under subsection (4)(b) of this section. In re Estate of Krueger, 235 Neb. 518, 455 N.W.2d 809 (1990).

Under subsection (4)(b)(i) of this section, a statement of a party defendant is not hearsay. State v. Boham, 233 Neb. 679, 447 N.W.2d 485 (1989).

Included within the definition of a statement for hearsay purposes are oral or written assertions, but oral assertions contained in remarks section of police complaint report were not hearsay statements because they were not offered to prove the truth of the matter asserted. State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

Testimony by police officers and social workers regarding statements made by declarants was offered to rebut a charge of recent fabrication, and was therefore admissible. In re Interest of D.J. et al., 224 Neb. 226, 397 N.W.2d 616 (1986).

A verbal act, which is an operative fact resulting in legal consequences, is not hearsay within the meaning of Neb. Evid. R. 801(3) and, therefore, is not inadmissible hearsay prohibited by Neb. Evid. R. 802. Alliance Nat. Bank v. State Surety Co., 223 Neb. 403, 390 N.W.2d 487 (1986).

A statement by a party's agent or servant within the scope of agency or employment offered against the party is not hearsay. Bump v. Firemen's Ins. Co., 221 Neb. 678, 380 N.W.2d 268 (1986).

Under this section, evidence of a consistent statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. State v. Gregory, 220 Neb. 778, 371 N.W.2d 754 (1985).

Statement made in presence of allegedly estranged wife, by husband, to the effect that they were back together again, to which wife agreed ''everything is going perfect,'' was admissible as an exception to the hearsay rule. In re Interest of M., 215 Neb. 383, 338 N.W.2d 764 (1983).

Testimony about a conversation offered to corroborate allegations that certain statements were made but not to prove that the statements were true is not hearsay. Gray v. Maxwell, 206 Neb. 385, 293 N.W.2d 90 (1980).

Where a conversation between two parties is introduced to show the nature of the relationship between the parties, and is not offered for the truth of those statements, the conversation is not hearsay. Murdoch v. Murdoch, 200 Neb. 429, 264 N.W.2d 183 (1978).

Pursuant to subsection (4) of this section, the Nebraska rules of evidence provide that a statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. State v. Conn, 12 Neb. App. 635, 685 N.W.2d 357 (2004).

Pursuant to subsection (4)(b)(iv) of this section, a statement need not be one of fact to be admissible under the hearsay exception for statements made against a party's interest made by the party's agent or servant within the scope of his or her agency or employment. Gerken v. Hy-Vee, Inc., 11 Neb. App. 778, 660 N.W.2d 893 (2003).

Where a prior statement is relevant and meets the statutory requirements of Neb. Evid. R. 801(4)(a)(ii), it is not rendered inadmissible because it was made after the impeaching statement. State v. Austin, 1 Neb. App. 716, 510 N.W.2d 375 (1993).

In an oral contract dispute where defendant denied the existence of a contract, plaintiff introduced defendant's petition from another case as an admission against interest, since it applied to the same contract at issue and was signed by defendant's attorney on behalf of the company. Nichols Media Consultants, Inc. v. Ken Morehead Inv. Co., Inc., 1 Neb. App. 220, 491 N.W.2d 368 (1992).

3. Miscellaneous

Where the State accused the defendant of fabricating his version of events to comport with the physical evidence found at the crime scene, the defendant's motive to fabricate could not have arisen until the defendant had knowledge of the substance of that evidence. Any statements consistent with the defendant's version of events and made before the defendant learned of this evidence were admissible as prior consistent statements under subsection (4)(a)(ii) of this section. State v. Neal, 265 Neb. 693, 658 N.W.2d 694 (2003).

Pursuant to subsection (4)(b)(v) of this section, before the trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence. State v. Myers, 258 Neb. 300, 603 N.W.2d 378 (1999).

Pursuant to subsection (4) of this section, an attempt at impeachment cannot be equated with charges of recent fabrication, improper influence, or improper motive. State v. Lotter, 255 Neb. 456, 586 N.W.2d 591 (1998).

Pursuant to subsection (4)(a) of this section, attempts at impeachment cannot be equated to charges of recent fabrication. State v. Buechler, 253 Neb. 727, 572 N.W.2d 65 (1998).

The prima facie proof of a conspiracy requisite to the introduction of evidence under subsection (4) of this section requires only enough evidence to take the question to the jury. State v. Hansen, 252 Neb. 489, 562 N.W.2d 840 (1997).

Pursuant to subsection (4)(a)(ii) of this section, the introduction of a declarant's consistent out-of-court statement to rebut charges of improper influence or recent fabrication is permitted only when the consistent statement was made prior to the alleged act of improper influence or recent fabrication. State v. Morris, 251 Neb. 23, 554 N.W.2d 627 (1996).

A litigant's written opinion about the value of real property made for the purpose of a property tax protest is not relevant to its market value for the purpose of valuing an easement later taken by the State. Holman v. Papio-Missouri River Nat. Resources Dist., 246 Neb. 787, 523 N.W.2d 510 (1994).

Since a prior consistent statement may be accorded substantive use only if it is used to rebut an express or implied charge, impeachment of the witness is a precondition. State v. Smith, 241 Neb. 311, 488 N.W.2d 33 (1992).

The victim is not a ''party'' to a criminal case for the purposes of impeachment by a prior inconsistent statement. State v. Antillon, 229 Neb. 348, 426 N.W.2d 533 (1988).

As a result of Rule 801(4)(a) of the Nebraska Evidence Rules, what was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement provided the requirements prescribed by Rule 801(4)(a) are satisfied. A proceeding contemplated by Rule 801(4)(a) is a formal action before a judicial tribunal, as well as an action before a quasi-judicial officer or board, invoked to enforce or protect a right. State v. Johnson, 220 Neb. 392, 370 N.W.2d 136 (1985).

If an attack on the credibility of a witness through use of an inconsistent statement is accompanied by or interpretable as a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends strongly to disprove that the testimony was the result of contrivance. State v. Johnson, 220 Neb. 392, 370 N.W.2d 136 (1985).

A prior inconsistent statement of a witness was admissible as substantive evidence when the statement was sworn testimony at a prior preliminary hearing. State v. Jackson, 217 Neb. 363, 348 N.W.2d 876 (1984).

A prior consistent statement is not admissible as substantive corroborative evidence unless it fits the exception of section 27-804(4)(a)(ii), R.R.S.1943. State v. Packett, 206 Neb. 548, 294 N.W.2d 605 (1980).

Circumstances under which prior inconsistent statements admissible explained. State v. Packett, 206 Neb. 548, 294 N.W.2d 605 (1980).

Conviction for possession of marijuana with intent to distribute reversed where hearsay testimony of an alleged coconspirator improperly received. State v. Bobo, 198 Neb. 551, 253 N.W.2d 857 (1977).

This section makes prior inconsistent statements of a witness admissible as substantive evidence only if they were made under oath. State v. Isley, 195 Neb. 539, 239 N.W.2d 262 (1976).

27-802 Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by these rules, by other rules adopted by the statutes of the State of Nebraska, or by the discovery rules of the Supreme Court.

Source: Laws 1975, LB 279, § 56; Laws 2000, LB 921, § 29.

With certain exceptions, hearsay evidence is not admissible. In re Interest of Constance G., 254 Neb. 96, 575 N.W.2d 133 (1998).

Medical reports produced out of court are hearsay. Vacanti v. Master Electronics Corp., 245 Neb. 586, 514 N.W.2d 319 (1994).

An insurer's estimate of the cost of repairing damage to a vehicle, without further testimony by the insurer or the repair person, is inadmissible hearsay testimony. State v. Larkin, 222 Neb. 398, 383 N.W.2d 804 (1986).

Facts of the case held to be sufficient to place young child's statement as within the hearsay exceptions. State v. Roy, 214 Neb. 204, 333 N.W.2d 398 (1983).

Hearsay evidence is not admissible except as otherwise provided by the statutes of the state. State v. Williams, 203 Neb. 649, 279 N.W.2d 847 (1979).

27-803 Rule 803. Hearsay exceptions; enumerated; availability of declarant immaterial.

Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

(2) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will;

(3) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(4) A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his or her memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party;

(5) A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events, or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight;

(6) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (5) of this section to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate a lack of trustworthiness;

(7) Upon reasonable notice to the opposing party prior to trial, records, reports, statements, or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law, unless the sources of information or the method or circumstances of the investigation are shown by the opposing party to indicate a lack of trustworthiness;

(8) Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(9) To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with section 27-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation or entry;

(10) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

(11) Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter;

(12) Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like;

(13) The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office;

(14) A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

(15) Statements in a document in existence thirty years or more whose authenticity is established;

(16) Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations;

(17) Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits;

(18) Reputation among members of his or her family by blood, adoption, or marriage, or among his or her associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his or her personal or family history;

(19) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located;

(20) Reputation of a person's character among his or her associates or in the community;

(21) Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against a person other than the accused. The pendency of an appeal may be shown but does not affect admissibility;

(22) Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation; and

(23) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.

Source: Laws 1975, LB 279, § 57; Laws 1999, LB 64, § 1.

1. Excited utterance
2. State of mind
3. Business record
4. Medical diagnosis
5. Residual hearsay
6. Miscellaneous

1. Excited utterance

Where victim's statement appeared to be result of pressure exerted on her, necessary element of spontaneity was absent and statement was not admissible as excited utterance. State v. Dyer, 245 Neb. 385, 513 N.W.2d 316 (1994).

For a statement to qualify as an excited utterance under subsection (1) of this section, (1) there must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. State v. Tlamka, 244 Neb. 670, 508 N.W.2d 846 (1993); State v. Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990); State v. Lee, 216 Neb. 63, 341 N.W.2d 600 (1983).

For hearsay to be admissible as an excited utterance under subsection (1) of this section, statements need not be made contemporaneously with the exciting cause but may be made subsequent to it, provided there has not been time for the exciting influence to lose its sway and be dissipated. The key requirement is spontaneity, a showing that the statement was made without time for conscious reflection. The true test is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue. State v. Tlamka, 244 Neb. 670, 508 N.W.2d 846 (1993).

A statement made by victim exhibiting observable manifestations of stress qualified as an excited utterance although elapsed time between stressful event and statement was not established. The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. State v. Jacob, 242 Neb. 176, 494 N.W.2d 109 (1993).

Because there was no showing that minor's statements were made while she was under the stress of a startling event, the trial court abused its discretion in admitting testimony of the babysitter as to what the minor told her. In re Interest of D.P.Y. and J.L.Y., 239 Neb. 647, 477 N.W.2d 573 (1991).

Statements made to police officer at scene of a crime resulting from young woman encouraging the speaker to cooperate did not fall within excited utterance exception to the hearsay rule. State v. Martin, 239 Neb. 339, 476 N.W.2d 536 (1991).

Under subsection (1) of this section, spontaneity is a key requirement for the excited utterance exception and is demonstrated by showing the statement was made without time for conscious reflection. State v. Sullivan, 236 Neb. 344, 461 N.W.2d 84 (1990).

A statement by a 4-year-old witness regarding child abuse and murder made in response to police questioning nearly 2 days after the events in question constitutes an excited utterance. The statement is also admissible under the residual hearsay exception. Under the excited utterance hearsay exception, a declarant's nervous state is relevant to the issue of whether the statement was made by the declarant while under the stress of the event. Under this exception, the crucial consideration is whether there has been time for conscious reflection. State v. Plant, 236 Neb. 317, 461 N.W.2d 253 (1990).

The determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. In the case of small children, generally, the stress of a sexual assault is present for some time after an assault occurs, and the key requirement for admissibility is spontaneity. In re Interest of R.A. and V.A., 225 Neb. 157, 403 N.W.2d 357 (1987).

A statement made by a young boy to his mother shortly after a sexual assault is an excited utterance under subsection (1) of this section and thus an exception to the bar against hearsay. State v. Gonzales, 219 Neb. 846, 366 N.W.2d 775 (1985).

A statement to police officers made by a 7-year-old girl shortly after she was sexually assaulted and relating to the sexual assault, qualifies as an excited utterance. State v. Red Feather, 205 Neb. 734, 289 N.W.2d 768 (1980).

A spontaneous statement made at the time of the event by one who has personal knowledge of the subject matter of the statement may be admissible under this section if the statutory conditions precedent to admission are met. State v. Reed, 201 Neb. 800, 272 N.W.2d 759 (1978).

Pursuant to subsection (1) of this section, statements made by a victim of sexual assault to a neighbor after the victim walked several blocks to the neighbor's house and was visibly shaken and scared were admissible under this section. State v. Sanchez-Lahora, 9 Neb. App. 621, 616 N.W.2d 810 (2000).

2. State of mind

Pursuant to subsection (2) of this section, the state-of-mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant only if the declarant's then existing state of mind is a material issue in the case. State v. Hansen, 252 Neb. 489, 562 N.W.2d 840 (1997).

Victim's extrajudicial declarations of fear of the defendant are admissible under the state of mind exception to the hearsay rule only if there is a manifest need for such evidence and it is relevant to a material issue in the case. The state of mind exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant if the state of mind of the declarant at the time the statement was made is an issue in the case. State v. Drinkwalter, 242 Neb. 40, 493 N.W.2d 319 (1992).

As specifically provided under subsection (2) of this section, hearsay statements of memory offered to prove the fact remembered are not admissible under the state-of-mind exception. State v. Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990).

A declaration offered to show the defendant's state of mind which is too remote in point of time should be excluded as lacking probative value. State v. Harrison, 221 Neb. 521, 378 N.W.2d 199 (1985).

Hearsay statements made immediately prior to an incident which resulted in the death of the declarant are admissible as a statement of declarant's then existing state of mind and emotion to prove declarant's intent, plan, motive, or conduct. State v. Smith, 202 Neb. 501, 276 N.W.2d 104 (1979).

Where a statement is made indicating an intention to pay rent, the statement qualifies as a declaration of state of mind and is an exception to the hearsay rule. Barnes v. Milligan, 200 Neb. 450, 264 N.W.2d 186 (1978).

Statement of intent related to the destination and purpose of a journey admissible only if made at or near time of departure. Fite v. Ammco Tools, Inc., 199 Neb. 353, 258 N.W.2d 922 (1977).

Offered evidence of an utterance by accused suggesting his state of mind or emotion, held not admissible as exception to hearsay rule where such state of mind was not a material fact. State v. Pelton, 197 Neb. 412, 249 N.W.2d 484 (1977).

3. Business record

For admissibility of a document as a business record, first, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as part of a regular business practice at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness. State v. Wright, 231 Neb. 410, 436 N.W.2d 205 (1989); Chalupa v. Hartford Fire Ins. Co., 217 Neb. 662, 350 N.W.2d 541 (1984).

Foundational requirements for admitting a document under the business records exception to the hearsay rule are set out in this case. State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

A computer printout, disregarding pencil notations put on the document after the record was prepared, was admissible in evidence as a business record. Richards v. Arthaloney, 216 Neb. 11, 342 N.W.2d 642 (1983).

Because there was sufficient foundational testimony, admission of bank records under this section did not violate Neb.

Const., Art. I, § 11. To admit bank records under this section, testimony of each individual teller or processor who handled the records is not necessary, but records may be admitted through foundational testimony of knowledgeable witnesses. State v. Spaulding, 211 Neb. 575, 319 N.W.2d 449 (1982).

The supervisor of all customer billing records was an appropriate witness with regard to explaining the compilation of data and conditions of how the billings were prepared, and his testimony was admissible as a qualified lay witness. City of Lincoln v. Bud Moore, Inc., 210 Neb. 647, 316 N.W.2d 590 (1982).

Subsection (5) of this section does not require a party offering business records to prove that the recordkeeping system is standard within the industry. State v. Ford, 1 Neb. App. 575, 501 N.W.2d 318 (1993).

4. Medical diagnosis

Statements of a foster parent were properly admissible under subsection (3), where the evidence demonstrated that the statements were made to assist in the provision of medical diagnosis or treatment, that the statements were reasonably pertinent to such diagnosis and treatment, and that a doctor would reasonably rely on such statements. In re Interest of B.R. et al., 270 Neb. 685, 708 N.W.2d 586 (2005).

Pursuant to subsection (17) of this section, duly admitted learned treatises do not independently establish the standard of care in a medical malpractice action. They are merely evidence of the standard of care to the extent relied upon by the expert witness in direct examination, or called to the attention of the expert witness upon cross-examination. Breeden v. Anesthesia West, 265 Neb. 356, 656 N.W.2d 913 (2003).

As a general rule, the hearsay exception found in subsection (3) of this section applies to persons seeking medical assistance from persons who are expected to provide some form of health care. The rationale for the hearsay exception found in subsection (3) of this section is that reliability is assured by the likelihood that the patient believes that the effectiveness of the treatment will depend on the accuracy of the information provided. Vacanti v. Master Electronics Corp., 245 Neb. 586, 514 N.W.2d 319 (1994).

Statement made by victim to medical technicians which did not relate to diagnosis or treatment was not admissible under subsection (3) of this section. State v. Dyer, 245 Neb. 385, 513 N.W.2d 316 (1994).

Child's statements relating to the source of sexual abuse are admissible as an exception to the hearsay rule when it is clear that the comments relate to a medical condition and are offered in the context of a medical examination and diagnosis. State v. Roenfeldt, 241 Neb. 30, 486 N.W.2d 197 (1992).

Exculpatory statements made by an accused to a psychiatrist for diagnosis of accused's mental condition, insofar as they recite the accused's actions in relation to a crime, are not competent evidence of the truth of the statements. Statements are admissible only to show cause of mental condition and as are pertinent to diagnosis or treatment of mental condition. State v. Hardin, 212 Neb. 774, 326 N.W.2d 38 (1982).

Statements made to an emergency room physician in the course of questioning to ascertain the nature and cause of injury are admissible under section 27-803(3). Where those statements were made by a 7-year-old girl, approximately an hour after she had been sexually assaulted, and while she was still upset, anxious, and crying, and the statements related to the assault, they are also admissible as excited utterances. State v. Red Feather, 205 Neb. 734, 289 N.W.2d 768 (1980).

A therapist's testimony that she observed the defendant look astonished when he explained to the therapist he had been charged with sexually abusing a minor and that the defendant denied the abuse to the therapist did not qualify as an exception for medical diagnosis under subsection (3) of this section. State v. Egger, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

Where a treating physician testifying for the State as an expert witness in the prosecution of a sexual assault has restated to the jury the victim's version of the alleged assault, and where the victim is capable of telling the jury her version of the alleged assault, the State cannot use subsection (3) of this section as a means of allowing a psychiatrist testifying as a subsequent expert witness to once again restate to the jury the victim's version of the alleged assault. State v. White, 2 Neb. App. 106, 507 N.W.2d 654 (1993).

Child sexual abuse victim's out-of-court statements, as restated at trial by emergency room physician who had treated the victim, identifying defendant as her abuser were admissible because the statements were made in the course of medical treatment for purposes of diagnosis. State v. Max, 1 Neb. App. 257, 492 N.W.2d 887 (1992).

5. Residual hearsay

In determining whether a statement is admissible under the residual exception to the hearsay rule, a court considers five factors: (1) a statement's trustworthiness, (2) the materiality of the statement, (3) the probative importance of the statement, (4) the interests of justice, and (5) whether notice was given to an opponent. In order for a statement to be admitted under the residual exception, the statement's proponent must notify the adverse party of his or her intent to offer the statement, as well as the particulars of the statement, sufficiently in advance of trial, not during trial, to provide the adverse party with a fair opportunity to prepare to meet it. State v. Castor, 262 Neb. 423, 632 N.W.2d 298 (2001).

Declarant's statement was inadmissible under subsection (22) of this section where record failed to establish declarant had personal knowledge regarding the subject matter of her testimony. State v. Jacob, 242 Neb. 176, 494 N.W.2d 109 (1993).

The residual hearsay exception is to be used rarely and only in exceptional circumstances. In connection with the residual hearsay exception, particularized guarantees of trustworthiness must be shown from the totality of the circumstances, which circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. State v. Plant, 236 Neb. 317, 461 N.W.2d 253 (1990).

Under subsection (22) of this section, hearsay testimony may be admissible under certain conditions, provided adequate notice is given. The question of trustworthiness under subsection (22) of this section does not involve whether the witness is trustworthy, but, rather, involves whether the statement being reported by the witness is trustworthy. Although there is a distinction to be made between trustworthiness and credibility, the tests which are applied with regard to reviewing credibility must of necessity likewise apply with regard to trustworthiness. In re Estate of Severns, 217 Neb. 803, 352 N.W.2d 865 (1984).

6. Miscellaneous

Pursuant to subsection (23) of this section, reports may not be received in evidence for the purpose of a termination proceeding, nor relied upon by the court, unless they have been admitted without objection or brought within the provisions of this section as an exception to the hearsay rule. In re Interest of Ty M. & Devon M., 265 Neb. 150, 655 N.W.2d 672 (2003).

Standard medical texts and other authorities may be used for the purpose of impeaching, contradicting, or discrediting a witness through cross-examination or during rebuttal testimony; however, such cannot be used as independent evidence of the opinions and theories advanced by the parties. Stang-Starr v. Byington, 248 Neb. 103, 532 N.W.2d 26 (1995).

Under subsection (7) of this section, admission into evidence of ''records, reports, statements or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law'' does not apply to investigative reports prepared by, or orders and determinations of probable cause issued by, the Nebraska Equal Opportunity Commission. Humphrey v. Nebraska Public Power Dist., 243 Neb. 872, 503 N.W.2d 211 (1993).

Facts of the case held to be sufficient to place young child's statement as within the hearsay exceptions. State v. Roy, 214 Neb. 204, 333 N.W.2d 398 (1983).

Taped interviews of an accused by a psychiatrist while the accused was under the influence of an inhibition-reducing drug

in which the accused described observations of the crime charged did not fall within this exception. State v. Rowe, 210 Neb. 419, 315 N.W.2d 250 (1982).

Somewhat similar provision in prior section construed. Laux v. Robinson, 195 Neb. 601, 239 N.W.2d 786 (1976).

Under the circumstances surrounding alleged statements made by the declarant while sleeping, the statements, as testified to by the declarant's sibling, were not excited utterances admissible under subsection (1) of this section and did not contain sufficient indicia of reliability to be admissible under subsection (23) of this section. In re Interest of Jamie P., 12 Neb. App. 261, 670 N.W.2d 814 (2003).

Pursuant to subsection (17) of this section, a videotape may be admissible pursuant to the learned treatise exception to the hearsay rule provided that sufficient foundation is laid for its admission. Hill v. Hill, 10 Neb. App. 570, 634 N.W.2d 811 (2001).

Pursuant to the language of Nebraska's learned treatise exception to the hearsay rule, a learned treatise is only admissible in conjunction with testimony by an expert witness. Hill v. Hill, 10 Neb. App. 570, 634 N.W.2d 811 (2001).

The proper foundation for admitting evidence as past recollection recorded under subsection (4) of this section should consist of a showing that (1) the witness has no present recollection of the facts, (2) the witness' memory is not refreshed upon reference to the document, (3) the document is an original memorandum made or adopted by the witness from personal observation, (4) the document was prepared or adopted by the witness contemporaneously with the event and was an accurate recording of the occurrence, and (5) the substance of the proffered writing is otherwise admissible. State v. Cervantes, 3 Neb. App. 95, 523 N.W.2d 532 (1994).

27-804 Rule 804. Hearsay exceptions; enumerated; declarant unavailable; unavailability, defined.

(1) Unavailability as a witness includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or

(b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or

(c) Testifies to lack of memory of the subject matter of his statement; or

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(a) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered;

(b) A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death;

(c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement;

(d)(i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(e) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Source: Laws 1975, LB 279, § 58.

1. Unavailability determination
2. Notice of unavailability
3. Admissibility of statements
4. Residual hearsay
5. Miscellaneous

1. Unavailability determination

Under subsection (1)(b) of this section, where it was clear from the record that a witness was intent on continuing to refuse the court's repeated requests to testify and that there was no sanction available that would compel the witness to testify because the witness was already serving a lengthy sentence, it was not a judicial abuse of discretion to conclude that the witness was unavailable, even though the court's instruction to testify was not couched in the specific language of an ''order''. State v. McHenry, 250 Neb. 614, 550 N.W.2d 364 (1996).

Child victims of abuse may be unavailable for purposes of the residual hearsay exception due to the trauma resulting from the abuse. State v. Plant, 236 Neb. 317, 461 N.W.2d 253 (1990).

The party seeking to introduce hearsay evidence pursuant to this section's exception must show that diligence was used to locate the witness and that the witness is unavailable. It is within the sound discretion of the trial court to determine whether the proponent has met this burden. State v. Jordan, 229 Neb. 563, 427 N.W.2d 796 (1988).

A witness is not unavailable under subsection (1)(e) of this section unless the prosecutorial authorities have made a good faith effort to obtain the witness' presence at trial. State v. Carter, 226 Neb. 636, 413 N.W.2d 901 (1987).

The requirement of unavailability for the admission of hearsay testimony under this section will not be regarded as satisfied if the proponent of the evidence has caused the unavailability. State v. Wiley, 223 Neb. 835, 394 N.W.2d 641 (1986).

A prerequisite to the admission of hearsay statements into evidence under these exceptions to the rule against hearsay is that the proponent of the statement must make a showing that the declarant is unavailable as a witness. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown. State v. Bothwell, 218 Neb. 395, 355 N.W.2d 506 (1984).

Testimony given by a witness at a prior trial is not to be considered hearsay if the declarant is unavailable as a witness. State v. Evans, 212 Neb. 476, 323 N.W.2d 106 (1982).

Pursuant to subsection (2)(a) of this section, the occurrence witness who lived in another state, and thus outside the subpoena power of the court, was unavailable to testify for the purposes of this section. The definition of ''unavailability'' in Neb. Ct. R. of Discovery 32(a)(3)(B) does not create different conditions for availability than subsection (1)(e) of this section. Burke v. Harman, 6 Neb. App. 309, 574 N.W.2d 156 (1998).

2. Notice of unavailability

Subsection (2)(e) of this section is not a firmly rooted hearsay exception for Confrontation Clause purposes. State v. Sheets, 260 Neb. 325, 618 N.W.2d 117 (2000).

It is not enough that the adverse party is aware of an unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his intention to use the statement in order to take advantage of hearsay exception in subsection (2)(e) of this section. Drew v. Walkup, 240 Neb. 946, 486 N.W.2d 187 (1992).

Under subsection (2)(e) of this section, it is not enough that the adverse party is aware of the unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his intentions to use the statement at trial. State v. Boppre, 234 Neb. 922, 453 N.W.2d 406 (1990).

Section 27-804(2)(e), R.R.S.1943, requires actual notice of the intent to use the out-of-court statement. State v. Leisy, 207 Neb. 118, 295 N.W.2d 715 (1980).

3. Admissibility of statements

Subsection (2)(c) of this section uses the term ''statement'' in a narrow sense to refer to a specific declaration or remark incriminating the speaker and not more broadly to refer to the entire narrative portion of the speaker's confession. To the extent subsection (2)(c) of this section encompasses inherently

unreliable statements, it is not a firmly rooted hearsay exception for purposes of Confrontation Clause analysis. State v. Sheets, 260 Neb. 325, 618 N.W.2d 117 (2000).

Testimony falling within the parameters of subsection (2)(a) of this section is admissible because the opportunity to cross-examine, the administering of an oath, the solemnity of the occasion, and the accuracy of modern methods of recording testimony all combine to give former testimony a high degree of reliability. Nickell v. Russell, 260 Neb. 1, 614 N.W.2d 349 (2000).

Subsection (2)(a) of this section is a firmly rooted hearsay exception, and therefore testimony admitted thereunder does not violate the Confrontation Clause of the U.S. or Nebraska Constitution. State v. Carter, 255 Neb. 591, 586 N.W.2d 818 (1998).

An appellate court will affirm the trial court's ruling on whether evidence is admissible under subsection (2)(e) of this section unless the trial court has abused its discretion. State v. Jacob, 253 Neb. 950, 574 N.W.2d 117 (1998).

Subsection (2)(a) of this section is a firmly rooted hearsay exception. State v. Allen, 252 Neb. 187, 560 N.W.2d 829 (1997).

Per subsection (2)(a) of this section, the exception to the hearsay rule does not exclude depositions taken in compliance with law if the declarant is unavailable as a witness. The unavailability requirement of this statute must be read into Neb. Ct. R. of Discovery 32 (rev. 1996) so the Nebraska discovery rules do not create an additional exception to the hearsay rule. Menkens v. Finley, 251 Neb. 84, 555 N.W.2d 47 (1996).

In determining whether a statement is admissible under this section, a court considers five factors: (1) the statement's trustworthiness, (2) materiality of the statement, (3) probative importance of the statement, (4) interests of justice, and (5) whether notice of the statement's prospective use was given to the opponent. Under this section, a court must make a preliminary inquiry to determine whether a declarant had personal knowledge regarding the subject matter of the statement that is sought to be introduced pursuant to the residual exception to the hearsay rule. State v. McBride, 250 Neb. 636, 550 N.W.2d 659 (1996).

To be admissible as a statement against the declarant's penal interest, pursuant to subsection (2)(c) of this section, the proponent of the evidence must establish that the declarant is unavailable, and that the statement is against the declarant's penal interests. If the statement implicates a third party in the alleged crime, the proponent must also prove that the statement was trustworthy. State v. Hughes, 244 Neb. 810, 510 N.W.2d 33 (1993).

In determining whether evidence is admissible under subsection (2)(e) of this section, the residual exception to the hearsay rule, a court considers (1) a statement's trustworthiness, (2) the probative importance of the statement, (3) the materiality of the statement, (4) the interests of justice, and (5) whether notice of the statement's prospective use was given to opponent. An appellate court will affirm the trial court's ruling unless the trial court has abused its discretion. State v. Toney, 243 Neb. 237, 498 N.W.2d 544 (1993).

The essential element to the admission of a statement as a dying declaration pursuant to subsection (2)(b) of this section is that declarant be conscious of approaching death at the time of the making of the statement; although this is best shown by express communication of declarant to that effect, circumstances surrounding declarant's death may be sufficient. Declarant's statement was inadmissible under subsection (2)(e) of this section where record failed to establish declarant had personal knowledge regarding the subject matter of her testimony. State v. Jacob, 242 Neb. 176, 494 N.W.2d 109 (1993).

A wife's statement is not against her pecuniary interest because the statement might tend to incriminate her husband, exposing him to criminal prosecution and possible incarceration, resulting in loss of support previously provided by her husband. State v. Johnson, 236 Neb. 831, 464 N.W.2d 167 (1991).

A statement by a 4-year-old witness regarding child abuse and murder made in response to police questioning nearly 2 days after the events in question constitutes an excited utterance. The statement is also admissible under the residual hearsay exception. State v. Plant, 236 Neb. 317, 461 N.W.2d 253 (1990).

Statements made by decedent to her attorney in course of professional consultation held admissible under this section but not a statement made by decedent to a friend which had no equivalent guarantees of trustworthiness. State v. Beam, 206 Neb. 248, 292 N.W.2d 302 (1980).

The contents of a conversation that included what may have been a general statement of regret was not admissible under the exception to the hearsay rule set out in section 27-804(2)(c), R.R.S.1943. State v. Matthews, 205 Neb. 709, 289 N.W.2d 542 (1980).

4. Residual hearsay

The court must make a preliminary inquiry to determine whether a declarant has personal knowledge regarding the subject matter of the statement that is sought to be introduced pursuant to subsection (2)(e) of this section, the residual exception to the hearsay rule. State v. Toney, 243 Neb. 237, 498 N.W.2d 544 (1993).

The residual hearsay exception is to be used rarely and only in exceptional circumstances. In connection with the residual hearsay exception, particularized guarantees of trustworthiness must be shown from the totality of the circumstances, which circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. State v. Plant, 236 Neb. 317, 461 N.W.2d 253 (1990).

It is the duty of the proponent of a will, in the first instance, to make a prima facie case as to testamentary capacity; it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. Under the residual hearsay exception, the proponent of the evidence has the burden of establishing each of the conditions of admissibility imposed by the rule. In re Estate of Schoch, 209 Neb. 812, 311 N.W.2d 903 (1981).

5. Miscellaneous

A defendant's due process rights are protected by the language of this section. State v. Lotter, 266 Neb. 245, 664 N.W.2d 892 (2003).

In determining whether there are corroborating circumstances which clearly indicate the trustworthiness of a statement tending to expose the declarant to criminal liability and offered to exculpate the accused, a court should examine all circumstances surrounding the making of the statement, as well as any other evidence which either supports or undermines its veracity. State v. Lotter, 266 Neb. 245, 664 N.W.2d 892 (2003).

In determining whether ''other reasonable means'' are available to secure the appearance of a witness so as to admit or not admit the deposition testimony of the witness, the court may consider the stakes in the litigation, the relative resources of the parties, the importance of the declarant's statement in the suit, the foreseeability of the need for the statement, the relative expense encountered in securing the declarant's trial or deposition testimony, the financial hardship on the proponent to secure the witness' personal appearance, and the hostility or animosity of the witness whose testimony is sought. Maresh v. State, 241 Neb. 496, 489 N.W.2d 298 (1992).

The opportunity to cross-examine was not unduly denied because questions the deposition witness refused to answer were about collateral matters and did not relate to the subject of the witness' direct examination. Burke v. Harman, 6 Neb. App. 309, 574 N.W.2d 156 (1998).

27-805 Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Source: Laws 1975, LB 279, § 59.

Police complaint report admitted into evidence was not hearsay within hearsay because each part of the combined statements conformed with an exception to the hearsay rule. State v. Wilson, 225 Neb. 466, 406 N.W.2d 123 (1987).

27-806 Rule 806. Attacking and supporting credibility of declarant; opportunity to explain; examine declarant.

When a hearsay statement or a statement defined in subdivision (4)(b)(iii), (iv), or (v) of section 27-801 has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Source: Laws 1975, LB 279, § 60.

ARTICLE 9

AUTHENTICATION AND IDENTIFICATION

Section

27-901 Rule 901. Requirement of authentication or identification; general provision; illustrations and examples; enumerated.

(1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(a) Testimony that a matter is what it is claimed to be;

(b) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation;

(c) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated;

(d) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

(e) Identification of a voice, whether heard first-hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

(f) Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or

business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

(g) Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept;

(h) Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence thirty years or more at the time it is offered;

(i) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; and

(j) Any method of authentication or identification provided by act of the Legislature or by other rules adopted by the Supreme Court which are not in conflict with laws governing such matters.

Source: Laws 1975, LB 279, § 61.

1. Authentication
2. Miscellaneous

1. Authentication

Even if direct, eyewitness testimony is absent, the contents of photographic evidence itself, together with such circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate the evidence sufficiently to justify its admission pursuant to this section. State v. Anglemyer, 269 Neb. 237, 691 N.W.2d 153 (2005).

This section incorporates two traditional models of authenticating photographic evidence: the illustrative or ''pictorial testimony'' model, and the ''silent witness'' model. Under the illustrative model, a photograph, motion picture, videotape, or other recording is viewed merely as a graphic portrayal of oral testimony and is admissible only when a witness testifies that it is a correct and accurate representation of facts that the witness personally observed. Under the ''silent witness'' theory of admission, photographic evidence may draw its verification not from any witness who has actually viewed the scene portrayed, but from other evidence which supports the reliability of the photographic product. State v. Anglemyer, 269 Neb. 237, 691 N.W.2d 153 (2005).

In a trial for attempted murder, assault, and other crimes, the defendant's cousin was qualified to identify the defendant's handwriting in a notebook with information about types of guns where the cousin was familiar with the defendant's handwriting from the years they were friends and went to school together. State v. Aguilar, 268 Neb. 411, 683 N.W.2d 349 (2004).

A husband's familiarity with his wife's handwriting, acquired during the course of the marriage, satisfies the foundational requirements of this section. State v. Tyma, 264 Neb. 712, 651 N.W.2d 582 (2002).

Note found on defendant at time of arrest, which defendant identifies as ''a note I wrote,'' may be admitted under subsection (2) of this section, which provides that an item of evidence may be authenticated or identified by testimony that a matter is what it is claimed to be. State v. Patman, 227 Neb. 206, 416 N.W.2d 582 (1987).

A document is authenticated when evidence is presented that is sufficient to support a finding that the matter in question is what its proponent claims. State v. Taylor, 12 Neb. App. 58, 666 N.W.2d 753 (2003).

Requirements of ''authentication'' are governed by this section. A document is authenticated when evidence is presented that is sufficient to support a finding that the matter in question is what its proponent claims. State v. Miller, 11 Neb. App. 404, 651 N.W.2d 594 (2002).

2. Miscellaneous

The plain language of this section is directory rather than mandatory. State v. Anglemyer, 269 Neb. 237, 691 N.W.2d 153 (2005).

In order to establish evidence's sufficient probative force to prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment. State v. Linn, 248 Neb. 809, 539 N.W.2d 435 (1995).

The purpose of this section is to require that evidence must be sufficient to support a finding that the matter in question is what its proponent claims. Making certain that the defendants uttered the exact words used in the assaults was not critical in ensuring that the voices the victim heard when the assaults took place were those of the defendants. State v. Ferris, 212 Neb. 835, 326 N.W.2d 185 (1982).

27-902 Rule 902. Self-authentication; when.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone or the Trust Territory of the Pacific Islands, or of a

political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution;

(2) A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in subdivision (1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

(3) A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (a) of the executing or attesting person, or (b) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the judge may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification;

(4) A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with subdivision (1), (2) or (3) of this section or complying with any Act of Congress or the Legislature or rule adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters;

(5) Books, pamphlets, or other publications purporting to be issued by public authority;

(6) Printed materials purporting to be newspapers or periodicals;

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin;

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

(9) Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law; or

(10) Any signature, document, or other matter declared by Act of Congress and the laws of the State of Nebraska to be presumptively or prima facie genuine or authentic.

Source: Laws 1975, LB 279, § 62.

Cross References

Ordinances of city of the primary class, see section 15-402.

Copies of judicial records related to a defendant's conviction and sentencing in another state that are certified by a deputy clerk for the clerk of the district court in that state as a true and correct copy of the original and impressed with the court's official seal are self-authenticating and do not require extrinsic evidence of authenticity for admission under this section. State v. Hall, 270 Neb. 669, 708 N.W.2d 209 (2005).

No extrinsic authentication is required for admissibility of a copy of an official record certified by its authorized custodian, a court reporter, who has complied with the rules of the Supreme Court as to its certification. State v. Benzel, 220 Neb. 466, 370 N.W.2d 501 (1985).

The adoption of this section repealed section 25-1286 and therefor governs the admissibility of a court decree from another state. State v. Munn, 212 Neb. 265, 322 N.W.2d 429 (1982).

27-903 Rule 903. Subscribing witness testimony; when necessary.

The testimony of a subscribing witness in not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Source: Laws 1975, LB 279, § 63.

ARTICLE 10

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Section

27-1001 Rule 1001. Definitions; writings and recordings, photographs, original, and duplicate.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation;

(2) Photographs include still photographs, X-ray films, video tapes, and motion pictures;

(3) An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original; and

(4) A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Source: Laws 1975, LB 279, § 64.

A bank photocopy of a processed check qualifies as a duplicate under subsection (4) of this section. Equitable Life v. Starr, 241 Neb. 609, 489 N.W.2d 857 (1992).

27-1002 Rule 1002. Requirement of original; exception.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in

these rules or by Act of Congress or of the Legislature of the State of Nebraska or by other rules adopted by the Supreme Court of Nebraska.

Source: Laws 1975, LB 279, § 65.

This ''original writings'' rule, which is sometimes inaccurately referred to as the ''best evidence'' rule, applies only if the party offering the evidence is seeking to prove the contents of a writing, recording, or photograph. State v. Decker, 261 Neb. 382, 622 N.W.2d 903 (2001).

The best evidence rule, which might more properly be called the ''original writing'' rule or, more correctly, the rule for ''production of an original writing or document'', is in reality a rule of preference for the production of the original of a writing, recording, or photograph when the contents of the item are sought to be proved. The original writing or ''original document'' rule does not set up a hierarchy for admissibility of evidence, but applies when a party seeks to prove material contents of a writing, recording, or photograph. The purpose of this section is the prevention of fraud, inaccuracy, mistake, or mistransmission of critical facts contained in a writing, recording, or photograph when its contents are an issue in a proceeding. By its terms, this section applies to proof of the contents of a recording. State v. Kula, 260 Neb. 183, 616 N.W.2d 313 (2000).

The original document rule does not set up a hierarchy for admissibility of evidence, but applies when a party seeks to prove material contents of a writing, recording, or photograph. The purpose of this section is the prevention of fraud, inaccuracy, mistake, or mistransmission of critical facts contained in a writing, recording, or photograph when its contents are at issue in a proceeding. Equitable Life v. Starr, 241 Neb. 609, 489 N.W.2d 857 (1992).

Not error to admit in evidence a transcription of a tape recording which was itself in evidence. State v. Martin, 198 Neb. 811, 255 N.W.2d 844 (1977).

27-1003 Rule 1003. Admissibility of duplicate; when.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Source: Laws 1975, LB 279, § 66.

A duplicate writing, as defined by subdivision (4) of section 27-1001, is admissible under this section to the same extent as an original writing without a showing that the original is lost or destroyed or is otherwise unavailable under the circumstances expressed in section 27-1004 regarding a lost or destroyed original. Equitable Life v. Starr, 241 Neb. 609, 489 N.W.2d 857 (1992).

The burden of raising an issue as to the authenticity of the original or the unfairness of the circumstances is on the party opposing admission. State v. Frederiksen, 224 Neb. 653, 400 N.W.2d 225 (1987).

Duplicates of defendant's bank checks were properly admissible where identified by bank official and authenticity of original checks not challenged. State v. Costello, 199 Neb. 43, 256 N.W.2d 97 (1977).

27-1004 Rule 1004. Admissibility of other evidence of contents; when.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) No original can be obtained by any available judicial process or procedure; or

(3) At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) The writing, recording, or photograph is not closely related to a controlling issue.

Source: Laws 1975, LB 279, § 67.

The language of this section, which carves out exceptions to the best evidence rule, makes exceptions for only specific instances of unavailability, such as where the original has been lost or destroyed, cannot be obtained by judicial means, or is not closely related to a controlling issue. State v. Kula, 260 Neb. 183, 616 N.W.2d 313 (2000).

Absent evidence of bad faith on the part of university officials, secondary evidence of test scores is admissible where it is shown that the original writings have been lost or destroyed. State ex rel. Mercurio v. Board of Regents, 213 Neb. 251, 329 N.W.2d 87 (1983).

The existence of a written employment contract, alleged by plaintiff and denied by defendant, was properly a question for the jury. Montgomery v. Quantum Labs, Inc., 198 Neb. 160, 251 N.W.2d 892 (1977).

27-1005 Rule 1005. Public records; contents, how proved.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with section 27-902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Source: Laws 1975, LB 279, § 68.

27-1006 Rule 1006. Voluminous writings, recordings, or photographs; summaries; availability; orders.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

Source: Laws 1975, LB 279, § 69.

Requirements for admission of an exhibit into evidence pursuant to Neb. Evid. R. 1006 set out this case. Crowder v. Aurora Co-op Elev. Co., 223 Neb. 704, 393 N.W.2d 250 (1986).

This section had no application to an exhibit listing persons for whom building moving services had been performed with enumeration of dates and charges, but oral testimony by one who had personal knowledge of the facts laid appropriate foundation for its admission. Groenewold v. Building Movers, Inc., 197 Neb. 187, 247 N.W.2d 629 (1976).

27-1007 Rule 1007. Contents of writings, recordings, or photographs; how proved.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Source: Laws 1975, LB 279, § 70.

27-1008 Rule 1008. Functions of judge and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the judge to determine. However, when an issue is raised (1) whether the asserted writing ever existed, or (2) whether another writing, recording, or photograph produced at the trial is the original, or (3) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Source: Laws 1975, LB 279, § 71.

The existence of a written employment contract, alleged by plaintiff and denied by defendant, was properly a question for the jury. Montgomery v. Quantum Labs, Inc., 198 Neb. 160, 251 N.W.2d 892 (1977).

ARTICLE 11

MISCELLANEOUS RULES

Section

Section
27-1103. Rule 1103. Act, how cited.

27-1101 Rule 1101. Applicability of rules; courts; proceedings generally; rules inapplicable; grand jury, miscellaneous proceedings; rules applicable in part.

(1) The Nebraska Evidence Rules apply to the following courts in the State of Nebraska: Supreme Court, Court of Appeals, district courts, county courts, and juvenile courts. The word judge when used in the rules shall mean any judge of any court to which the rules apply or other officer who is authorized by statute to hold any hearing to which the rules apply.

(2) The rules apply generally to all civil and criminal proceedings, including contempt proceedings except those in which the judge may act summarily.

(3) The rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(4) The rules, other than those with respect to privileges, do not apply in the following situations:

(a) Proceedings before grand juries;

(b) Proceedings for extradition or rendition; preliminary examinations or hearings in criminal cases; sentencing or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise;

(c) Contested cases before an administrative agency under the Administrative Procedure Act unless a party to the case requests that the agency be bound by the rules of evidence applicable in the district court; or

(d) Proceedings before the Nebraska Workers' Compensation Court or the Small Claims Court.

Source: Laws 1975, LB 279, § 72; Laws 1984, LB 13, § 46; Laws 1991, LB 732, § 70.

Cross References

Administrative Procedure Act, see section 84-920.

The Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence. Sheridan v. Catering Mgmt., Inc., 252 Neb. 825, 566 N.W.2d 110 (1997).

Nebraska Evidence Rules do not apply in juvenile court dispositional hearings such as one to terminate parental rights. The requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. In re Interest of P.D., 231 Neb. 608, 437 N.W.2d 156 (1989).

The Nebraska Evidence Rules, sections 27-101 to 27-1103, do not apply in juvenile court dispositional hearings, such as one to terminate parental rights; however, they do provide guidance in determining the type of evidence which meets due process requirements. In re Interest of D.L.S., 230 Neb. 435, 432 N.W.2d 31 (1988).

The Nebraska Evidence Rules do not apply at a sentencing hearing. An affidavit may be used for purposes of sentencing if it is relevant to the sentence to be imposed. State v. Dillon, 222 Neb. 131, 382 N.W.2d 353 (1986).

Nebraska Evidence Rules do not apply to proceedings for the granting or revoking of probation. State v. Ozmun, 221 Neb. 481, 378 N.W.2d 170 (1985).

Statutory rules of evidence do not apply to, among other things, proceedings for extradition. In re Application of Mahan for Writ of Habeas Corpus, 211 Neb. 671, 319 N.W.2d 760 (1982).

The statutory rules of evidence, except those governing privilege, do not apply to proceedings for extradition. Dovel v. Adams, 207 Neb. 766, 301 N.W.2d 102 (1981).

The Board of Nursing is not bound by the law of evidence unless a party so requests. Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N.W.2d 683 (1976).

27-1102 Rule 1102. Act, when effective.

These rules shall apply in all trials commenced after December 31, 1975.

Source: Laws 1975, LB 279, § 74.

27-1103 Rule 1103. Act, how cited.

These rules may be known and cited as the Nebraska Evidence Rules.

Source: Laws 1975, LB 279, § 73.

ARTICLE 12

INADMISSIBILITY OF CERTAIN CONDUCT AS EVIDENCE

Section
27-1201. Unanticipated outcome of medical care; civil action; health care provider or employee; use of certain statements and conduct; limitations.

27-1201 Unanticipated outcome of medical care; civil action; health care provider or employee; use of certain statements and conduct; limitations.

(1) In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as a result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest. A statement of fault which is otherwise admissible and is part of or in addition to any such communication shall be admissible.

(2) For purposes of this section, unless the context otherwise requires:

(a) Health care provider means any person licensed or certified by the State of Nebraska to deliver health care under the Uniform Licensing Law and any health care facility licensed under the Health Care Facility Licensure Act. Health care provider includes any professional corporation or other professional entity comprised of such health care providers;

(b) Relative means a patient's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, stepbrother, stepsister, half brother, half sister, or spouse's parents. Relative includes persons related to the patient through adoptive relationships. Relative also includes any person who has a family-type relationship with the patient;

(c) Representative means a legal guardian, attorney, person designated to make health care decisions on behalf of a patient under a power of attorney, or any person recognized in law or custom as a patient's agent; and

(d) Unanticipated outcome means the outcome of a medical treatment or procedure that differs from the expected result.

Source: Laws 2007, LB373, § 1.

Cross References

Health Care Facility Licensure Act, see section 71-401.
Uniform Licensing Law, see section 71-101.

CHAPTER 28
CRIMES AND PUNISHMENTS

Article.

Article.
(n) Deceptive or Misleading Advertising. 28-1476 to 28-1478.
(o) Beverage Containers. 28-1479.
(p) Civil Disorders Involving Explosives or Firearms. 28-1480 to 28-1482.
(q) Food. 28-1483
15. Task Force. Repealed.

Cross References

Banks and banking offenses, see Chapter 8.
Contempt of court, prosecution, see sections 25-2121 to 25-2123.
Criminal procedure, see Chapter 29.
Election offenses, see Chapter 32, article 15.
Food-related offenses, see sections 81-2,239 to 82-2,292.
Game and fish offenses, see Chapter 37.
Health occupations and professions offenses, see Chapter 38.
Horseracing offenses, see Chapter 2, article 12.
Intoxicating liquors, see Chapter 53.
Labor offenses, see Chapter 48.
Livestock offenses, see Chapter 54.
Motor vehicle offenses, see Chapter 60.
Penal and correctional institutions, see Chapter 83, article 4.
Political accountability and disclosure offenses, see Chapter 49, article 14.
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Revenue and taxation offenses, see Chapter 77.
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ARTICLE 1

PROVISIONS APPLICABLE TO OFFENSES GENERALLY

(a) GENERAL PROVISIONS

Section
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(a) GENERAL PROVISIONS

28-101 Code, how cited.

Sections 28-101 to 28-1350 shall be known and may be cited as the Nebraska Criminal Code.

Source: Laws 1977, LB 38, § 1; Laws 1980, LB 991, § 8; Laws 1982, LB 465, § 1; Laws 1985, LB 371, § 1; Laws 1985, LB 406, § 1; Laws 1986, LB 969, § 1; Laws 1986, LB 956, § 12; Laws 1987, LB 451, § 1; Laws 1988, LB 170, § 1; Laws 1988, LB 463, § 41;

Laws 1989, LB 372, § 1; Laws 1990, LB 50, § 10; Laws 1990, LB 1018, § 1; Laws 1990, LB 571, § 2; Laws 1991, LB 135, § 1; Laws 1991, LB 477, § 2; Laws 1992, LB 1098, § 5; Laws 1992, LB 1184, § 8; Laws 1994, LB 988, § 1; Laws 1994, LB 1035, § 1; Laws 1994, LB 1129, § 1; Laws 1995, LB 371, § 1; Laws 1995, LB 385, § 11; Laws 1996, LB 908, § 2; Laws 1997, LB 90, § 1; Laws 1997, LB 814, § 6; Laws 1998, LB 218, § 2; Laws 1999, LB 6, § 1; Laws 1999, LB 49, § 1; Laws 1999, LB 163, § 1; Laws 1999, LB 511, § 1; Laws 2002, LB 276, § 1; Laws 2002, LB 824, § 1; Laws 2003, LB 17, § 1; Laws 2003, LB 43, § 8; Laws 2003, LB 273, § 2; Laws 2004, LB 943, § 1; Laws 2006, LB 57, § 1; Laws 2006, LB 287, § 4; Laws 2006, LB 1086, § 6; Laws 2006, LB 1199, § 1; Laws 2007, LB142, § 1; Laws 2008, LB764, § 1; Laws 2008, LB1055, § 1.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB764, section 1, with LB1055, section 1, to reflect all amendments.

Note: Changes made by LB1055 became effective April 22, 2008. Changes made by LB764 became effective July 18, 2008.

28-102 Purposes; principles of construction.

The general purposes of the provisions governing the definition of offenses are:

(1) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;

(2) To subject to public control persons whose conduct indicates that they are disposed to commit crimes;

(3) To safeguard conduct that is without fault and which is essentially victimless in its effect from condemnation as criminal;

(4) To give fair warning of the nature of the conduct declared to constitute an offense; and

(5) To differentiate on reasonable grounds between serious and minor offenses.

Source: Laws 1977, LB 38, § 2.

28-103 Restrictions on applicability.

(1) The provisions of this code shall not apply to any offense committed prior to January 1, 1979. Such an offense shall be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted.

(2) For the purposes of this section, an offense shall be deemed to have been committed prior to January 1, 1979, if any element of the offense occurred prior thereto.

(3) This code shall not bar, suspend or otherwise affect any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action.

Source: Laws 1977, LB 38, § 3.

28-104 Offense; crime; synonymous.

The terms offense and crime are synonymous as used in this code and mean a violation of, or conduct defined by, any statute for which a fine, imprisonment, or death may be imposed.

Source: Laws 1977, LB 38, § 4.

28-105 Felonies; classification of penalties; sentences; where served; eligibility for probation.

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into nine classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I felony	Death
Class IA felony	Life imprisonment without parole
Class IB felony	Maximum — life imprisonment Minimum — twenty years imprisonment
Class IC felony	Maximum — fifty years imprisonment Mandatory minimum — five years imprisonment
Class ID felony	Maximum — fifty years imprisonment Mandatory minimum — three years imprisonment
Class II felony	Maximum — fifty years imprisonment Minimum — one year imprisonment
Class III felony	Maximum — twenty years imprisonment, or twenty-five thousand dollars fine, or both Minimum — one year imprisonment
Class IIIA felony	Maximum — five years imprisonment, or ten thousand dollars fine, or both Minimum — none
Class IV felony	Maximum — five years imprisonment, or ten thousand dollars fine, or both Minimum — none

(2) All sentences of imprisonment for Class IA, IB, IC, ID, II, and III felonies and sentences of one year or more for Class IIIA and IV felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services. Sentences of less than one year shall be served in the county jail except as provided in this subsection. If the department certifies that it has programs and facilities available for persons sentenced to terms of less than one year, the court may order that any sentence of six months or more be served in any institution under the jurisdiction of the department. Any such certification shall be given by the department to the State Court Administrator, who shall forward copies thereof to each judge having jurisdiction to sentence in felony cases.

(3) Nothing in this section shall limit the authority granted in sections 29-2221 and 29-2222 to increase sentences for habitual criminals.

(4) A person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation.

Source: Laws 1977, LB 38, § 5; Laws 1989, LB 592, § 1; Laws 1995, LB 371, § 2; Laws 1997, LB 364, § 1; Laws 1998, LB 900, § 1; Laws 1998, LB 1266, § 1; Laws 2002, Third Spec. Sess., LB 1, § 1.

1. Sentencing
2. Miscellaneous

1. Sentencing

A sentence of imprisonment for a term of 60 years to life for second degree murder is not excessive in the absence of an abuse of judicial discretion. State v. Weaver, 267 Neb. 826, 677 N.W.2d 502 (2004).

When a flat sentence of ''life imprisonment'' is imposed and no minimum sentence is stated, by operation of law, the minimum sentence for parole eligibility purposes is the minimum imposed by law under the statute. State v. Gray, 259 Neb. 897, 612 N.W.2d 507 (2000).

The Nebraska sentencing statutes do not require that the minimum sentence be for a different term than the maximum sentence. State v. Cook, 251 Neb. 781, 559 N.W.2d 471 (1997).

County jail was not under the jurisdiction of the Department of Correctional Services; therefore, it was plain error for district court to sentence defendant convicted of Class III felony to term in county jail. State v. Wilcox, 239 Neb. 882, 479 N.W.2d 134 (1992).

Pursuant to subsection (2) of this section, the district court lacks statutory authority to sentence a defendant convicted of a Class III felony to a term of imprisonment in the county jail. State v. Wren, 234 Neb. 291, 450 N.W.2d 684 (1990).

Under the provisions of this section and section 28-304(2), a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years. State v. Ward, 226 Neb. 809, 415 N.W.2d 151 (1987).

Where an indeterminate sentence is pronounced, the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term. Where maximum allowable sentence is five years, an indeterminate sentence of two to five years is excessive and must be modified to a sentence of not less than one year eight months nor more than five years. State v. Bosak, 207 Neb. 693, 300 N.W.2d 201 (1981).

2. Miscellaneous

The Legislature lacked constitutional authority to amend the language of the statutory penalty for a Class IA felony by inserting the phrase ''without parole'' after ''life imprisonment'' during the 2002 special session. State v. Conover, 270 Neb. 446, 703 N.W.2d 898 (2005).

The change of the minimum penalty for first degree murder from life imprisonment to life imprisonment without parole is presumed to be an increase in the minimum penalty that cannot be applied to acts committed prior to the change without violating constitutional ex post facto principles. State v. Gales, 265 Neb. 598, 658 N.W.2d 604 (2003).

This section does not impose a mandatory minimum term of incarceration for persons convicted of a Class II felony. State v. Hamik, 262 Neb. 761, 635 N.W.2d 123 (2001).

28-105.01 Death penalty imposition; restriction on person under eighteen years; restriction on person with mental retardation; sentencing procedure.

(1) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of eighteen years at the time of the commission of the crime.

(2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.

(3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

(4) If (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) the defendant waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall hold a hearing prior to any sentencing determination proceeding as provided in section 29-2521 upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed. A ruling by the court that the evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under subsection (2) of this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing determination proceeding as provided in section 29-2521 or to argue that such evidence should be given mitigating significance.

Source: Laws 1982, LB 787, § 23; Laws 1998, LB 1266, § 2; Laws 2002, Third Spec. Sess., LB 1, § 2.

28-106 Misdemeanors; classification of penalties; sentences; where served.

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, misdemeanors are divided into seven classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I misdemeanor	Maximum — not more than one year imprisonment, or one thousand dollars fine, or both Minimum — none
Class II misdemeanor	Maximum — six months imprisonment, or one thousand dollars fine, or both Minimum — none
Class III misdemeanor	Maximum — three months imprisonment, or five hundred dollars fine, or both Minimum — none
Class IIIA misdemeanor	Maximum — seven days imprisonment, five hundred dollars fine, or both Minimum — none
Class IV misdemeanor	Maximum — no imprisonment, five hundred dollars fine Minimum — one hundred dollars fine
Class V misdemeanor	Maximum — no imprisonment, one hundred dollars fine Minimum — none
Class W misdemeanor	Driving under the influence or implied consent First conviction Maximum — sixty days imprisonment and five hundred dollars fine Mandatory minimum — seven days imprisonment and four hundred dollars fine Second conviction Maximum — six months imprisonment and five hundred dollars fine Mandatory minimum — thirty days imprisonment and five hundred dollars fine Third conviction Maximum — one year imprisonment and six hundred dollars fine Mandatory minimum — ninety days imprisonment and six hundred dollars fine

(2) Sentences of imprisonment in misdemeanor cases shall be served in the county jail, except that in the following circumstances the court may, in its discretion, order that such sentences be served in institutions under the jurisdiction of the Department of Correctional Services:

(a) If the sentence is for a term of one year upon conviction of a Class I misdemeanor;

(b) If the sentence is to be served concurrently or consecutively with a term for conviction of a felony; or

(c) If the Department of Correctional Services has certified as provided in section 28-105 as to the availability of facilities and programs for short-term prisoners and the sentence is for a term of six months or more.

Source: Laws 1977, LB 38, § 6; Laws 1982, LB 568, § 1; Laws 1986, LB 153, § 1; Laws 1992, LB 291, § 1; Laws 1998, LB 309, § 1; Laws 2002, LB 82, § 3; Laws 2005, LB 594, § 1.

The proper determination of punishment for fourth offense driving under the influence of an alcoholic liquor or drug is governed by subsection (1) of this section and not by section 28-107(3). State v. Schultz, 252 Neb. 746, 566 N.W.2d 739 (1997).

For a Class III misdemeanor, a sentence of five days in jail with a fine of three hundred dollars is within the statutory maximum and will not be disturbed on appeal absent an abuse of discretion. State v. Rosenberry, 209 Neb. 383, 307 N.W.2d 823 (1981).

28-107 Felony or misdemeanor, defined outside of code; how treated.

(1) Any felony or misdemeanor defined by state statute outside of this code without specification of its class shall be punishable as provided in the statute defining it, or as otherwise provided by law outside of this code, except as provided in subsections (2) and (3) of this section.

(2) A felony defined by statute outside this code, without classification, the sentence for which exceeds the sentence authorized in this code for a Class III felony, shall constitute for sentencing purposes a Class III felony. A person adjudged guilty under such law is deemed to be convicted of a Class III felony and shall be sentenced for a felony of that class in accordance with this code.

(3) A misdemeanor defined by a statute outside this code, the sentence for which exceeds the sentence authorized in this code for a Class I misdemeanor, shall constitute for sentencing purposes a Class I misdemeanor. A person adjudged guilty under such law is deemed to be convicted of a Class I misdemeanor and shall be sentenced for a Class I misdemeanor in accordance with this code.

Source: Laws 1977, LB 38, § 7.

The proper determination of punishment for fourth offense driving under the influence of an alcoholic liquor or drug is governed by section 28-106(1) and not subsection (3) of this section. State v. Schultz, 252 Neb. 746, 566 N.W.2d 739 (1997).

28-108 Subsequent enactment of criminal laws.

Criminal laws enacted after January 1, 1979, shall be classified for sentencing purposes in accordance with section 28-105 or 28-106.

Source: Laws 1977, LB 38, § 8.

28-109 Terms, defined.

For purposes of the Nebraska Criminal Code, unless the context otherwise requires:

(1) Act shall mean a bodily movement, and includes words and possession of property;

(2) Aid or assist shall mean knowingly to give or lend money or credit to be used for, or to make possible or available, or to further activity thus aided or assisted;

(3) Benefit shall mean any gain or advantage to the beneficiary including any gain or advantage to another person pursuant to the desire or consent of the beneficiary;

(4) Bodily injury shall mean physical pain, illness, or any impairment of physical condition;

(5) Conduct shall mean an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;

(6) Deadly physical force shall mean force, the intended, natural, and probable consequence of which is to produce death, or which does, in fact, produce death;

(7) Deadly weapon shall mean any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury;

(8) Deface shall mean to alter the appearance of something by removing, distorting, adding to, or covering all or a part of the thing;

(9) Dwelling shall mean a building or other thing which is used, intended to be used, or usually used by a person for habitation;

(10) Government shall mean the United States, any state, county, municipality, or other political unit, any branch, department, agency, or subdivision of any of the foregoing, and any corporation or other entity established by law to carry out any governmental function;

(11) Governmental function shall mean any activity which a public servant is legally authorized to undertake on behalf of government;

(12) Motor vehicle shall mean every self-propelled land vehicle, not operated upon rails, except self-propelled chairs used by persons who are disabled and electric personal assistive mobility devices as defined in section 60-618.02;

(13) Omission shall mean a failure to perform an act as to which a duty of performance is imposed by law;

(14) Peace officer shall mean any officer or employee of the state or a political subdivision authorized by law to make arrests, and shall include members of the National Guard on active service by direction of the Governor during periods of emergency or civil disorder;

(15) Pecuniary benefit shall mean benefit in the form of money, property, commercial interest, or anything else, the primary significance of which is economic gain;

(16) Person shall mean any natural person and where relevant a corporation or an unincorporated association;

(17) Public place shall mean a place to which the public or a substantial number of the public has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, playgrounds, and the common areas of public and private buildings and facilities;

(18) Public servant shall mean any officer or employee of government, whether elected or appointed, and any person participating as an advisor, consultant, process server, or otherwise in performing a governmental function, but the term does not include witnesses;

(19) Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation;

(20) Serious bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body;

(21) Tamper shall mean to interfere with something improperly or to make unwarranted alterations in its condition;

(22) Thing of value shall mean real property, tangible and intangible personal property, contract rights, choses in action, services, and any rights of use or enjoyment connected therewith; and

(23) Voluntary act shall mean an act performed as a result of effort or determination, and includes the possession of property if the actor was aware of his or her physical possession or control thereof for a sufficient period to have been able to terminate it.

Source: Laws 1977, LB 38, § 9; Laws 1993, LB 370, § 8; Laws 2002, LB 1105, § 427.

The statutory test for recklessness pursuant to subdivision (19) of this section is purely objective, rendering testimony as to the subjective state of mind of the defendant irrelevant. State v. Kistenmacher, 231 Neb. 318, 436 N.W.2d 168 (1989).

Knife wounds which cause the victim to bleed so badly that she passes out and which require thirteen stitches create a substantial risk of death and, therefore, constitute serious bodily injury. State v. Schuette, 223 Neb. 777, 393 N.W.2d 718 (1986).

Definition of ''thing of value'' appearing in this section applicable to prosecution under section 28-611(1). State v. Spaulding, 211 Neb. 575, 319 N.W.2d 449 (1982).

Protracted or permanent hearing loss constitutes a serious bodily injury. State v. Thomas, 210 Neb. 298, 314 N.W.2d 15 (1981).

Evidence indicated that shooting was intentional and not reckless. While every shooting does not automatically inflict a serious bodily injury, when one is shot in the chest above the heart and the bullet is surgically removed, the statutory definition of serious bodily injury is met. State v. Billups, 209 Neb. 737, 311 N.W.2d 512 (1981).

(b) DISCRIMINATION-BASED OFFENSES

28-110 Statement of rights.

A person in the State of Nebraska has the right to live free from violence, or intimidation by threat of violence, committed against his or her person or the destruction or vandalism of, or intimidation by threat of destruction or vandalism of, his or her property regardless of his or her race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability.

Source: Laws 1997, LB 90, § 2.

28-111 Enhanced penalty; enumerated offenses.

Any person who commits one or more of the following criminal offenses against a person or a person's property because of the person's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of the person's association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability shall be punished by the imposition of the next higher penalty classification than the penalty classification prescribed for the criminal offense, unless such criminal offense is already punishable as a Class IB felony or higher classification: Manslaughter, section 28-305; assault in the first degree, section 28-308; assault in the second degree, section 28-309; assault in the third degree, section 28-310; terroristic threats, section 28-311.01; stalking, section 28-311.03; kidnapping, section 28-313; false imprisonment in the first degree, section 28-314; false imprisonment in the second degree, section 28-315; sexual assault in the first degree, section 28-319; sexual assault in the second or third degree, section 28-320; sexual assault of a child, sections 28-319.01 and 28-320.01; arson in the first degree, section 28-502; arson in the second degree, section 28-503; arson in the third degree, section 28-504; criminal mischief, section 28-519; criminal trespass in the first degree, section 28-520; or criminal trespass in the second degree, section 28-521.

Source: Laws 1997, LB 90, § 3; Laws 2006, LB 1199, § 2.

28-112 Allegations set forth in indictment or information; burden of proof.

The allegations stating that the underlying offense was committed because of the person's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of the person's association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability shall be set forth in the indictment or information. It is the burden of the prosecuting attorney to prove such allegations beyond a reasonable doubt to the judge or jury in the state's case in chief.

Source: Laws 1997, LB 90, § 4; Laws 2004, LB 270, § 1.

28-113 Civil action authorized; statute of limitations; proof required.

(1) A person against whom a violation of section 28-111 has been committed may bring a civil action for equitable relief, general and special damages, reasonable attorney's fees, and costs.

(2) A civil action brought pursuant to this section must be brought within four years after the date of the violation of section 28-111.

(3) In a civil action brought pursuant to this section, the plaintiff shall establish by a preponderance of the evidence that the defendant committed the criminal offense against the plaintiff or the plaintiff's property because of the plaintiff's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of the plaintiff's association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability.

Source: Laws 1997, LB 90, § 5.

28-114 Nebraska Commission on Law Enforcement and Criminal Justice; duties.

The Nebraska Commission on Law Enforcement and Criminal Justice shall establish and maintain a central repository for the collection and analysis of information regarding criminal offenses committed against a person because of the person's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of the person's association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability. Upon establishing such a repository, the commission shall develop a procedure to monitor, record, classify, and analyze information relating to criminal offenses apparently directed against individuals or groups, or their property, because of their race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of their association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability.

Source: Laws 1997, LB 90, § 6.

28-115 Criminal offense against a pregnant woman; enhanced penalty.

(1) Any person who commits any of the following criminal offenses against a pregnant woman shall be punished by the imposition of the next higher penalty classification than the penalty classification prescribed for the criminal offense, unless such criminal offense is already punishable as a Class IB felony or higher classification: Assault in the first degree, section 28-308; assault in the second degree, section 28-309; assault in the third degree, section 28-310;

sexual assault in the first degree, section 28-319; sexual assault in the second or third degree, section 28-320; sexual assault of a child in the second or third degree, section 28-320.01; sexual abuse of an inmate or parolee in the first degree, section 28-322.01; sexual abuse of an inmate or parolee in the second degree, section 28-322.03; sexual abuse of a protected individual in the first or second degree, section 28-322.04; domestic assault in the first, second, or third degree, section 28-323; assault on an officer in the first degree, section 28-929; assault on an officer in the second degree, section 28-930; assault on an officer in the third degree, section 28-931; assault on an officer using a motor vehicle, section 28-931.01; assault by a confined person, section 28-933; proximately causing serious bodily injury while operating a motor vehicle, section 60-6,198; and sexual assault of a child in the first degree, section 28-319.01.

(2) The prosecution shall allege and prove beyond a reasonable doubt that the victim was pregnant at the time of the offense.

Source: Laws 2006, LB 57, § 9.

ARTICLE 2
INCHOATE OFFENSES

Section
28-201. Criminal attempt; conduct; penalties.
28-202. Conspiracy, defined; penalty.
28-203. Conspiracy; renunciation of criminal intent.
28-204. Accessory to felony, defined; penalties.
28-205. Aiding consummation of felony; penalty.
28-206. Prosecuting for aiding and abetting.

28-201 Criminal attempt; conduct; penalties.

(1) A person shall be guilty of an attempt to commit a crime if he or she:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

(4) Criminal attempt is:

(a) A Class II felony when the crime attempted is a Class I, Class IA, or Class IB felony;

(b) A Class III felony when the crime attempted is a Class II felony;

(c) A Class IIIA felony when the crime attempted is assault in the first degree under section 28-308, sexual assault in the second degree under section 28-320, manufacturing, distributing, delivering, dispensing, or possessing with intent to manufacture, distribute, deliver, or dispense controlled substances listed in

Schedule I, II, or III of section 28-405 under section 28-416 except for an exceptionally hazardous drug, incest under section 28-703, child abuse under subsection (5) of section 28-707, assault on an officer in the second degree under section 28-930, or assault by a confined person with a deadly or dangerous weapon under section 28-932;

(d) A Class IV felony when the crime attempted is a Class III felony not listed in subdivision (4)(c) of this section;

(e) A Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony;

(f) A Class II misdemeanor when the crime attempted is a Class I misdemeanor; and

(g) A Class III misdemeanor when the crime attempted is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 10; Laws 1997, LB 364, § 2; Laws 1998, LB 1266, § 3.

1. Criminal attempt
2. Lesser-included offense
3. Miscellaneous

1. Criminal attempt

A person can intentionally attempt an act that does not require criminal intent to complete. State v. James, 265 Neb. 243, 655 N.W.2d 891 (2003).

The statutory elements of attempted first degree murder are a substantial step in a course of conduct intended to culminate in the commission of a purposeful, malicious, premeditated killing of another person. The statutory elements of attempted second degree murder are a substantial step in a course of conduct intended to culminate in the commission of an intentional killing of another person. State v. Al-Zubaidy, 253 Neb. 357, 570 N.W.2d 713 (1997).

Within the offense of criminal attempt, an attempt to commit a particular crime may also include an attempt to commit a lesser-included offense in reference to the designated crime alleged to have been attempted. State v. Sutton, 231 Neb. 30, 434 N.W.2d 689 (1989).

Within the offense of ''criminal attempt,'' an attempt to commit a particular crime may also include an attempt to commit a lesser-included offense in reference to the designated crime alleged to have been attempted. State v. Jackson, 225 Neb. 843, 408 N.W.2d 720 (1987).

Although a gun is unloaded and thereby incapable of causing death or injury, a person may be guilty of attempted murder or assault if the person pulling the trigger believes the gun to be loaded. State v. Benzel, 220 Neb. 466, 370 N.W.2d 501 (1985).

In order to constitute an attempt to commit a crime under this section, there must be an intentional act on the part of the defendant which would constitute a substantial step toward the completion of the allegedly attempted crime, assuming that the circumstances at the time were as the defendant believed them to be. State v. Sodders, 208 Neb. 504, 304 N.W.2d 62 (1981).

Where a particular result is an element of the underlying crime, subsection (1)(a) and (b) require that the actor intended the result. Under subsection (2), the actor can be convicted of criminal attempt if he knows that his conduct will produce the result. In other words, the actor can be convicted of attempt if he is aware of the high probability that such result will occur. One cannot commit the crime of attempt where the underlying crime contains only a reckless mens rea. State v. Hemmer, 3 Neb. App. 769, 531 N.W.2d 559 (1995).

2. Lesser-included offense

Where a crime is capable of being attempted, an attempt to commit such a crime is a lesser-included offense of the crime charged. It is not necessary to charge a criminal defendant with the lesser-included offense of which the defendant may be found guilty because by charging the greater offense, the defendant is by implication charged with the lesser offense. State v. James, 265 Neb. 243, 655 N.W.2d 891 (2003).

Attempted first degree assault is not a lesser-included offense of unlawful discharge of a firearm, and unlawful discharge of a firearm is not a lesser-included offense of attempted first degree assault. State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997).

Whether a particular offense is a lesser-included offense of the offense with which defendant is charged is determined by examining the allegations in the information and the evidence offered in support of the charge. State v. Garza, 236 Neb. 202, 459 N.W.2d 739 (1990).

Because an attempted crime as defined by this section may be committed without the crime itself being committed, no offense can be a lesser-included offense of an attempted crime prosecuted under this section. State v. Swoopes, 223 Neb. 914, 395 N.W.2d 500 (1986).

3. Miscellaneous

A charge of a completed crime logically includes a charge of an attempt to commit it. State v. James, 265 Neb. 243, 655 N.W.2d 891 (2003).

Abandonment is not a defense to the commission of the crime of criminal attempt under Nebraska law. State v. Schmidt, 213 Neb. 126, 327 N.W.2d 624 (1982).

Instruction to jury on attempt phrased in the language of this section was not error. State v. Bradley, 210 Neb. 882, 317 N.W.2d 99 (1982).

In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which, if successful, would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal. State v. Meredith, 208 Neb. 637, 304 N.W.2d 926 (1981).

Prior to 1979, there was no general attempt statute in the Nebraska Criminal Code. State v. Meredith, 208 Neb. 637, 304 N.W.2d 926 (1981).

Defendant who pled guilty to attempted murder was not precluded from challenging criminal attempt statute as unconstitutionally vague during habeas corpus proceeding. When examined in light of defendant's conduct, this section is not

unconstitutionally vague. Sodders v. Parratt, 693 F.2d 811 (8th Cir. 1982).

28-202 Conspiracy, defined; penalty.

(1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:

(a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and

(b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

(2) If a person knows that one with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring to commit such crime with such other person or persons whether or not he knows their identity.

(3) If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(4) Conspiracy is a crime of the same class as the most serious offense which is an object of the conspiracy, except that conspiracy to commit a Class I felony is a Class II felony.

A person prosecuted for a criminal conspiracy shall be acquitted if such person proves by a preponderance of the evidence that his or her conduct occurred in response to an entrapment.

Source: Laws 1977, LB 38, § 11.

In enacting this section, the Legislature adopted the unilateral approach to the agreement element of conspiracy as found in the Model Penal Code. State v. Heitman, 262 Neb. 185, 629 N.W.2d 542 (2001).

A conviction under this section requires proof of an overt act, but not successful commission of a felony. State v. Null, 247 Neb. 192, 526 N.W.2d 220 (1995).

Because Nebraska adheres to the unilateral approach to the crime of conspiracy, the fact that none of the ''coconspirators'' at any time planned to follow through with the plan has no impact on the culpability of the defendant. State v. Knight, 239 Neb. 958, 479 N.W.2d 792 (1992).

Conspiracy requires the proof of an overt act which tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime. State v. Anderson, 229 Neb. 436, 427 N.W.2d 770 (1988); State v. Anderson, 229 Neb. 427, 427 N.W.2d 764 (1988).

Circumstantial evidence may be sufficient to establish the existence of a conspiracy or the criminal intent necessary for conspiracy. State v. Anderson, 229 Neb. 427, 427 N.W.2d 764 (1988).

An ''overt act'' is an act which tends to show a preexisting conspiracy and manifests an intent or design toward accomplishment of a crime, but need not itself have the capacity to accomplish the conspiratorial objective and need not itself be a criminal act. State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987).

A person may be convicted of a conspiracy to solicit the commission of murder even though the person with whom he conspired feigned agreement and at no time intended to go through with the plan. An overt act is an act done in pursuance of the conspiracy and manifests an intent or design looking toward accomplishing the crime. The act need not have a tendency to accomplish the object of the conspiracy, nor be criminal in itself. State v. John, 213 Neb. 76, 328 N.W.2d 181 (1982).

The Wharton Rule exception to establishing conspiracy does not apply to offenses that can be committed by one person, or if more or different people participate in the conspiracy than are necessary to commit the substantive offense, or when the substantive offense has not yet been committed by any of the conspirators. State v. Clason, 3 Neb. App. 339, 526 N.W.2d 673 (1994).

28-203 Conspiracy; renunciation of criminal intent.

In a prosecution for criminal conspiracy, it shall be an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the conspiracy.

Source: Laws 1977, LB 38, § 12.

28-204 Accessory to felony, defined; penalties.

(1) A person is guilty of being an accessory to felony if with intent to interfere with, hinder, delay, or prevent the discovery, apprehension, prosecution, conviction, or punishment of another for an offense, he or she:

(a) Harbors or conceals the other;

(b) Provides or aids in providing a weapon, transportation, disguise, or other means of effecting escape or avoiding discovery or apprehension;

(c) Conceals or destroys evidence of the crime or tampers with a witness, informant, document, or other source of information, regardless of its admissibility in evidence;

(d) Warns the other of impending discovery or apprehension other than in connection with an effort to bring another into compliance with the law;

(e) Volunteers false information to a peace officer; or

(f) By force, intimidation, or deception, obstructs anyone in the performance of any act which might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.

(2)(a) Accessory to felony is a Class III felony if the actor violates subdivision (1)(a), (1)(b), or (1)(c) of this section, the actor knows of the conduct of the other, and the conduct of the other constitutes a Class I, IA, IB, IC, or ID felony.

(b) Accessory to felony is a Class IIIA felony if the actor violates subdivision (1)(a), (1)(b), or (1)(c) of this section, the actor knows of the conduct of the other, and the conduct of the other constitutes a Class II felony.

(c) Accessory to felony is a Class IV felony if the actor violates subdivision (1)(a), (1)(b), or (1)(c) of this section, the actor knows of the conduct of the other, and the conduct of the other constitutes a Class III or Class IIIA felony.

(d) Accessory to felony is a Class I misdemeanor if the actor violates subdivision (1)(a), (1)(b), or (1)(c) of this section, the actor knows of the conduct of the other, and the conduct of the other constitutes a Class IV felony.

(e) Accessory to felony is a Class IV felony if the actor violates subdivision (1)(d), (1)(e), or (1)(f) of this section, the actor knows of the conduct of the other, and the conduct of the other constitutes a felony of any class other than a Class IV felony.

(f) Accessory to felony is a Class I misdemeanor if the actor violates subdivision (1)(d), (1)(e), or (1)(f) of this section, the actor knows of the conduct of the other, and the conduct of the other constitutes a Class IV felony.

Source: Laws 1977, LB 38, § 13; Laws 1999, LB 40, § 1.

The crime of being an accessory to a felony, as defined in this section, is not a lesser-included offense of the crime of robbery. State v. Arthaloney, 230 Neb. 819, 433 N.W.2d 545 (1989).

When a jury is the fact finder in a case involving accessory to a felony charges, the jury should be instructed so as to ensure that the underlying offense of the principal is specifically determined. State v. Romo, 12 Neb. App. 472, 676 N.W.2d 737 (2004).

A person must have reliable knowledge of the principal's identity to be guilty as an accessory under this section. Merely reporting false information about a crime without knowledge of the principal's identity constitutes the misdemeanor of false reporting, as defined by section 28-907. State v. Anderson, 10 Neb. App. 163, 626 N.W.2d 627 (2001).

28-205 Aiding consummation of felony; penalty.

(1) A person is guilty of aiding consummation of felony if he intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony.

(2) If the crime involved is a felony of any class, aiding consummation of crime is a Class IV felony.

Source: Laws 1977, LB 38, § 14.

28-206 Prosecuting for aiding and abetting.

A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.

Source: Laws 1977, LB 38, § 15.

1. Aiding and abetting
2. Miscellaneous

1. Aiding and abetting

Given the provisions of this section, an information charging a defendant with a specific crime gives the defendant adequate notice that he or she may be prosecuted for the crime specified or as having aided and abetted the commission of the crime specified. An aiding and abetting instruction is proper where warranted by the evidence, notwithstanding the fact that the information charging the defendant does not contain specific aiding and abetting language. State v. Contreras, 268 Neb. 797, 688 N.W.2d 580 (2004).

An information charging an aider and abettor of a crime need not include any additional facts than those necessary to charge the principal of the crime. One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. State v. Leonor, 263 Neb. 86, 638 N.W.2d 798 (2002).

One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act. State v. Brunzo, 248 Neb. 176, 532 N.W.2d 296 (1995).

For a defendant to be prosecuted for aiding and abetting, mere encouragement or assistance is sufficient participation in the criminal act. State v. Sanders, 241 Neb. 687, 490 N.W.2d 211 (1992).

Where a defendant is charged with aiding and abetting a second degree murder, the intent element applies to the aider and abettor or to the person who actually commits the murder. State v. Dean, 237 Neb. 65, 464 N.W.2d 782 (1991).

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. State v. Schreck, 224 Neb. 650, 399 N.W.2d 830 (1987).

2. Miscellaneous

Evidence is sufficient to uphold a defendant's convictions for first degree murder and use of a deadly weapon in the commission of a felony when there is evidence indicating that the defendant had a conversation with another individual regarding who was going to kill a particular victim, that the defendant supplied the other individual with the murder weapon, that the defendant unlawfully broke into the victim's residence for the purpose of killing the victim, and that the defendant hit someone in the victim's residence with a piece of wood. State v. Larsen, 255 Neb. 532, 586 N.W.2d 641 (1998).

Injuries which a victim sustains by his or her own action may not be a foreseeable consequence of the intended criminal act. State v. Trackwell, 235 Neb. 845, 458 N.W.2d 181 (1990).

A person involved in a conspiratorial effort to steal from a store is liable for all items taken from that store. State v. Mason, 232 Neb. 400, 440 N.W.2d 490 (1989).

Where persons acting in concert commit an assault, each is responsible for the injuries received by the victim. State v. Thomas, 210 Neb. 298, 314 N.W.2d 15 (1981).

ARTICLE 3

OFFENSES AGAINST THE PERSON

Cross References

Assault by a confined person, see sections 28-932 and 28-933.
Assault on an officer, see sections 28-929 to 28-931.01.

(a) GENERAL PROVISIONS

Section
28-301. Compounding a felony, defined; penalty.
28-302. Homicide; terms, defined.
28-303. Murder in the first degree; penalty.
28-304. Murder in the second degree; penalty.
28-305. Manslaughter; penalty.
28-306. Motor vehicle homicide; penalty.
28-307. Assisting suicide, defined; penalty.
28-308. Assault in the first degree; penalty.
28-309. Assault in the second degree; penalty.
28-310. Assault in the third degree; penalty.
28-310.01. Strangulation; penalty; affirmative defense.

Section

(d) ASSAULT OF AN UNBORN CHILD ACT

(a) GENERAL PROVISIONS

28-301 Compounding a felony, defined; penalty.

(1) A person is guilty of compounding a felony if he accepts or agrees to accept any pecuniary benefit or other reward or promise thereof, as consideration for:

(a) Refraining from seeking prosecution of an offender; or

(b) Refraining from reporting to law enforcement authorities the commission of any felony or information relating to a felony.

(2) It is an affirmative defense to prosecution under this section that the benefit received by the defendant did not exceed an amount which the defendant reasonably believed to be due him as restitution for harm caused by the crime.

(3) Compounding is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 16.

28-302 Homicide; terms, defined.

As used in sections 28-302 to 28-306, unless the context otherwise requires:

(1) Homicide shall mean the killing of a person by another;

(2) Person, when referring to the victim of a homicide, shall mean a human being who had been born and was alive at the time of the homicidal act; and

(3) Premeditation shall mean a design formed to do something before it is done.

Source: Laws 1977, LB 38, § 17.

Pursuant to subsection (3) of this section, evidence of premeditation is sufficient to uphold conviction for first degree murder when it demonstrates that the defendant told others that he wanted to ''go finish (the victim) off'', that the defendant broke off a knife attack on the victim to evade detection by a passing car, and that the defendant resumed the knife attack once the car had passed and the defendant heard the victim making noises which indicated that the victim was still alive. State v. Larsen, 255 Neb. 532, 586 N.W.2d 641 (1998).

28-303 Murder in the first degree; penalty.

A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he or she purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2519 to 29-2524.

Source: Laws 1977, LB 38, § 18; Laws 2002, Third Spec. Sess., LB 1, § 3.

1. Felony murder
2. Jury
3. Lesser-included offense
4. Malice
5. Requisite mental state
6. Miscellaneous

1. Felony murder

The crime of first degree murder constitutes one offense even though there may be alternate theories by which criminal liability for first degree murder may be charged and prosecuted in Nebraska. State v. White, 254 Neb. 566, 577 N.W.2d 741 (1998).

One may commit first degree murder either by committing premeditated murder or by killing another person while in the commission of certain felonies. A defendant need not be charged and convicted of an underlying felony in order to be convicted of first degree murder pursuant to subsection (2) of this section. State v. White, 239 Neb. 554, 477 N.W.2d 24 (1991).

A specific intent to kill is not required for felony murder, but only the intent to do a felonious act which causes a victim's death. State v. Dixon, 237 Neb. 630, 467 N.W.2d 397 (1991).

The felony murder statute does not violate the eighth amendment to the U.S. Constitution. State v. Rust, 223 Neb. 150, 388 N.W.2d 483 (1986).

A victim's fatal heart attack, proximately caused by a defendant's felonious conduct toward that victim, establishes the causal connection between felonious conduct and homicide necessary to permit a conviction for felony murder. State v. Dixon, 222 Neb. 787, 387 N.W.2d 682 (1986).

Proof of intent to kill is not an element of crime of felony murder. Statement in State v. Kauffman, 183 Neb. 817, 164 N.W.2d 469 (1969), that ''purpose to kill is conclusively presumed from the criminal intention required for robbery'' is disapproved. State v. Bradley, 210 Neb. 882, 317 N.W.2d 99 (1982).

2. Jury

A jury needs to be unanimous only in its finding that the defendant committed first degree murder and not as to the theory which brought it to that verdict. State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997).

In a first degree murder case, the jury need only be unanimous as to its verdict that defendant committed first degree murder, and not as to the theory which brought them to that verdict. State v. Buckman, 237 Neb. 936, 468 N.W.2d 589 (1991).

3. Lesser-included offense

Second degree murder and manslaughter are not lesser-included offenses of the felonies set out in this section, so no instruction to the jury on them is ordinarily required. State v. Hubbard, 211 Neb. 531, 319 N.W.2d 116 (1982).

4. Malice

Evidence of premeditated malice is sufficient to uphold conviction for first degree murder when it demonstrates that the defendant told others that he wanted to ''go finish (the victim) off'', that the defendant stopped a knife attack on the victim to evade detection by a passing car, and that the defendant resumed the knife attack once the car had passed and the defendant heard the victim making noises indicating that the victim was still alive. State v. Larsen, 255 Neb. 532, 586 N.W.2d 641 (1998).

In order to be guilty of first degree murder, one must have killed purposely and with deliberate and premeditated malice. State v. Lyle, 245 Neb. 354, 513 N.W.2d 293 (1994).

5. Requisite mental state

Nothing in this section or in the Nebraska Supreme Court's interpretation of this section requires that a defendant must rationally consider the probable consequences of his or her actions or rationally determine to kill the victim without legal justification. State v. Harms, 263 Neb. 814, 643 N.W.2d 359 (2002).

In order to prove the requisite mental state, the state is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause and which is defined as any willful or corrupt intention of the mind. State v. Krimmel, 216 Neb. 825, 346 N.W.2d 396 (1984).

To prove the requisite mental state for first degree murder, the state must show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. State v. Lamb, 213 Neb. 498, 330 N.W.2d 462 (1983).

6. Miscellaneous

A defendant who aids and abets a first degree murder by having a conversation with another individual regarding who is going to kill the particular victim, supplying the other individual with the murder weapon, unlawfully breaking and entering the victim's residence for the purpose of killing the victim, and hitting someone in the victim's residence with a piece of wood can be prosecuted and punished as if he or she was the principal offender. State v. Larsen, 255 Neb. 532, 586 N.W.2d 641 (1998).

The statutory elements of attempted first degree murder are a substantial step in a course of conduct intended to culminate in the commission of a purposeful, malicious, premeditated killing of another person. State v. Al-Zubaidy, 253 Neb. 357, 570 N.W.2d 713 (1997).

28-304 Murder in the second degree; penalty.

(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

(2) Murder in the second degree is a Class IB felony.

Source: Laws 1977, LB 38, § 19.

1. Elements
2. Lesser-included offense
3. Malice
4. Plea bargains
5. Requisite mental state
6. Sentencing

1. Elements

A person commits second degree murder if he causes the death of a person intentionally, but without premeditation. State v. Weaver, 267 Neb. 826, 677 N.W.2d 502 (2004).

Malice is not a necessary element of second degree murder under this section. The interpretation of this section that malice is not a necessary element of second degree murder may be applied retroactively. State v. Redmond, 262 Neb. 411, 631 N.W.2d 501 (2001).

The statutory elements of attempted second degree murder are a substantial step in a course of conduct intended to culminate in the commission of an intentional killing of another person. State v. Al-Zubaidy, 253 Neb. 357, 570 N.W.2d 713 (1997).

Without the element of malice or mens rea, this section would be of doubtful validity and perhaps unconstitutional. Malice is a necessary element of second degree murder. Applying rules of proper statutory construction, this section, though silent as to the longstanding material element of malice, must be read to include malice as an element of second degree murder in order to preserve a defendant's right to his or her presumption of innocence. State v. Ryan, 249 Neb. 218, 543 N.W.2d 128 (1996).

Malice is an essential element of murder in the second degree. State v. Dean, 246 Neb. 869, 523 N.W.2d 861 (1994).

An information which alleges that defendant committed second degree murder but does not allege that the act was committed with ''malice'' fails to allege an essential element of the crime. State v. Manzer, 246 Neb. 536, 519 N.W.2d 558 (1994).

Malice is an element of second degree murder. State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994).

In order to support a conviction of second degree murder, the defendant must intend to kill; the prosecution must prove, beyond a reasonable doubt, that the defendant caused the victim's death intentionally. State v. Franklin, 241 Neb. 579, 489 N.W.2d 552 (1992).

In order to convict a person of second degree murder, the State is required to prove all three elements—death, intent to kill, and causation—beyond a reasonable doubt; none of the elements are presumed upon proof of the others, nor is any element presumed in the absence of proof by defendant of the converse of that element. Evidence of provocation by one other than the person whom defendant killed or attempted to kill cannot serve to mitigate an intentional killing from second degree murder to manslaughter. State v. Cave, 240 Neb. 783, 484 N.W.2d 458 (1992).

The essential elements of second degree murder are that the murder must be done purposely and maliciously. State v. Dean, 237 Neb. 65, 464 N.W.2d 782 (1991).

2. Lesser-included offense

Second degree murder is not a lesser-included offense of the charge of felony murder. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

3. Malice

Malice is an element of second degree murder. State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994).

Malice, in the context of this provision, has been said to denote that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse and to be any willful or corrupt intention of the mind. State v. Moniz, 224 Neb. 198, 397 N.W.2d 37 (1986).

4. Plea bargains

Although no authority was cited that a plea bargain must be supported by a concession on the part of the State, altering of charge from first degree murder to second degree murder was a substantial concession because it removed the possibility of the death sentence. State v. Suffredini, 224 Neb. 220, 397 N.W.2d 51 (1986).

5. Requisite mental state

The state of mind required for second degree murder may be inferred from the evidence of the criminal act. State v. Williams, 226 Neb. 647, 413 N.W.2d 907 (1987).

The state of mind required for second degree murder may be inferred from the circumstantial evidence of the criminal act. State v. Rowe, 214 Neb. 685, 335 N.W.2d 309 (1983).

6. Sentencing

Pursuant to subsection (2) of this section, a sentence of imprisonment for a term of 60 years to life for second degree murder is not excessive in the absence of an abuse of judicial discretion. State v. Weaver, 267 Neb. 826, 677 N.W.2d 502 (2004).

Under the provisions of section 28-105 and subsection (2) of this statute, a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years. State v. Ward, 226 Neb. 809, 415 N.W.2d 151 (1987).

A fifteen-year sentence was not excessive, in view of the seriousness of the crime, even though the defendant was a fifty-eight-year-old man with no previous criminal record, who was apparently provoked by the excessive demands of the victim, and who expressed remorse about committing the crime. State v. Kelly, 207 Neb. 295, 298 N.W.2d 370 (1980).

Where state Supreme Court interpreted 16- to 20-year sentence for second degree murder as definite 20-year term with a statutory 10-year minimum, defendant not prejudiced. Rouse v. Foster, 672 F.2d 649 (8th Cir. 1982).

28-305 Manslaughter; penalty.

(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

(2) Manslaughter is a Class III felony.

Source: Laws 1977, LB 38, § 20.

1. Involuntary manslaughter
2. Lesser-included offense
3. Malice
4. Motor vehicle homicide
5. Requisite mental state
6. Unlawful acts
7. Voluntary manslaughter
8. Miscellaneous

1. Involuntary manslaughter

Subsection (1) of this section establishes and distinguishes the two categories of manslaughter: an unlawful killing, without malice, ''upon a sudden quarrel,'' which may be characterized as voluntary manslaughter, and an unlawful but unintentional killing, without malice, as the result of the defendant's commission of an unlawful act, which may be characterized as involuntary manslaughter. State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989).

Involuntary manslaughter is not a lesser-included offense of voluntary manslaughter. Involuntary manslaughter is killing without intent and without provocation, while committing an unlawful act. Voluntary manslaughter is killing with intent and with provocation (upon a sudden quarrel), regardless of whether the killing occurs in the course of an unlawful act. State v. Joseph, 1 Neb. App. 525, 499 N.W.2d 858 (1993).

2. Lesser-included offense

Manslaughter is not a lesser-included offense of the charge of felony murder. State v. Palmer, 224 Neb. 282, 399 N.W.2d 706 (1986).

Involuntary manslaughter is not a lesser-included offense of voluntary manslaughter. Involuntary manslaughter is killing without intent and without provocation, while committing an unlawful act. Voluntary manslaughter is killing with intent and with provocation (upon a sudden quarrel), regardless of whether the killing occurs in the course of an unlawful act. State v. Joseph, 1 Neb. App. 525, 499 N.W.2d 858 (1993).

3. Malice

One who has killed without malice upon a sudden quarrel is guilty not of first degree murder but of manslaughter. It is not the assault or provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements of malice and deliberation necessary to constitute murder are absent. If one had enough time between the provocation and the killing to reflect on one's intended course of action, then the mere presence of passion does not reduce the crime below murder. Whether a killing constitutes manslaughter or murder in the first degree depends upon the state of mind of the killer. The question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind. State v. Lyle, 245 Neb. 354, 513 N.W.2d 293 (1994).

4. Motor vehicle homicide

Motor vehicle homicide is not a lesser-included offense of manslaughter under current statutes. State v. Wright, 261 Neb. 277, 622 N.W.2d 676 (2001).

One who is convicted of manslaughter under this section for a killing involving the use of a motor vehicle must be sentenced in accordance with this section rather than section 28-306, the motor vehicle homicide statute. State v. Burnett, 254 Neb. 771, 579 N.W.2d 513 (1998).

Manslaughter can be committed when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law. The penalty for manslaughter resulting from the operation of a motor vehicle is specified in section 39-669.20. State v. Roth, 222 Neb. 119, 382 N.W.2d 348 (1986).

5. Requisite mental state

There is no requirement of an intention to kill in committing manslaughter. State v. Blackson, 245 Neb. 833, 515 N.W.2d 773 (1994).

State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989), holding that manslaughter is an intentional killing of another, is overruled. State v. Jones, 245 Neb. 821, 515 N.W.2d 654 (1994).

One who has killed without malice upon a sudden quarrel is guilty not of first degree murder but of manslaughter. It is not the assault or provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements of malice and deliberation necessary to constitute murder are absent. If one had enough time between the provocation and the killing to reflect on one's intended course of action, then the mere presence of passion does not reduce the crime below murder. Whether a killing constitutes manslaughter or murder in the first degree depends upon the state of mind of the killer. The question is whether, under all the facts and circumstances, a reasonable time had elapsed from the time of the provocation to the instant of the killing for the passion to subside and for reason to resume control of the mind. State v. Lyle, 245 Neb. 354, 513 N.W.2d 293 (1994).

The test for determining whether there existed adequate provocation so as to mitigate an intentional killing from murder to manslaughter is an objective one; qualities peculiar to defendant which render him particularly excitable, including intoxication, are not considered. State v. Cave, 240 Neb. 783, 484 N.W.2d 458 (1992).

6. Unlawful acts

Whether physical act committed by person responsible for care and supervision of minor is justifiable act or unlawful assault is fact question. State v. Miner, 216 Neb. 309, 343 N.W.2d 899 (1984).

7. Voluntary manslaughter

Under subsection (1) of this section, the phrase ''sudden quarrel'' is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. State v. Morrow, 237 Neb. 653, 467 N.W.2d 63 (1991).

''Accident'' is not a defense to the crime of voluntary manslaughter under subsection (1) of this section, but does relate to intent to kill, which is an element of the crime of manslaughter committed ''upon a sudden quarrel.'' State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989).

As used in subsection (1) of this section, the phrase ''sudden quarrel'' does not necessarily mean an exchange of angry words or an altercation contemporaneous with the unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim; a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989).

Subsection (1) of this section establishes and distinguishes the two categories of manslaughter: an unlawful killing, without malice, ''upon a sudden quarrel,'' which may be characterized as voluntary manslaughter, and an unlawful but unintentional killing, without malice, as the result of the defendant's commission of an unlawful act, which may be characterized as involuntary manslaughter. State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989).

To sustain a conviction for voluntary manslaughter under subsection (1) of this section, that is, a conviction for killing another, without malice, ''upon a sudden quarrel,'' the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another. State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989).

When it is claimed that a killing was upon a sudden quarrel, there are three elements of the crime of manslaughter: the killing of another, upon a sudden quarrel, and without malice. State v. Batiste, 231 Neb. 481, 437 N.W.2d 125 (1989).

The pointing of a gun at another is a reckless act within the contemplation of section 28-310, and as such is an unlawful act, sufficient, should the gun discharge, to support a manslaughter conviction under subsection (1) of this section. State v. Bachkora, 229 Neb. 421, 427 N.W.2d 71 (1988).

Manslaughter is a killing done upon a sudden quarrel, a legally recognized and sufficient provocation, which causes a

reasonable person to lose normal self-control. State v. Butler, 10 Neb. App. 537, 634 N.W.2d 46 (2001).

Involuntary manslaughter is not a lesser-included offense of voluntary manslaughter. Involuntary manslaughter is killing without intent and without provocation, while committing an unlawful act. Voluntary manslaughter is killing with intent and with provocation (upon a sudden quarrel), regardless of whether the killing occurs in the course of an unlawful act. State v. Joseph, 1 Neb. App. 525, 499 N.W.2d 858 (1993).

8. Miscellaneous

Admission of evidence of blood test results in a criminal prosecution for manslaughter under this section is not authorized under section 60-6,210. State v. Brouillette, 265 Neb. 214, 655 N.W.2d 876 (2003).

The analysis of provocation which mitigates an intentional killing logically applies to assault cases as well, given that the core difference between the two crimes is generally whether the victim lives or dies. State v. Butler, 10 Neb. App. 537, 634 N.W.2d 46 (2001).

Attempted manslaughter held not to exist under this section, given that a defendant cannot intentionally perform an act toward the commission of an unintentional crime. State v. George, 3 Neb. App. 354, 527 N.W.2d 638 (1995).

28-306 Motor vehicle homicide; penalty.

(1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.

(2) Except as provided in subsection (3) of this section, motor vehicle homicide is a Class I misdemeanor.

(3)(a) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 60-6,213 or 60-6,214, motor vehicle homicide is a Class IIIA felony.

(b) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06, motor vehicle homicide is a Class III felony. The court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least one year and not more than fifteen years and shall order that the operator's license of such person be revoked for the same period.

(c) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06, motor vehicle homicide is a Class II felony if the defendant has a prior conviction for a violation of section 60-6,196 or 60-6,197.06, under a city or village ordinance enacted in conformance with section 60-6,196, or under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the defendant was convicted would have been a violation of section 60-6,196. The court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of fifteen years and shall order that the operator's license of such person be revoked for the same period.

(d) An order of the court described in subdivision (b) or (c) of this subsection shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

Source: Laws 1977, LB 38, § 21; Laws 1979, LB 1, § 1; Laws 1992, LB 291, § 2; Laws 1993, LB 370, § 9; Laws 1993, LB 575, § 3; Laws 1997, LB 364, § 3; Laws 2001, LB 38, § 1; Laws 2004, LB 208, § 1; Laws 2006, LB 925, § 1.

Cross References

Operator's license, assessment of points and revocation, see sections 60-496 to 60-497.01, 60-498 to 60-498.04, 60-499, and 60-4,182 et seq.

Motor vehicle homicide is not a lesser-included offense of manslaughter under current statutes. State v. Wright, 261 Neb. 277, 622 N.W.2d 676 (2001).

One who is convicted of manslaughter under section 28-305 for a killing involving the use of a motor vehicle must be sentenced in accordance with that section rather than this section, the motor vehicle homicide statute. State v. Burnett, 254 Neb. 771, 579 N.W.2d 513 (1998).

In order to convict a defendant of felony motor vehicle homicide under this section, the State must prove the defen-

dant's driving in violation of section 39-669.07 proximately caused the death of another. State v. Batts, 233 Neb. 776, 448 N.W.2d 136 (1989) (pursuant to Laws 1993, LB 370, section 293, language from section 39-669.07 was placed in section 60-6,196).

In order to convict a defendant under this section, the State must prove that the accused's intoxication was the proximate cause of the accident and resulting death. State v. Ring, 233 Neb. 720, 447 N.W.2d 908 (1989) (pursuant to Laws 1993, LB 370, section 293, language from section 39-669.07 was placed in section 60-6,196).

Motor vehicle homicide is a lesser-included offense of manslaughter. State v. Roth, 222 Neb. 119, 382 N.W.2d 348 (1986).

28-307 Assisting suicide, defined; penalty.

(1) A person commits assisting suicide when, with intent to assist another person in committing suicide, he aids and abets him in committing or attempting to commit suicide.

(2) Assisting suicide is a Class IV felony.

Source: Laws 1977, LB 38, § 22.

28-308 Assault in the first degree; penalty.

(1) A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person.

(2) Assault in the first degree shall be a Class III felony.

Source: Laws 1977, LB 38, § 23.

1. Constitutionality
2. Generally
3. Lesser-included offense
4. Proximate cause
5. Requisite mental state
6. Serious bodily injury

1. Constitutionality

This section is not unconstitutional solely because it does not allow a defense of consent. State v. Van, 268 Neb. 814, 688 N.W.2d 600 (2004).

The language of this section clearly is not unconstitutionally vague. The jury properly found assault in the first degree where the defendant deliberately struck the victim four times in the jaw, causing a fracture which required surgery to prevent serious permanent disfigurement. State v. Schreck, 226 Neb. 172, 409 N.W.2d 624 (1987).

2. Generally

In dealing with a criminal charge all attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault. State v. Hatfield, 218 Neb. 470, 356 N.W.2d 872 (1984).

3. Lesser-included offense

Attempted first degree assault is not a lesser-included offense of unlawful discharge of a firearm, and unlawful discharge of a firearm is not a lesser-included offense of attempted first degree assault. State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997).

First degree assault and second degree assault are two distinct offenses and second degree assault is not a lesser-included offense of first degree assault. State v. Billups, 209 Neb. 737, 311 N.W.2d 512 (1981).

4. Proximate cause

Where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary to prove a causal connection between a blow and the injuries inflicted. A jury may properly infer from the evidence that a single blow to a victim's jaw was the proximate cause of the victim's serious injuries. State v. Costanzo, 227 Neb. 616, 419 N.W.2d 156 (1988).

5. Requisite mental state

The intent required under subsection (1) of this section relates to the assault, not to the injury which results. State v. Williams, 243 Neb. 959, 503 N.W.2d 561 (1993).

The law is settled that independent evidence of specific intent is not required. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. To determine whether the defendant acted with justification or had the required intent for assault in the first degree, the jury may consider circumstantial evidence as to the force of the blow the defendant administered. State v. Costanzo, 227 Neb. 616, 419 N.W.2d 156 (1988).

6. Serious bodily injury

In reference to first degree assault, assaultive conduct which results in exposure to the specific harms described in section 28-109(20), and not actual infliction of the harms described in that statute, is the gravamen of first degree assault and the criminal conduct proscribed by subsection (1) of this section; it is not necessary that the injury cause death, serious permanent disfigurement, or impairment of the function of any part or organ of the body, but only that it involved a substantial risk of producing those results. State v. Swigart, 233 Neb. 517, 446 N.W.2d 216 (1989).

Knife wounds which cause the victim to bleed so badly that she passes out and which require thirteen stitches create a substantial risk of death and, therefore, constitute serious bodily injury. State v. Schuette, 223 Neb. 777, 393 N.W.2d 718 (1986).

Assault in the first degree is not a lesser-included offense of attempted murder in the second degree. State v. Lovelace, 212 Neb. 356, 322 N.W.2d 673 (1982).

Evidence indicated that shooting was intentional and not reckless. While every shooting does not automatically inflict a serious bodily injury, when one is shot in the chest above the heart and the bullet is surgically removed, the statutory definition of serious bodily injury is met. State v. Billups, 209 Neb. 737, 311 N.W.2d 512 (1981).

Multiple injuries including a cerebral concussion and nasal fracture constitute serious bodily injuries which will support a conviction for first degree assault under this section. State v. Sare, 209 Neb. 91, 306 N.W.2d 164 (1981).

A trier of fact can use common knowledge to determine if the victim has suffered serious bodily injury. In re Interest of Janet J., 12 Neb. App. 42, 666 N.W.2d 741 (2003).

28-309 Assault in the second degree; penalty.

(1) A person commits the offense of assault in the second degree if he or she:

(a) Intentionally or knowingly causes bodily injury to another person with a dangerous instrument;

(b) Recklessly causes serious bodily injury to another person with a dangerous instrument; or

(c) While during confinement or in legal custody of the Department of Correctional Services or in any county jail, unlawfully strikes or wounds another.

(2) Assault in the second degree shall be a Class IIIA felony.

Source: Laws 1977, LB 38, § 24; Laws 1982, LB 347, § 7; Laws 1997, LB 364, § 4.

1. Dangerous instrument
2. Lesser-included offense
3. Recklessly
4. Requisite mental state
5. Sentencing
6. Constitutionality

1. Dangerous instrument

For the purposes of subsection (1)(a) of this section, a ''dangerous instrument'' is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury. The intent required by this subsection is not an intent to cause bodily injury, but rather an intent to use the dangerous instrument in the manner in which it was in fact used. State v. Ayres, 236 Neb. 824, 464 N.W.2d 316 (1991).

A piece of curbing can be a ''dangerous instrument'' when thrown at others. State v. Sianouthai, 225 Neb. 62, 402 N.W.2d 316 (1987).

Under this section, a dangerous instrument is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury. Under this section, teeth are not to be considered a dangerous instrument. State v. Bachelor, 6 Neb. App. 426, 575 N.W.2d 625 (1998).

2. Lesser-included offense

Assault in the second degree is not a lesser-included offense of attempted second degree murder. State v. Sanders, 235 Neb. 183, 455 N.W.2d 108 (1990).

Use of a firearm or other deadly weapon in the commission of a felony is not a lesser-included offense of assault in the second degree. State v. Jackson, 217 Neb. 332, 348 N.W.2d 866 (1984).

Whether a particular offense is a lesser-included offense is determined by examining the allegations in the information and the evidence offered in support of the charge, and it is clear that some of the elements of second degree assault, without the addition of any element irrelevant to second degree assault, may also constitute third degree assault. State v. Britt, 1 Neb. App. 245, 493 N.W.2d 631 (1992).

3. Recklessly

''Recklessly,'' as used in subsection (1)(b) of this section, defined. For purposes of a second degree assault contrary to subsection (1)(b), the requisite reckless act or conduct involves the actor's conscious choice in a course of action involving a dangerous instrument, which constitutes disregard of a substantial and unjustifiable risk to another, and does not require the actor's intent to cause serious bodily injury to another. Under subsection (1)(b), concerning a second degree assault based on a reckless act or conduct, an intent to inflict or cause bodily injury is not an element; rather, the reckless act or conduct, causing serious bodily injury, is the gravamen. State v. Hoffman, 227 Neb. 131, 416 N.W.2d 231 (1987).

4. Requisite mental state

The intent required under subsection (1) of this section relates to the assault, not to the injury which results. State v. Williams, 243 Neb. 959, 503 N.W.2d 561 (1993).

Assault with a dangerous instrument, like simple assault, is a general intent crime. State v. Duis, 207 Neb. 851, 301 N.W.2d 587 (1981).

5. Sentencing

The sentencing court did not abuse its discretion by sentencing defendant to a six-month term for a third degree assault and a four-month term for a second degree assault arising out of the same incident. Both sentences were within the statutory limits set for Class III felonies and Class II misdemeanors, respectively. The third degree assault involved an aggravating factor. State v. Hatwan, 208 Neb. 450, 303 N.W.2d 779 (1981).

6. Constitutionality

This section is not unconstitutional solely because it does not allow a defense of consent. State v. Van, 268 Neb. 814, 688 N.W.2d 600 (2004).

28-310 Assault in the third degree; penalty.

(1) A person commits the offense of assault in the third degree if he:

(a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or

(b) Threatens another in a menacing manner.

(2) Assault in the third degree shall be a Class I misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it shall be a Class II misdemeanor.

Source: Laws 1977, LB 38, § 25.

1. Bodily injury
2. Constitutionality
3. Generally
4. Lesser-included offense
5. Mutual consent
6. Recklessly
7. Requisite mental state
8. Sentencing
9. Double jeopardy

1. Bodily injury

Bodily injury may be inferred from evidence that defendant intentionally struck the victim, even though the victim testified that blow did not cause physical pain. State v. Waltrip, 240 Neb. 888, 484 N.W.2d 831 (1992).

This section does not require proof of serious bodily injury. Proof of facts from which bodily injury may be inferred is sufficient. State v. Goodon, 219 Neb. 186, 361 N.W.2d 537 (1985).

2. Constitutionality

This is a serious offense for which a jury trial is constitutionally required, unless expressly and intelligently waived by the defendant. State v. Lafler, 224 Neb. 613, 399 N.W.2d 808 (1987).

Statute neither unconstitutionally vague nor overbroad. In re Interest of Siebert, 223 Neb. 454, 390 N.W.2d 522 (1986).

3. Generally

A violation of subsection (1)(b) of this section requires an intentional act, and it is error to give an instruction using the lesser standards of culpability in subsection (1)(a), ''knowingly'' and ''recklessly''. State v. Cebuhar, 252 Neb. 796, 567 N.W.2d 129 (1997).

Adult bodybuilder who dunked 9-year-old boy's head into urinal could be convicted of third degree assault under this section. State v. Gray, 239 Neb. 1024, 479 N.W.2d 796 (1992).

Whether physical act committed by person responsible for care and supervision of minor is justifiable act or unlawful assault is fact question. State v. Miner, 216 Neb. 309, 343 N.W.2d 899 (1984).

4. Lesser-included offense

Third degree assault under subsection (1)(b) of this section is not a lesser-included offense of terroristic threats under subsection (1)(a) of section 28-311.01. State v. Smith, 267 Neb. 917, 678 N.W.2d 733 (2004).

Assuming that third degree assault under this section may, under certain circumstances, be a lesser-included offense of third degree assault on a peace officer under section 28-931, it is not prejudicial error to fail to instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. State v. Taylor, 262 Neb. 639, 634 N.W.2d 744 (2001).

One of the forms of third degree assault, intentionally or knowingly causing bodily injury to another person, is a lesser-included offense of first degree assault. State v. Pribil, 224 Neb. 28, 395 N.W.2d 543 (1986).

5. Mutual consent

The language of subsection (2) of this section requires mutual consent for a fight or scuffle in order to render an assault a Class II misdemeanor. State v. Schroder, 218 Neb. 860, 359 N.W.2d 799 (1984).

When there is a factual question concerning a charge of third degree assault by mutual consent, the state of mind of the ''victim'' is an issue, and testimony regarding state of mind is then relevant. State v. Farr, 1 Neb. App. 272, 493 N.W.2d 638 (1992).

6. Recklessly

The pointing of a gun at another is a reckless act within the contemplation of subsection (1)(a) of this section. State v. Bachkora, 229 Neb. 421, 427 N.W.2d 71 (1988).

7. Requisite mental state

The intent required under subsection (1) of this section relates to the assault, not to the injury which results. State v. Williams, 243 Neb. 959, 503 N.W.2d 561 (1993).

When there is a factual question concerning a charge of third degree assault by mutual consent, the state of mind of the ''victim'' is an issue, and testimony regarding state of mind is then relevant. State v. Farr, 1 Neb. App. 272, 493 N.W.2d 638 (1992).

8. Sentencing

The sentencing court did not abuse its discretion by sentencing defendant to a six-month term for a third degree assault and a four-month term for a second degree assault arising out of the same incident. Both sentences were within the statutory limits set for Class III felonies and Class II misdemeanors, respectively. The third degree assault involved an aggravating factor. State v. Hatwan, 208 Neb. 450, 303 N.W.2d 779 (1981).

9. Double jeopardy

In applying Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932), to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy. State v. Winkler, 266 Neb. 155, 663 N.W.2d 102 (2003).

Third degree assault and the making of terroristic threats are separate offenses for the purpose of double jeopardy. State v. Winkler, 266 Neb. 155, 663 N.W.2d 102 (2003).

28-310.01 Strangulation; penalty; affirmative defense.

(1) A person commits the offense of strangulation if the person knowingly or intentionally impedes the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck of the other person.

(2) Except as provided in subsection (3) of this section, strangulation is a Class IV felony.

(3) Strangulation is a Class III felony if:

(a) The person used or attempted to use a dangerous instrument while committing the offense;

(b) The person caused serious bodily injury to the other person while committing the offense; or

(c) The person has been previously convicted of strangulation.

(4) It is an affirmative defense that an act constituting strangulation was the result of a legitimate medical procedure.

Source: Laws 2004, LB 943, § 2.

28-311 Criminal child enticement; penalties.

(1) No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under the age of fourteen years to enter into any vehicle, whether or not the person knows the age of the child, if:

(a) The person does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity; and

(b)(i) The person is not a law enforcement officer, emergency services provider as defined in section 71-507, firefighter, or other person who regularly provides emergency services, is not the operator of a bookmobile or other such vehicle operated by the state or a political subdivision and used for informing, educating, organizing, or transporting children, is not a paid employee of, or a volunteer for, a nonprofit or religious organization which provides activities for children, and is not an employee or agent of or a volunteer acting under the direction of any board of education or (ii) the person is a person listed in subdivision (1)(b)(i) of this section but, at the time the person undertakes the activity, he or she is not acting within the scope of his or her lawful duties in that capacity.

(2) It is an affirmative defense to a charge under this section that the person undertook the activity in response to a bona fide emergency situation or that the person undertook the activity in response to a reasonable belief that it was necessary to preserve the health, safety, or welfare of the child.

(3) Any person who violates this section commits criminal child enticement and is guilty of a Class I misdemeanor. If such person has previously been convicted of (a) criminal child enticement under this section, (b) sexual assault of a child in the first degree under section 28-319.01, (c) sexual assault of a child in the second or third degree under section 28-320.01, or (d) assault under section 28-308, 28-309, or 28-310, kidnapping under section 28-313, or false imprisonment under section 28-314 or 28-315 when the victim was under eighteen years of age when such person violates this section, such person is guilty of a Class IV felony.

Source: Laws 1999, LB 49, § 2; Laws 2006, LB 1199, § 3.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

28-311.01 Terroristic threats; penalty.

(1) A person commits terroristic threats if he or she threatens to commit any crime of violence:

(a) With the intent to terrorize another;

(b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or

(c) In reckless disregard of the risk of causing such terror or evacuation.

(2) Terroristic threats is a Class IV felony.

Source: Laws 1986, LB 956, § 11.

1. Terroristic threats
2. Double jeopardy
3. Unconstitutionally vague
4. Miscellaneous

1. Terroristic threats

A terroristic threat made under subsection (1)(a) of this section requires an intent to terrorize another and is not concerned with the result produced by an individual's threat. State v. Smith, 267 Neb. 917, 678 N.W.2d 733 (2004).

Third degree assault under subsection (1)(b) of section 28-310 is not a lesser-included offense of terroristic threats under subsection (1)(a) of this section. State v. Smith, 267 Neb. 917, 678 N.W.2d 733 (2004).

To violate the statute prohibiting the commission of terroristic threats does not require an intent to execute the threats made or that the recipient of the threat be terrorized. State v. Saltzman, 235 Neb. 964, 458 N.W.2d 239 (1990).

A threat may be written, oral, physical, or any combination thereof, and whether a particular conduct constitutes a threat depends on the context of the interaction between the involved people. State v. Curlile, 11 Neb. App. 52, 642 N.W.2d 517 (2002).

2. Double jeopardy

In applying Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932), to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy. State v. Winkler, 266 Neb. 155, 663 N.W.2d 102 (2003).

Third degree assault and the making of terroristic threats are separate offenses for the purpose of double jeopardy. State v. Winkler, 266 Neb. 155, 663 N.W.2d 102 (2003).

3. Unconstitutionally vague

Subsection (1) of this section is not unconstitutionally vague. State v. Schmailzl, 243 Neb. 734, 502 N.W.2d 463 (1993).

As used in subsection (1)(c) of this section, the phrase ''reckless disregard of the risk of causing such terror or evacuation'' is not unconstitutionally vague. State v. Mayo, 237 Neb. 128, 464 N.W.2d 798 (1991).

Subsection (1)(c) of this section defines the crime with sufficient definiteness and ascertainable standards of guilt to inform those subject to it as to what conduct will result in punishment, and it is constitutional. State v. Bourke, 237 Neb. 121, 464 N.W.2d 805 (1991).

4. Miscellaneous

The pointing of a gun can be a ''threat to commit a crime of violence'' pursuant to this section; however, the pointing of a gun in self-defense is necessarily less serious than when no issue of self-defense is involved. State v. Oldenburg, 10 Neb. App. 104, 628 N.W.2d 278 (2001).

28-311.02 Stalking and harassment; legislative intent; terms, defined.

(1) It is the intent of the Legislature to enact laws dealing with stalking offenses which will protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated by individuals who intentionally follow, detain, stalk, or harass them or impose any restraint on their personal liberty and which will not prohibit constitutionally protected activities.

(2) For purposes of sections 28-311.02 to 28-311.05, 28-311.09, and 28-311.10:

(a) Harass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose;

(b) Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person;

(c) Family or household member means a spouse or former spouse of the victim, children of the victim, a person presently residing with the victim or

who has resided with the victim in the past, a person who had a child in common with the victim, other persons related to the victim by consanguinity or affinity, or any person presently involved in a dating relationship with the victim or who has been involved in a dating relationship with the victim. For purposes of this subdivision, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement but does not include a casual relationship or an ordinary association between persons in a business or social context; and

(d) Substantially conforming criminal violation means a guilty plea, a nolo contendere plea, or a conviction for a violation of any federal law or law of another state or any county, city, or village ordinance of this state or another state substantially similar to section 28-311.03. Substantially conforming is a question of law to be determined by the court.

Source: Laws 1992, LB 1098, § 1; Laws 1993, LB 299, § 1; Laws 1998, LB 218, § 3; Laws 2006, LB 1113, § 21.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

28-311.03 Stalking.

Any person who willfully harasses another person or a family or household member of such person with the intent to injure, terrify, threaten, or intimidate commits the offense of stalking.

Source: Laws 1992, LB 1098, § 2; Laws 1993, LB 299, § 2; Laws 1998, LB 218, § 4; Laws 2006, LB 1113, § 22.

28-311.04 Stalking; violations; penalties.

(1) Except as provided in subsection (2) of this section, any person convicted of violating section 28-311.03 is guilty of a Class I misdemeanor.

(2) Any person convicted of violating section 28-311.03 is guilty of a Class IV felony if:

(a) The person has a prior conviction under such section or a substantially conforming criminal violation within the last seven years;

(b) The victim is under sixteen years of age;

(c) The person possessed a deadly weapon at any time during the violation;

(d) The person was also in violation of section 28-311.09, 42-924, or 42-925 at any time during the violation; or

(e) The person has been convicted of any felony in this state or has been convicted of a crime in another jurisdiction which, if committed in this state, would constitute a felony and the victim or a family or household member of the victim was also the victim of such previous felony.

Source: Laws 1992, LB 1098, § 3; Laws 1993, LB 299, § 3; Laws 2006, LB 1113, § 23.

28-311.05 Stalking; not applicable to certain conduct.

Sections 28-311.02 to 28-311.04, 28-311.09, and 28-311.10 shall not apply to conduct which occurs during labor picketing.

Source: Laws 1992, LB 1098, § 4; Laws 1998, LB 218, § 5.

28-311.06 Hazing, defined; penalty.

(1) For purposes of this section and section 28-311.07:

(a) Hazing shall mean any activity by which a person intentionally or recklessly endangers the physical or mental health or safety of an individual for the purpose of initiation into, admission into, affiliation with, or continued membership with any organization as defined in subdivision (1)(b) of this section. Such hazing activity shall include whipping, beating, branding, forced and prolonged calisthenics, prolonged exposure to the elements, forced consumption of any food, liquor, beverage, drug, or harmful substance not generally intended for human consumption, prolonged sleep deprivation, or any brutal treatment or the performance of any unlawful act which endangers the physical or mental health or safety of any person; and

(b) Organization shall mean an organization of student members operating under the sanction of a postsecondary educational institution but shall not include the alumni organization or any corporation which owns the house or real estate of such organization.

(2) It shall be unlawful to commit the offense of hazing. Any person who commits the offense of hazing shall be guilty of a Class II misdemeanor.

(3) Any organization as defined in subdivision (1)(b) of this section whose members commit the offense of hazing in violation of the provisions of this section shall be punished by a fine of not more than ten thousand dollars.

Source: Laws 1994, LB 1129, § 2.

28-311.07 Hazing; consent not a defense.

Notwithstanding any provisions to the contrary, consent shall not be a defense to a prosecution pursuant to section 28-311.06.

Source: Laws 1994, LB 1129, § 3.

28-311.08 Unlawful intrusion; penalty.

(1) It shall be unlawful for any person to knowingly intrude upon any other person without his or her consent or knowledge in a place of solitude or seclusion.

(2) For purposes of this section:

(a) Intrude means the viewing or recording, either by video, audio, or other electronic means, of a person in a state of undress; and

(b) Place of solitude or seclusion means a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, any facility, public or private, used as a restroom, tanning booth, locker room, shower room, fitting room, or dressing room.

(3) Violation of this section is a Class III misdemeanor unless the victim is under the age of eighteen in which case a violation is a Class II misdemeanor. Lack of knowledge as to the victim's age is not a defense to the enhanced penalty under this section.

Source: Laws 1996, LB 908, § 1.

28-311.09 Harassment protection order; procedure; costs; enforcement.

(1) Any victim who has been harassed as defined by section 28-311.02 may file a petition and affidavit for a harassment protection order as provided in subsection (3) of this section. Upon the filing of such a petition and affidavit in support thereof, the judge or court may issue a harassment protection order without bond enjoining the respondent from (a) imposing any restraint upon the person or liberty of the petitioner, (b) harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner, or (c) telephoning, contacting, or otherwise communicating with the petitioner.

(2) The petition for a harassment protection order shall state the events and dates of acts constituting the alleged harassment.

(3) A petition for a harassment protection order shall be filed with the clerk of the district court, and the proceeding may be heard by the county court or the district court as provided in section 25-2740.

(4) A petition for a harassment protection order filed pursuant to subsection (1) of this section may not be withdrawn except upon order of the court. An order issued pursuant to subsection (1) of this section shall specify that it is effective for a period of one year unless otherwise modified by the court. Any person who knowingly violates an order issued pursuant to subsection (1) of this section after service shall be guilty of a Class II misdemeanor.

(5)(a) Fees to cover costs associated with the filing of a petition for a harassment protection order or the issuance or service of a harassment protection order seeking only the relief provided by this section shall not be charged, except that a court may assess such fees and costs if the court finds, by clear and convincing evidence, that the statements contained in the petition were false and that the harassment protection order was sought in bad faith.

(b) A court may also assess costs associated with the filing of a petition for a harassment protection order or the issuance or service of a harassment protection order seeking only the relief sought in the harassment protection order against the respondent.

(6) The clerk of the district court shall make available standard application and affidavit forms for a harassment protection order with instructions for completion to be used by a petitioner. The clerk and his or her employees shall not provide assistance in completing the forms. The State Court Administrator shall adopt and promulgate the standard application and affidavit forms provided for in this section as well as the standard temporary and final harassment protection order forms and provide a copy of such forms to all clerks of the district courts in this state. These standard temporary and final harassment protection order forms shall be the only such forms used in this state.

(7) Any order issued under subsection (1) of this section may be issued ex parte without notice to the respondent if it reasonably appears from the specific facts shown by affidavit of the petitioner that irreparable harm, loss, or damage will result before the matter can be heard on notice. If the specific facts included in the affidavit (a) do not show that the petitioner will suffer irreparable harm, loss, or damage or (b) show that, for any other compelling reason, an ex parte order should not be issued, the court or judge may forthwith cause notice of the application to be given to the adverse party stating that he or she may show cause, not more than fourteen days after service upon him or her, why such order should not be entered. If such ex parte order is issued without notice to the respondent, the court shall forthwith cause notice of the petition and order to be given the respondent stating that, upon service on the respon-

dent, the order shall remain in effect for a period of one year unless the respondent shows cause why the order should not remain in effect for a period of one year. The court shall also cause to be served upon the respondent a form with which to request a show-cause hearing. If the respondent wishes to appear and show cause why the order should not remain in effect for a period of one year, he or she shall affix his or her current address, telephone number, and signature to the form and return it to the clerk of the district court within five days after service upon him or her. Upon receipt of the request for a show-cause hearing, the court shall immediately schedule a show-cause hearing to be held within thirty days after the receipt of the request for a show-cause hearing and shall notify the petitioner and respondent of the hearing date.

(8) Upon the issuance of any harassment protection order under this section, the clerk of the court shall forthwith provide the petitioner, without charge, with two certified copies of such order. The clerk of the court shall also forthwith provide the local police department or local law enforcement agency and the local sheriff's office, without charge, with one copy each of such order and one copy each of the sheriff's return thereon. The clerk of the court shall also forthwith provide a copy of the harassment protection order to the sheriff's office in the county where the respondent may be personally served together with instructions for service. Upon receipt of the order and instructions for service, such sheriff's office shall forthwith serve the harassment protection order upon the respondent and file its return thereon with the clerk of the court which issued the harassment protection order within fourteen days of the issuance of the harassment protection order. If any harassment protection order is dismissed or modified by the court, the clerk of the court shall forthwith provide the local police department or local law enforcement agency and the local sheriff's office, without charge, with one copy each of the order of dismissal or modification.

(9) A peace officer may with or without a warrant arrest a person if (a) the officer has probable cause to believe that the person has committed a violation of an order issued pursuant to this section or a violation of a valid foreign harassment protection order recognized pursuant to section 28-311.10 and (b) a petitioner under this section provides the peace officer with a copy of a harassment protection order or the peace officer determines that such an order exists after communicating with the local law enforcement agency or a person protected under a valid foreign harassment protection order recognized pursuant to section 28-311.10 provides the peace officer with a copy of a valid foreign harassment protection order.

(10) A peace officer making an arrest pursuant to subsection (9) of this section shall take such person into custody and take such person before a judge of the county court or the court which issued the harassment protection order within a reasonable time. At such time the court shall establish the conditions of such person's release from custody, including the determination of bond or recognizance, as the case may be. The court shall issue an order directing that such person shall have no contact with the alleged victim of the harassment.

Source: Laws 1998, LB 218, § 6.

28-311.10 Foreign harassment protection order; enforcement.

(1) A valid foreign harassment protection order or order similar to a harassment protection order issued by a court of another state, tribe, or territory shall

be accorded full faith and credit by the courts of this state and enforced as if it were issued in this state.

(2) A foreign harassment order issued by a court of another state, tribe, or territory shall be valid if:

(a) The issuing court had jurisdiction over the parties and matter under the law of such state, tribe, or territory;

(b) The respondent was given reasonable notice and an opportunity to be heard sufficient to protect the respondent's right to due process before the order was issued; and

(c) The harassment order from another jurisdiction has not been rendered against both the petitioner and the respondent, unless: (i) The respondent filed a cross or counter petition, complaint, or other written pleading seeking such a harassment order; and (ii) the issuing court made specific findings of harassment against both the petitioner and respondent and determined that each party was entitled to such an order. There is a presumption of the validity of the foreign protection order when the order appears authentic on its face.

(3) A peace officer may rely upon a copy of any putative valid foreign harassment protection order which has been provided to the peace officer by any source.

Source: Laws 1998, LB 218, § 7.

28-312 Terms, defined.

As used in sections 28-312 to 28-315, unless the context otherwise requires:

(1) Restrain shall mean to restrict a person's movement in such a manner as to interfere substantially with his liberty:

(a) By means of force, threat, or deception; or

(b) If the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of him; and

(2) Abduct shall mean to restrain a person with intent to prevent his liberation by:

(a) Secreting or holding him in a place where he is not likely to be found; or

(b) Endangering or threatening to endanger the safety of any human being.

Source: Laws 1977, LB 38, § 27.

28-313 Kidnapping; penalties.

(1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:

(a) Hold him for ransom or reward; or

(b) Use him as a shield or hostage; or

(c) Terrorize him or a third person; or

(d) Commit a felony; or

(e) Interfere with the performance of any government or political function.

(2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.

(3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

Source: Laws 1977, LB 38, § 28.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

This section creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties under this section is to be imposed are not elements of the offense of kidnapping, and their existence or nonexistence should properly be determined by the trial judge. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in this section. State v. Becerra, 263 Neb. 753, 642 N.W.2d 143 (2002).

Pursuant to subsection (3) of this section, kidnapping as a Class II felony is not a separate offense from kidnapping as a Class IA felony. The provisions of subsection (3) of this section are only mitigating circumstances which may reduce the penalty for kidnapping, and the existence or nonexistence of the mitigating circumstances is a matter properly considered by the court at sentencing, not the jury. State v. Becerra, 253 Neb. 653, 573 N.W.2d 397 (1998).

In the absence of a statutory definition, terrorize in subsection (1)(c) of this section means to fill with terror, scare, frighten, markedly disturb with fear, throw into a state of alarm, make afraid, or terrify. State v. Robbins, 253 Neb. 146, 570 N.W.2d 185 (1997).

The specific intentions specified in subsections (1)(a) through (e) of this section apply both to the act of abducting and to the act of continued restraint after having already abducted another. One commits kidnapping if one either abducts another with one or more of the intentions specified in subsections (1)(a) through (e) of this section, or abducts another without any of those intentions, but forms one or more of them while continuing to restrain the abducted person. Proof of the intent required for subsections (1)(a) through (e) of the crime of kidnapping, as defined by this section, requires proof of something more than the abduction. State v. Robbins, 253 Neb. 146, 570 N.W.2d 185 (1997).

Kidnapping is not a lesser-included offense of first degree sexual assault, nor is sexual assault a lesser-included offense of kidnapping; it is not impossible to commit one of these crimes without having committed the other. State v. Maeder, 229 Neb. 568, 428 N.W.2d 180 (1988).

Sections 28-313 and 28-314 define separate offenses. State v. Miller, 216 Neb. 72, 341 N.W.2d 915 (1983).

The purpose of kidnapping in every instance is to make it possible to commit some other crime. One may not erase the commission of a crime simply because, after committing it, a second crime is committed. State v. Schmidt, 213 Neb. 126, 327 N.W.2d 624 (1982).

The Nebraska kidnapping statute defines only a single criminal offense which is punishable by two different ranges of penalties depending on the treatment accorded the victim. State v. Schneckloth, Koger, and Heathman, 210 Neb. 144, 313 N.W.2d 438 (1981).

The district court did not abuse its discretion in sentencing the defendant to forty years for aiding and abetting kidnapping where sentence was well within the statutory limits, whether crime was classified as a Class IA or Class II felony, and the court had correctly considered that the victims were not voluntarily released and one victim had been raped, though defendant was not convicted of aiding and abetting the rape. United States v. Gomez, 733 F.2d 69 (8th Cir. 1984).

28-314 False imprisonment in the first degree; penalty.

(1) A person commits false imprisonment in the first degree if he or she knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold him or her in a condition of involuntary servitude.

(2) False imprisonment in the first degree is a Class IIIA felony.

Source: Laws 1977, LB 38, § 29; Laws 1997, LB 364, § 5.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

Sufficient evidence was presented from which a jury could reasonably infer that the defendant, either alone or while aiding and abetting a codefendant, intended to restrain the victim under terrorizing circumstances which exposed her to the risk of serious bodily injury. State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997).

Sections 28-313 and 28-314 define separate offenses. State v. Miller, 216 Neb. 72, 341 N.W.2d 915 (1983).

Pursuant to subsection (1) of this section, the offense of first degree false imprisonment requires that the knowing restraint of another person be either under terrorizing circumstances, under circumstances which expose the person to the risk of serious bodily injury, or with the intent to hold the individual in a condition of involuntary servitude. None of these conditions can be accomplished without restraining the individual without legal authority. State v. Brownell, 11 Neb. App. 68, 644 N.W.2d 166 (2002).

Pursuant to subsection (1) of this section, the restraint required to commit the offense of first degree false imprisonment must necessarily be without legal authority. State v. Brownell, 11 Neb. App. 68, 644 N.W.2d 166 (2002).

Second degree false imprisonment is a lesser-included offense of first degree false imprisonment. State v. Brownell, 11 Neb. App. 68, 644 N.W.2d 166 (2002).

First degree false imprisonment is not a lesser-included offense of kidnapping. State v. Newman, 5 Neb. App. 291, 559 N.W.2d 764 (1997).

28-315 False imprisonment in the second degree; penalty.

(1) A person commits false imprisonment in the second degree if he knowingly restrains another person without legal authority.

(2) In any prosecution under this section, it shall be an affirmative defense that the person restrained (a) was on or in the immediate vicinity of the premises of a retail mercantile establishment and he was restrained for the purpose of investigation or questioning as to the ownership of any merchandise; and (b) was restrained in a reasonable manner and for not more than a reasonable time; and (c) was restrained to permit such investigation or questioning by a police officer, or by the owner of the mercantile establishment, his authorized employee or agent; and (d) that such police officer, owner, employee or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit theft of merchandise on the premises; *Provided*, nothing in this section shall prohibit or restrict any person restrained pursuant to this section from maintaining any applicable civil remedy if no theft has occurred.

(3) False imprisonment in the second degree is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 30.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

Second degree false imprisonment is a lesser-included offense of first degree false imprisonment. State v. Brownell, 11 Neb. App. 68, 644 N.W.2d 166 (2002).

28-316 Violation of custody; penalty.

(1) Any person, including a natural or foster parent, who, knowing that he has no legal right to do so or, heedless in that regard, takes or entices any child under the age of eighteen years from the custody of its parent having legal custody, guardian, or other lawful custodian commits the offense of violation of custody.

(2) Except as provided in subsection (3) of this section, violation of custody is a Class II misdemeanor.

(3) Violation of custody in contravention of an order of any district or juvenile court of this state granting the custody of a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian of the custody of such child, is a Class IV felony.

Source: Laws 1977, LB 38, § 31.

28-317 Sexual assault; legislative intent.

It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of judicial process, which will insure that the alleged offender in a criminal sexual offense case have preserved the constitutionally guaranteed due process of law procedures, and which will establish a system of investigation, prosecution, punishment, and rehabilitation for the welfare and benefit of the citizens of this state as such system is employed in the area of criminal sexual offenses.

Source: Laws 1977, LB 38, § 32.

28-318 Terms, defined.

As used in sections 28-317 to 28-321, unless the context otherwise requires:

(1) Actor means a person accused of sexual assault;

(2) Intimate parts means the genital area, groin, inner thighs, buttocks, or breasts;

(3) Past sexual behavior means sexual behavior other than the sexual behavior upon which the sexual assault is alleged;

(4) Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;

(5) Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under sections 28-319.01 and 28-320.01;

(6) Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen;

(7) Victim means the person alleging to have been sexually assaulted;

(8) Without consent means:

(a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

(b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and

(c) A victim need not resist verbally or physically where it would be useless or futile to do so; and

(9) Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where

the victim reasonably believes that the actor has the present or future ability to execute the threat.

Source: Laws 1977, LB 38, § 33; Laws 1978, LB 701, § 1; Laws 1984, LB 79, § 3; Laws 1985, LB 2, § 2; Laws 1995, LB 371, § 3; Laws 2004, LB 943, § 4; Laws 2006, LB 1199, § 4.

1. Jury instruction
2. Sexual contact
3. Sexual penetration

1. Jury instruction

Jury instruction approved, defining cunnilingus as including licking, kissing, sucking, or otherwise fondling the sex organ of a female with the mouth or tongue. State v. Piskorski, 218 Neb. 543, 357 N.W.2d 206 (1984).

2. Sexual contact

In proving sexual contact, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose. State v. Osborn, 241 Neb. 424, 490 N.W.2d 160 (1992).

''Sexual contact,'' as defined in subsection (5) of this section, is established when the State proves that defendant intentionally touched the victim's underpants in the area between the legs. State v. Andersen, 238 Neb. 32, 468 N.W.2d 617 (1991).

In proving ''sexual contact,'' defined in subdivision (5) of this section, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose. State v. Berkman, 230 Neb. 163, 430 N.W.2d 310 (1988).

3. Sexual penetration

Penetration need not be penile to be sufficient to establish first degree sexual assault. State v. Shepard, 239 Neb. 639, 477 N.W.2d 567 (1991).

The act of fellatio constitutes a sexual penetration within the meaning of this section. State v. Gonzales, 219 Neb. 846, 366 N.W.2d 775 (1985).

The slightest penetration of the sexual organs is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for first degree sexual assault. State v. Tatum, 206 Neb. 625, 294 N.W.2d 354 (1980).

28-319 Sexual assault; first degree; penalty.

(1) Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age is guilty of sexual assault in the first degree.

(2) Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence.

(3) Any person who is found guilty of sexual assault in the first degree for a second time when the first conviction was pursuant to this section or any other state or federal law with essentially the same elements as this section shall be sentenced to a mandatory minimum term of twenty-five years in prison.

Source: Laws 1977, LB 38, § 34; Laws 1978, LB 748, § 5; Laws 1993, LB 430, § 1; Laws 1995, LB 371, § 4; Laws 2006, LB 1199, § 5.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

1. Constitutionality
2. Defenses
3. Elements
4. Evidence
5. Force
6. Generally
7. Lesser-included offense
8. Sentencing
9. Sexual penetration
10. Miscellaneous

1. Constitutionality

A constitutional amendment adding first degree sexual assault to offenses for which bail may be denied, is constitutional and is not violative of the fourteenth amendment, due process clause of the U.S. Constitution. Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106 (1979).

Statute held to be constitutional and not violative of equal protection under the fourteenth amendment. Country v. Parratt, 684 F.2d 588 (8th Cir. 1982).

2. Defenses

For criminal prosecutions brought under subsection (1)(a) of this section, the trial court must instruct the jury on the defense of consent when evidence is produced which, under all of the circumstances, could reasonably be viewed by the jury as an indication of affirmative and freely given consent to sexual penetration by the alleged victim. State v. Koperski, 254 Neb. 624, 578 N.W.2d 837 (1998).

In a charge of sexual assault on a child, it is no defense that the victim engaged in active concealment or misrepresentation of age, and evidence on the issue of the victim's chastity is irrelevant and inadmissible. State v. Campbell, 239 Neb. 14, 473 N.W.2d 420 (1991).

Consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault upon a child. State v. Navarrete, 221 Neb. 171, 376 N.W.2d 8 (1985).

3. Elements

Serious personal injury is not an element of first degree sexual assault. It is a factor that a sentencing judge shall take into consideration in imposing sentence. State v. Freeman, 267 Neb. 737, 677 N.W.2d 164 (2004).

The victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct. State v. Rossbach, 264 Neb. 563, 650 N.W.2d 242 (2002).

Intent is not an element of first degree sexual assault as defined by subsection (1) of this section. State v. Trackwell, 244 Neb. 925, 509 N.W.2d 638 (1994).

Only in first degree sexual assault does the State have to prove that the actor subjected the victim to sexual penetration. State v. Narcisse, 231 Neb. 805, 438 N.W.2d 743 (1989).

4. Evidence

Under subsection (2) of this section, before imposition of a sentence on a defendant convicted of first degree sexual assault, a sentencing judge is not required to conduct an evidentiary hearing to determine whether the victim has sustained serious personal injury as a result of the sexual assault by the defendant; rather, concerning the question of personal injury to the victim, the judge shall consider information appropriately before the court in the sentencing process. State v. Bunner, 234 Neb. 879, 453 N.W.2d 97 (1990).

5. Force

For use of a firearm to subject a victim to sexual penetration by force or threat of force, it is only necessary that the victim be aware of the firearm's presence; that the assailant, in proximity to the firearm and knowing the firearm's location, has realistic accessibility to that firearm; and that the victim reasonably believes that the assailant will discharge the firearm to harm the victim unless the victim submits to the act of the assailant. State v. Dondlinger, 222 Neb. 741, 386 N.W.2d 866 (1986).

Removing articles of clothing from a sleeping person, physically spreading her legs, and performing nonconsenual cunnilingus is ''force'' sufficient to violate the statute. State v. Moeller, 1 Neb. App. 1046, 510 N.W.2d 500 (1993).

6. Generally

Cunnilingus, that is, stimulation by the tongue or lips of any part of a female's genitalia, is an act which may subject the actor to prosecution for first degree sexual assault. Once the perpetrator's lips or tongue touches any part of the female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia. State v. Brown, 225 Neb. 418, 405 N.W.2d 600 (1987).

Whatever basis there may have been for assuming that the common-law rule of spousal exclusion was applicable under the former rape law of this state, such assumption was effectively abrogated by the Legislature when it enacted this section. State v. Willis, 223 Neb. 844, 394 N.W.2d 648 (1986).

In a prosecution for sexual assault, the prosecutrix may testify on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details. State v. Watkins, 207 Neb. 859, 301 N.W.2d 338 (1981).

It is sufficient if the victim's testimony is corroborated as to material facts and circumstances which support her testimony as to the principal facts at issue. State v. Red Feather, 205 Neb. 734, 289 N.W.2d 768 (1980); State v. Rhodes, 201 Neb. 576, 270 N.W.2d 920 (1978).

7. Lesser-included offense

A trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses. State v. James, 265 Neb. 243, 655 N.W.2d 891 (2003).

Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. State v. James, 265 Neb. 243, 655 N.W.2d 891 (2003).

Kidnapping is not a lesser-included offense of first degree sexual assault, nor is sexual assault a lesser-included offense of kidnapping; it is not impossible to commit one of these crimes without having committed the other. State v. Maeder, 229 Neb. 568, 428 N.W.2d 180 (1988).

Sexual assault of a child is not a lesser-included offense of first degree sexual assault of a child. State v. Putz, 11 Neb. App. 332, 650 N.W.2d 486 (2002).

Sexual assault in the second degree is not a lesser-included offense of sexual assault in the first degree. State v. Schmidt, 5 Neb. App. 653, 562 N.W.2d 859 (1997).

Sexual assault in the third degree is not a lesser-included offense of sexual assault in the first degree. State v. Schmidt, 5 Neb. App. 653, 562 N.W.2d 859 (1997).

8. Sentencing

Under subsection (2) of this section, before imposition of a sentence on a defendant convicted of first degree sexual assault, a sentencing judge is not required to conduct an evidentiary hearing to determine whether the victim has sustained serious personal injury as a result of the sexual assault by the defendant; rather, concerning the question of personal injury to the victim, the judge shall consider information appropriately before the court in the sentencing process. State v. Bunner, 234 Neb. 879, 453 N.W.2d 97 (1990).

A sentence of thirty-five years without the possibility of parole for first degree sexual assault, second offense, did not constitute cruel and unusual punishment. State v. Brand, 219 Neb. 402, 363 N.W.2d 516 (1985).

9. Sexual penetration

When a defendant is charged with first degree sexual assault under this section, the issue is not whether the defendant had sexual intercourse with the victim; rather, the issue is whether the defendant achieved even the slightest penetration. State v. Faatz, 234 Neb. 796, 452 N.W.2d 751 (1990).

Only in first degree sexual assault does the State have to prove that the actor subjected the victim to sexual penetration. State v. Narcisse, 231 Neb. 805, 438 N.W.2d 743 (1989).

10. Miscellaneous

Attempted first degree sexual assault on a child is a crime in Nebraska. State v. James, 265 Neb. 243, 655 N.W.2d 891 (2003).

Whether expert testimony is required to prove that a victim is physically or mentally incapable of consenting to or appraising the nature of the sexual contact is to be determined on a case-by-case basis; it was not required when a psychotherapist who

specialized in treating sexually abused children used his training and experience to abuse his stepdaughters. State v. Collins, 7 Neb. App. 187, 583 N.W.2d 341 (1998).

28-319.01 Sexual assault of a child; first degree; penalty.

(1) A person commits sexual assault of a child in the first degree if he or she subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older.

(2) Sexual assault of a child in the first degree is a Class IB felony with a mandatory minimum sentence of fifteen years in prison for the first offense.

(3) Any person who is found guilty of sexual assault of a child in the first degree under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, (c) under section 28-320.01 before July 14, 2006, of sexual assault of a child or attempted sexual assault of a child, (d) under section 28-320.01 on or after July 14, 2006, of sexual assault of a child in the second or third degree or attempted sexual assault of a child in the second or third degree, or (e) in any other state or federal court under laws with essentially the same elements as this section, section 28-319, or section 28-320.01 as it existed before, on, or after July 14, 2006, shall be guilty of a Class IB felony with a mandatory minimum sentence of twenty-five years in prison.

Source: Laws 2006, LB 1199, § 6.

28-320 Sexual assault; second or third degree; penalty.

(1) Any person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

(2) Sexual assault shall be in the second degree and is a Class III felony if the actor shall have caused serious personal injury to the victim.

(3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

Source: Laws 1977, LB 38, § 35; Laws 1978, LB 701, § 2; Laws 1995, LB 371, § 5.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

1. Elements
2. Generally
3. Jury instructions
4. Lesser-included offense
5. Sexual contact

1. Elements

Defendant's conviction of sexual abuse of a vulnerable adult reversed because evidence was insufficient to establish element of sexual contact. State v. Hulshizer, 245 Neb. 244, 512 N.W.2d 372 (1994).

This section requires only that the state prove that the sexual contact took place and that the actor knew or should have known that the victim was mentally or physically incapable of resisting the actor's aggressions. In re Interest of J.M., 223 Neb. 609, 391 N.W.2d 146 (1986).

2. Generally

It is sufficient if the victim's testimony is corroborated as to material facts and circumstances which support her testimony as to the principal facts at issue. State v. Red Feather, 205 Neb. 734, 289 N.W.2d 768 (1980); State v. Rhodes, 201 Neb. 576, 270 N.W.2d 920 (1978).

3. Jury instructions

Trial court erred in instructing jury on second degree sexual assault. State v. Beermann, 231 Neb. 380, 436 N.W.2d 499 (1989).

4. Lesser-included offense

Third degree sexual assault is not a lesser-included offense of attempted first degree sexual assault. State v. Swoopes, 223 Neb. 914, 395 N.W.2d 500 (1986).

Third degree sexual assault is a lesser-included offense of second degree sexual assault. State v. Schwartz, 219 Neb. 833, 366 N.W.2d 766 (1985).

Sexual assault in the second degree is not a lesser-included offense of sexual assault in the first degree. State v. Schmidt, 5 Neb. App. 653, 562 N.W.2d 859 (1997).

Sexual assault in the third degree is not a lesser-included offense of sexual assault in the first degree. State v. Schmidt, 5 Neb. App. 653, 562 N.W.2d 859 (1997).

5. Sexual contact

Defendant's conviction of sexual abuse of a vulnerable adult reversed because evidence was insufficient to establish element of sexual contact. State v. Hulshizer, 245 Neb. 244, 512 N.W.2d 372 (1994).

28-320.01 Sexual assault of a child; second or third degree; penalties.

(1) A person commits sexual assault of a child in the second or third degree if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older.

(2) Sexual assault of a child is in the second degree if the actor causes serious personal injury to the victim. Sexual assault of a child in the second degree is a Class II felony for the first offense.

(3) Sexual assault of a child is in the third degree if the actor does not cause serious personal injury to the victim. Sexual assault of a child in the third degree is a Class IIIA felony for the first offense.

(4) Any person who is found guilty of second degree sexual assault of a child under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, (c) under section 28-319.01 for first degree or attempted first degree sexual assault of a child, or (d) in any other state or federal court under laws with essentially the same elements as this section, section 28-319, or section 28-319.01 shall be guilty of a Class IC felony and shall be sentenced to a mandatory minimum term of twenty-five years in prison.

(5) Any person who is found guilty of third degree sexual assault of a child under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, (c) under section 28-319.01 for first degree or attempted first degree sexual assault of a child, or (d) in any other state or federal court under laws with essentially the same elements as this section, section 28-319, or 28-319.01 shall be guilty of a Class IC felony.

Source: Laws 1984, LB 79, § 1; Laws 1991, LB 23, § 1; Laws 1996, LB 645, § 14; Laws 1997, LB 364, § 6; Laws 2006, LB 1199, § 7.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

As used in this section, the phrase ''fourteen years of age or younger'' designates persons whose age is less than or under fourteen years, and also designates persons who have reached and passed their fourteenth birthday but have not reached their fifteenth birthday. State v. Carlson, 223 Neb. 874, 394 N.W.2d 669 (1986).

Sexual assault of a child is not a lesser-included offense of first degree sexual assault of a child. State v. Putz, 11 Neb. App. 332, 650 N.W.2d 486 (2002).

28-320.02 Sexual assault; use of computer; prohibited acts; penalties.

(1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer as that term is defined in section 28-1343, to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320. A person shall not be convicted of both a violation of this subsection

and a violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320 if the violations arise out of the same set of facts or pattern of conduct and the individual solicited, coaxed, enticed, or lured under this subsection is also the victim of the sexual assault under section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320.

(2) A person who violates this section is guilty of a Class IIIA felony. If a person who violates this section has previously been convicted of a violation of this section or section 28-308, 28-309, 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320, the person is guilty of a Class III felony.

Source: Laws 2004, LB 943, § 3; Laws 2006, LB 1199, § 8.

28-321 Sexual assault; evidence of past sexual behavior; when admissible; procedure.

(1) If the defendant intends to offer evidence of specific instances of the victim's past sexual behavior, notice of such intention shall be given to the prosecuting attorney and filed with the court not later than fifteen days before trial.

(2) Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior. Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

Source: Laws 1977, LB 38, § 36; Laws 1984, LB 79, § 4.

1. Admissibility
2. Miscellaneous

1. Admissibility

Nebraska's rape shield law provides that evidence of a victim's past sexual behavior is admissible only when an offer of proof demonstrates to the court that questions put to a witness call for competent evidence. Unless it does so without equivocation, it is not error for the court to overrule the offer. State v. Earl, 252 Neb. 127, 560 N.W.2d 491 (1997).

Statements made by victim to examining physician that she had been molested for 4 years by her brother, that she has been sexually assaulted four times in high school, and that her 5-year-old child was the product of a sexual assault were not relevant and not admissible under the rape shield law. State v. Welch, 241 Neb. 699, 490 N.W.2d 216 (1992).

Under subsection (2) of this section, testimony regarding victim's past sexual behavior was improper. State v. Fraser, 230 Neb. 157, 430 N.W.2d 512 (1988).

Although evidence of a victim's past sexual behavior may be admissible under subsection (2)(b) on the issue of consent, the trial court, nevertheless, may apply the balance found in Rule 403 of the Nebraska Evidence Rules. State v. Hopkins, 221 Neb. 367, 377 N.W.2d 110 (1985).

In order that a victim's past consensual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant. State v. Hopkins, 221 Neb. 367, 377 N.W.2d 110 (1985).

Subsection (2) of this section does not mandate a pretrial hearing on the admissibility of evidence; this section merely indicates that if a defendant intends to offer evidence of the alleged victim's prior sexual behavior, the defendant must file a pretrial notice of his or her intent, and that upon the filing of the notice, either party may request the court to conduct an in camera hearing. State v. Washington, 11 Neb. App. 598, 658 N.W.2d 302 (2003).

A trial court may not exclude evidence offered under this section on the basis that the evidence is not credible. Testimony by a defendant in a hearing conducted pursuant to this section may be used to impeach that defendant's testimony at trial. State v. Sanchez-Lahora, 9 Neb. App. 621, 616 N.W.2d 810 (2000).

Under the rape shield law, evidence of a complainant's prior sexual behavior is inadmissible unless it tends to prove one of the two explicitly stated exceptions, i.e., source of physical evidence or consent. The statutory purpose of the rape shield law is to protect sexual assault victims from grueling cross-examination concerning their previous sexual behavior, which often elicits evidence of questionable relevance to the case being tried. State v. Johnson, 9 Neb. App. 140, 609 N.W.2d 48 (2000).

2. Miscellaneous

This section does not permit a trial court to weigh the credibility of a defendant's allegations of past consensual sexual conduct with a victim. State v. Sanchez-Lahora, 261 Neb. 192, 622 N.W.2d 612 (2001).

The purpose of the rape shield law is to protect sexual assault victims from grueling cross-examination concerning their previous sexual behavior, which often elicits evidence of questionable relevance to the case being tried. Assuming, without deciding, that there may be circumstances in which the accused's constitutional right to confrontation would require admission of evidence concerning a victim's prior sexual behavior which would not be admissible under the rape shield law, no such circumstances exist in this case. State v. Sanchez, 257 Neb. 291, 597 N.W.2d 361 (1999).

Nebraska rape shield law is constitutional on its face and as applied in this case to exclude evidence of the victim's previous consensual sexual relations with third parties. State v. Schenck, 222 Neb. 523, 384 N.W.2d 642 (1986).

If the prosecution tries a sexual assault case in a way that puts the victim's sexuality or sexual habits in issue and such sexuality or sexual habits are relevant because they make a material fact more or less probable, then the defendant has a constitutional right under the Confrontation Clause to respond, notwithstanding the rape shield law. State v. Johnson, 9 Neb. App. 140, 609 N.W.2d 48 (2000).

28-322 Sexual abuse of an inmate or parolee; terms, defined.

For purposes of sections 28-322 to 28-322.03:

(1) Inmate or parolee means any individual confined in a facility operated by the Department of Correctional Services or a city or county correctional or jail facility or under parole supervision; and

(2) Person means (a) an individual employed by the Department of Correctional Services or by the Office of Parole Administration, including any individual working in central administration of the department, any individual working under contract with the department, and any individual, other than an inmate's spouse, to whom the department has authorized or delegated control over an inmate or an inmate's activities, (b) an individual employed by a city or county correctional or jail facility, including any individual working in central administration of the city or county correctional or jail facility, any individual working under contract with the city or county correctional or jail facility, and any individual, other than an inmate's spouse, to whom the city or county correctional or jail facility has authorized or delegated control over an inmate or an inmate's activities, and (c) an individual employed by the Office of Probation Administration who performs official duties within any facility operated by the Department of Correctional Services or a city or county correctional or jail facility.

Source: Laws 1999, LB 511, § 2; Laws 2001, LB 155, § 1; Laws 2004, LB 943, § 5.

28-322.01 Sexual abuse of an inmate or parolee.

A person commits the offense of sexual abuse of an inmate or parolee if such person subjects an inmate or parolee to sexual penetration or sexual contact as those terms are defined in section 28-318. It is not a defense to a charge under this section that the inmate or parolee consented to such sexual penetration or sexual contact.

Source: Laws 1999, LB 511, § 3; Laws 2001, LB 155, § 2; Laws 2004, LB 943, § 6.

28-322.02 Sexual abuse of an inmate or parolee in the first degree; penalty.

Any person who subjects an inmate or parolee to sexual penetration is guilty of sexual abuse of an inmate or parolee in the first degree. Sexual abuse of an inmate or parolee in the first degree is a Class III felony.

Source: Laws 1999, LB 511, § 4.

28-322.03 Sexual abuse of an inmate or parolee in the second degree; penalty.

Any person who subjects an inmate or parolee to sexual contact is guilty of sexual abuse of an inmate or parolee in the second degree. Sexual abuse of an inmate or parolee in the second degree is a Class IV felony.

Source: Laws 1999, LB 511, § 5.

28-322.04 Sexual abuse of a protected individual; penalties.

(1) For purposes of this section:

(a) Person means an individual employed by the Department of Health and Human Services and includes, but is not limited to, any individual working in central administration or regional service areas or facilities of the department and any individual to whom the department has authorized or delegated control over a protected individual or a protected individual's activities, whether by contract or otherwise; and

(b) Protected individual means an individual in the care or custody of the department.

(2) A person commits the offense of sexual abuse of a protected individual if the person subjects a protected individual to sexual penetration or sexual contact as those terms are defined in section 28-318. It is not a defense to a charge under this section that the protected individual consented to such sexual penetration or sexual contact.

(3) Any person who subjects a protected individual to sexual penetration is guilty of sexual abuse of a protected individual in the first degree. Sexual abuse of a protected individual in the first degree is a Class III felony.

(4) Any person who subjects a protected individual to sexual contact is guilty of sexual abuse of a protected individual in the second degree. Sexual abuse of a protected individual in the second degree is a Class IV felony.

Source: Laws 2003, LB 17, § 2; Laws 2007, LB296, § 26.

28-323 Domestic assault; penalties.

(1) A person commits the offense of domestic assault in the third degree if he or she:

(a) Intentionally and knowingly causes bodily injury to his or her intimate partner; or

(b) Places, by physical menace, his or her intimate partner in fear of imminent bodily injury.

(2) A person commits the offense of domestic assault in the second degree if he or she intentionally and knowingly causes bodily injury to his or her intimate partner with a dangerous instrument.

(3) A person commits the offense of domestic assault in the first degree if he or she intentionally and knowingly causes serious bodily injury to his or her intimate partner.

(4) Violation of subsection (1) of this section is a Class I misdemeanor, except that for any second or subsequent violation of such subsection within twelve years after the date of the current conviction, any person so offending against the same intimate partner is guilty of a Class IV felony.

(5) Violation of subsection (2) of this section is a Class IIIA felony, except that for any second or subsequent violation of such subsection within twelve years after the date of the current conviction, any person so offending against the same intimate partner is guilty of a Class III felony.

(6) Violation of subsection (3) of this section is a Class III felony, except that for any second or subsequent violation under such subsection within twelve years after the date of the current conviction, any person so offending against the same intimate partner is guilty of a Class II felony.

(7) For purposes of this section, intimate partner means a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship. For purposes of this subsection, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context.

Source: Laws 2004, LB 613, § 5.

28-324 Robbery; penalty.

(1) A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.

(2) Robbery is a Class II felony.

Source: Laws 1977, LB 38, § 39.

The crime of being an accessory to a felony, as defined in section 28-204, is not a lesser-included offense of the crime of robbery. State v. Arthaloney, 230 Neb. 819, 433 N.W.2d 545 (1989).

If the sight of a weapon, whether it is operative or not, instills fear in the victim, that is sufficient under subsection (1) of this section. State v. Propst, 228 Neb. 722, 424 N.W.2d 136 (1988).

Robbery of contraband may be subject to the penal sanction of this section. State v. Dwyer, 226 Neb. 340, 411 N.W.2d 341 (1987).

Under the statute, a robbery is committed when property is taken from a person through the use of force, violence, or intimidation; however, the taking is sufficient if the property is taken from the individual's personal presence, protection, or control. It need not be taken from the person himself. State v. Sutton, 220 Neb. 128, 368 N.W.2d 492 (1985).

Where information charging an individual with robbery contains the name ''McDonald's Restaurant'' as the name of the person robbed, it is not of such a fundamental character as to make the indictment wholly invalid and, as such, objection to it was waived by the defendant's plea. State v. Coleman, 209 Neb. 823, 311 N.W.2d 911 (1981).

When a person found guilty of a substantive crime as well as being a habitual criminal is improperly sentenced, both sentences must be set aside and the case remanded for proper sentencing. State v. Rolling, 209 Neb. 243, 307 N.W.2d 123 (1981).

Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence, whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question. State v. Pena, 208 Neb. 250, 302 N.W.2d 735 (1981).

In a case where defendant repeatedly sexually assaulted his victim and, during a pause in the assaults, took money from her purse when it was not in the immediate control of the victim, the factfinder was permitted to infer that the necessary elements of force and intent were present and to find the defendant guilty of robbery. State v. Welchel, 207 Neb. 337, 299 N.W.2d 155 (1980).

28-325 Abortion; declaration of purpose.

The Legislature hereby finds and declares:

(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be

construed as legislatively encouraging abortions at any stage of unborn human development, but are rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973;

(3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;

(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; and

(5) That it is in the interest of the people of the State of Nebraska to maintain accurate statistical data to aid in providing proper maternal health regulations and education.

Source: Laws 1977, LB 38, § 40; Laws 1997, LB 23, § 1.

28-326 Terms, defined.

For purposes of sections 28-325 to 28-345, unless the context otherwise requires:

(1) Abortion means the use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child, and which causes the premature termination of the pregnancy;

(2) Hospital means those institutions licensed by the Department of Health and Human Services pursuant to the Health Care Facility Licensure Act;

(3) Physician means any person licensed to practice medicine in this state as provided in sections 71-102 to 71-110;

(4) Pregnant means that condition of a woman who has unborn human life within her as the result of conception;

(5) Conception means the fecundation of the ovum by the spermatozoa;

(6) Viability means that stage of human development when the unborn child is potentially able to live more than merely momentarily outside the womb of the mother by natural or artificial means;

(7) Emergency situation means that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial impairment of a major bodily function;

(8) Probable gestational age of the unborn child means what will with reasonable probability, in the judgment of the physician, be the gestational age of the unborn child at the time the abortion is planned to be performed; and

(9) Partial-birth abortion means an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. For purposes of this subdivision, the term partially delivers vaginally a living unborn child before killing the unborn child means deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.

Source: Laws 1977, LB 38, § 41; Laws 1979, LB 316, § 1; Laws 1984, LB 695, § 1; Laws 1986, LB 663, § 1; Laws 1993, LB 110, § 1; Laws 1996, LB 1044, § 59; Laws 1997, LB 23, § 2; Laws 2000, LB 819, § 64; Laws 2007, LB296, § 27.

Cross References

Health Care Facility Licensure Act, see section 71-401.

Sections 28-326(8), 28-327, 28-333, and 28-343 (1979) regulating abortion were unconstitutional. Womens Services, P.C. v. Thone, 690 F.2d 667 (8th Cir. 1982).

The portions of this statute which require that a woman seeking an abortion indicate in writing that she has been advised of possible alternatives to abortion and of the abortion procedures to be used, does not unduly burden either the woman's decisionmaking process or her obtaining an abortion and, in view of the state's interest in having the information conveyed, the sections are constitutional. Womens Services, P.C. v. Thone, 483 F.Supp. 1022 (D. Neb. 1979).

This section, as far as it requires a woman seeking an abortion to indicate that she has been advised of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, gives a person of ordinary intelligence fair notice as to the subject matter of the statute and is not void for vagueness. Womens Services, P.C. v. Thone, 483 F.Supp. 1022 (D. Neb. 1979).

28-327 Abortion; voluntary and informed consent required; exception.

No abortion shall be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed. Except in the case of an emergency situation, consent to an abortion is voluntary and informed only if:

(1) The woman is told the following by the physician who is to perform the abortion, by the referring physician, or by a licensed physician assistant or registered nurse who is an agent of either, at least twenty-four hours before the abortion:

(a) The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, and danger to subsequent pregnancies and infertility;

(b) The probable gestational age of the unborn child at the time the abortion is to be performed; and

(c) The medical risks associated with carrying her child to term.

The person providing the information specified in this subdivision to the person upon whom the abortion is to be performed shall be deemed qualified to so advise and provide such information only if, at a minimum, he or she has had training in each of the following subjects: Sexual and reproductive health; abortion technology; contraceptive technology; short-term counseling skills; community resources and referral; and informed consent. The physician or the physician's agent may provide this information by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied by the patient and whatever other relevant information is reasonably available to the physician or the physician's agent;

(2) The woman is informed by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either, at least twenty-four hours before the abortion:

(a) The name of the physician who will perform the abortion;

(b) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(c) That the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion; and

(d) That she has the right to review the printed materials described in section 28-327.01. The physician or his or her agent shall orally inform the woman that the materials have been provided by the Department of Health and Human Services and that they describe the unborn child and list agencies which offer alternatives to abortion. If the woman chooses to review the materials, they shall either be given to her at least twenty-four hours before the abortion or mailed to her at least seventy-two hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee. The physician and his or her agent may disassociate themselves from the materials and may comment or refrain from commenting on them as they choose;

(3) The woman certifies in writing, prior to the abortion, that the information described in subdivisions (1) and (2)(a), (b), and (c) of this section has been furnished her and that she has been informed of her right to review the information referred to in subdivision (2)(d) of this section; and

(4) Prior to the performance of the abortion, the physician who is to perform the abortion or his or her agent receives a copy of the written certification prescribed by subdivision (3) of this section.

Source: Laws 1977, LB 38, § 42; Laws 1979, LB 316, § 2; Laws 1984, LB 695, § 2; Laws 1993, LB 110, § 2; Laws 1996, LB 1044, § 60.

This section does not create an independent cause of action under section 25-206. The right of action for violation of this section is ''against the person who performed the abortion or attempted to perform the abortion''. Hill v. Women's Med. Ctr. of Neb., 254 Neb. 827, 580 N.W.2d 102 (1998).

Sections 28-326(8), 28-327, 28-333, and 28-343 (1979) regulating abortion were unconstitutional. Womens Services, P.C. v. Thone, 690 F.2d 667 (8th Cir. 1982).

The interest of the state in having women who seek abortions make a thoughtful decision after receiving certain information, while legitimate, is not sufficiently compelling to justify the substantial burden imposed by the requirement of a forty-eight hour wait between the expression of informed consent and the performance of the abortion. Therefor, sections 28-327 and 28-328 (1979) imposing the waiting period are unconstitutional and their implementation is permanently enjoined. Womens Services, P.C. v. Thone, 483 F.Supp. 1022 (D. Neb. 1979).

28-327.01 Department of Health and Human Services; printed materials; duties; availability.

(1) The Department of Health and Human Services shall cause to be published, within sixty days after September 9, 1993, the following easily comprehensible printed materials:

(a) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth, and while the child is dependent, including adoption agencies and agencies and services for prevention of unintended pregnancies, which materials shall include a comprehensive list of the agencies available, a description of the services they offer, and a description of the manner, including telephone numbers and addresses in which such agencies may be contacted or printed materials including a toll-free, twenty-four-hour-a-day telephone

number which may be called to orally obtain such a list and description of agencies in the locality of the caller and of the services they offer; and

(b) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a woman can be known to be pregnant to full term, including pictures or drawings representing the development of unborn children at the two-week gestational increments, and any relevant information on the possibility of the unborn child's survival. Any such pictures or drawings shall contain the dimensions of the unborn child and shall be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The materials shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion, the medical risks commonly associated with abortion, and the medical risks commonly associated with carrying a child to term.

(2) The materials shall be printed in a typeface large enough to be clearly legible.

(3) The materials required under this section shall be available from the department upon the request by any person, facility, or hospital for an amount equal to the cost incurred by the department to publish the materials.

Source: Laws 1993, LB 110, § 3; Laws 1996, LB 1044, § 61.

28-327.02 Abortion; emergency situation; physician; duties.

When an emergency situation compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his or her judgment that an abortion is necessary to avert her death or to avert substantial impairment of a major bodily function.

Source: Laws 1993, LB 110, § 4.

28-327.03 Civil liability; limitation.

No civil liability for failure to comply with subdivision (2)(d) of section 28-327 or that portion of subdivision (3) of such section requiring a written certification that the woman has been informed of her right to review the information referred to in subdivision (2)(d) of such section may be imposed unless the Department of Health and Human Services has published and made available the printed materials at the time the physician or his or her agent is required to inform the woman of her right to review them.

Source: Laws 1993, LB 110, § 5; Laws 1996, LB 1044, § 62.

28-327.04 Civil cause of action; authorized; evidence of professional negligence; attorney's fee.

Any person upon whom an abortion has been performed or attempted in violation of section 28-327 or the parent or guardian of a minor upon whom an abortion has been performed or attempted in violation of such section shall have a right to maintain a civil cause of action against the person who performed the abortion or attempted to perform the abortion. A violation of

such section shall be prima facie evidence of professional negligence. The written certification prescribed by subdivision (3) of section 28-327 signed by the person upon whom an abortion has been performed or attempted shall constitute and create a rebuttable presumption of full compliance with all provisions of section 28-327 in favor of the physician who performed or attempted to perform the abortion, the referring physician, or the agent of either. The written certification shall be admissible as evidence in the cause of action for professional negligence or in any criminal action. If judgment is rendered in favor of the plaintiff in any such action, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

Source: Laws 1993, LB 110, § 6.

28-327.05 Civil action; anonymity of woman; procedures.

In every civil action brought pursuant to section 28-327.04, the court shall rule whether the anonymity of any woman upon whom an abortion is performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion by a party or on its own motion, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted, anyone given standing under section 28-327.04 who brings a civil action under such section shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

Source: Laws 1993, LB 110, § 7.

28-328 Partial-birth abortion; prohibition; violation; penalties.

(1) No partial-birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The intentional and knowing performance of an unlawful partial-birth abortion in violation of subsection (1) of this section is a Class III felony.

(3) No woman upon whom an unlawful partial-birth abortion is performed shall be prosecuted under this section or for conspiracy to violate this section.

(4) The intentional and knowing performance of an unlawful partial-birth abortion shall result in the automatic suspension and revocation of an attending physician's license to practice medicine in Nebraska by the Division of Public Health pursuant to sections 38-177 to 38-1,102.

(5) Upon the filing of criminal charges under this section by the Attorney General or a county attorney, the Attorney General shall also file a petition to suspend and revoke the attending physician's license to practice medicine

pursuant to section 38-186. A hearing on such administrative petition shall be set in accordance with section 38-188. At such hearing, the attending physician shall have the opportunity to present evidence that the physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. A defendant against whom criminal charges are brought under this section may bring a motion to delay the beginning of the trial until after the entry of an order by the Director of Public Health pursuant to section 38-196. The findings of the director as to whether the attending physician's conduct was necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, shall be admissible in the criminal proceedings brought pursuant to this section.

Source: Laws 1997, LB 23, § 3; Laws 2007, LB296, § 28; Laws 2007, LB463, § 1118.

Section declared unconstitutional. Stenberg v. Carhart, 530 U.S. 914 (2000).

28-329 Abortion; when not to be performed.

No abortion shall be performed after the time at which, in the sound medical judgment of the attending physician, the unborn child clearly appears to have reached viability, except when necessary to preserve the life or health of the mother.

Source: Laws 1977, LB 38, § 44; Laws 1979, LB 316, § 3; Laws 1984, LB 695, § 4.

28-330 Abortion procedure; protection of viable, unborn child.

In any abortion performed pursuant to section 28-329, all reasonable precautions, in accord with the sound medical judgment of the attending physician and compatible with preserving the life or health of the mother, shall be taken to insure the protection of the viable, unborn child.

Source: Laws 1977, LB 38, § 45; Laws 1979, LB 316, § 4; Laws 1984, LB 695, § 5.

28-331 Care and treatment of child aborted.

When as the result of an abortion a child is, in the sound medical judgment of the attending physician, born alive, then all reasonable steps, in accordance with the sound medical judgment of the attending physician, shall be employed to preserve the life of the child. For purposes of this section, born alive shall mean the complete expulsion or extraction of the child from the mother irrespective of the duration of the pregnancy and after such expulsion or extraction such child breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles whether or not the umbilical cord has been cut or the placenta is attached.

Source: Laws 1977, LB 38, § 46; Laws 1979, LB 316, § 5; Laws 1984, LB 695, § 6.

28-332 Violation; penalty.

The intentional and knowing violation of section 28-329, 28-330, or 28-331 is a Class IV felony.

Source: Laws 1977, LB 38, § 47; Laws 1984, LB 695, § 7.

28-333 Repealed. Laws 1984, LB 695, § 9.

28-334 Repealed. Laws 1984, LB 695, § 9.

28-335 Abortion by other than licensed physician; penalty.

The performing of an abortion by any person other than a licensed physician is a Class IV felony.

Source: Laws 1977, LB 38, § 50.

28-336 Abortion by other than accepted medical procedures; penalty.

The performing of an abortion by using anything other than accepted medical procedures is a Class IV felony.

Source: Laws 1977, LB 38, § 51.

28-337 Hospital, clinic, institution; not required to admit patient for abortion.

No hospital, clinic, institution, or other facility in this state shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein, but the hospital, clinic, institution, or other facility shall inform the patient of its policy not to participate in abortion procedures. No cause of action shall arise against any hospital, clinic, institution, or other facility for refusing to perform or allow an abortion.

Source: Laws 1977, LB 38, § 52.

28-338 No person required to perform an abortion; no liability for refusal.

No person shall be required to perform or participate in any abortion, and the refusal of any person to participate in an abortion shall not be a basis for civil liability to any person. No hospital, governing board, or any other person, firm, association, or group shall terminate the employment or alter the position of, prevent or impair the practice or occupation of, or impose any other sanction or otherwise discriminate against any person who refuses to participate in an abortion.

Source: Laws 1977, LB 38, § 53.

28-339 Discrimination against person refusing to participate in an abortion; violation; penalty.

Any violation of section 28-338 is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 54.

28-340 Discrimination against person refusing to participate in an abortion; damages.

Any person whose employment or position has been in any way altered, impaired, or terminated in violation of sections 28-325 to 28-345 may sue in the

district court for all consequential damages, lost wages, reasonable attorney's fees incurred, and the cost of litigation.

Source: Laws 1977, LB 38, § 55; Laws 1997, LB 23, § 4.

28-341 Discrimination against person refusing to participate in an abortion; injunctive relief.

Any person whose employment or position has in any way been altered, impaired, or terminated because of his refusal to participate in an abortion shall have the right to injunctive relief, including temporary relief, pending trial upon showing of an emergency, in the district court, in accordance with the statutes, rules, and practices applicable in other similar cases.

Source: Laws 1977, LB 38, § 56.

28-342 Aborted child; sell, transfer, distribute, give away; violation; penalty.

The knowing, willful, or intentional sale, transfer, distribution, or giving away of any live or viable aborted child for any form of experimentation is a Class III felony. The knowing, willful, or intentional consenting to, aiding, or abetting of any such sale, transfer, distribution, or other unlawful disposition of an aborted child is a Class III felony. This section shall not prohibit or regulate diagnostic or remedial procedures the purpose of which is to preserve the life or health of the aborted child or the mother.

Source: Laws 1977, LB 38, § 57; Laws 1979, LB 316, § 8.

28-343 Department of Health and Human Services; abortion reporting form; items included; confidential.

The Department of Health and Human Services shall prescribe an abortion reporting form which shall be used for the reporting of every abortion performed in this state. Such form shall include the following items:

(1) The age of the pregnant woman;

(2) The location of the facility where the abortion was performed;

(3) The type of procedure performed;

(4) Complications, if any;

(5) The name of the attending physician;

(6) The pregnant woman's obstetrical history regarding previous pregnancies, abortions, and live births;

(7) The stated reason or reasons for which the abortion was requested;

(8) The state of the pregnant woman's legal residence;

(9) The length and weight of the aborted child, when measurable;

(10) Whether an emergency situation caused the physician to waive any of the requirements of section 28-327; and

(11) Such other information as may be prescribed in accordance with section 71-602.

The completed form shall be signed by the attending physician and sent to the department within fifteen days after each reporting month. The completed form shall be an original, typed or written legibly in durable ink, and shall not be deemed complete unless the omission of any item of information required shall have been disclosed or satisfactorily accounted for. Carbon copies shall

not be acceptable. The abortion reporting form shall not include the name of the person upon whom the abortion was performed. The abortion reporting form shall be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding.

Source: Laws 1977, LB 38, § 58; Laws 1979, LB 316, § 9; Laws 1984, LB 695, § 8; Laws 1989, LB 344, § 2; Laws 1996, LB 1044, § 63; Laws 1997, LB 307, § 2; Laws 2007, LB296, § 29.

This section is unconstitutional insofar as the statute requires physicians to make an official report of ''prescribed'' abortions. Womens Services, P.C. v. Thone, 483 F.Supp. 1022 (D. Neb. 1979).

28-344 Reporting form; violation; penalty.

Violation of section 28-343 is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 59.

28-345 Department of Health and Human Services; permanent file; rules and regulations.

The Department of Health and Human Services shall prepare and keep on permanent file compilations of the information submitted on the abortion reporting forms pursuant to such rules and regulations as established by the department, which compilations shall be a matter of public record. Under no circumstances shall the compilations of information include the name of any attending physician or identify in any respect facilities where abortions are performed. The department, in order to maintain and keep such compilations current, shall file with such reports any new or amended information.

Source: Laws 1977, LB 38, § 60; Laws 1979, LB 316, § 10; Laws 1996, LB 1044, § 64; Laws 2007, LB296, § 30.

28-346 Aborted infant; experimentation; prohibited; exception; penalty.

No person shall knowingly, intentionally, or willfully use any premature infant aborted alive for any type of scientific, research, laboratory, or other kind of experimentation except as necessary to protect or preserve the life or health of such premature infant aborted alive. Violation of this section is a Class IV felony.

Source: Laws 1979, LB 316, § 11.

28-347 Repealed. Laws 1991, LB 425, § 13.

(b) ADULT PROTECTIVE SERVICES ACT

28-348 Act, how cited.

Sections 28-348 to 28-387 shall be known and may be cited as the Adult Protective Services Act.

Source: Laws 1988, LB 463, § 1.

28-349 Legislative intent.

The Legislature recognizes the need for the investigation and provision of services to certain persons who are substantially impaired and are unable to protect themselves from abuse. Often such persons cannot find others able or

willing to render assistance. The Legislature intends through the Adult Protective Services Act to establish a program designed to fill this need and to assure the availability of the program to all eligible persons. It is also the intent of the Legislature to authorize the least restriction possible on the exercise of personal and civil rights consistent with the person's need for services.

Source: Laws 1988, LB 463, § 2.

28-350 Definitions, where found.

For purposes of the Adult Protective Services Act, unless the context otherwise requires, the definitions found in sections 28-351 to 28-371 shall be used.

Source: Laws 1988, LB 463, § 3.

28-351 Abuse, defined.

Abuse shall mean any knowing, intentional, or negligent act or omission on the part of a caregiver, a vulnerable adult, or any other person which results in physical injury, unreasonable confinement, cruel punishment, sexual abuse, exploitation, or denial of essential services to a vulnerable adult.

Source: Laws 1988, LB 463, § 4.

Defendant's conviction of sexual abuse of a vulnerable adult reversed because evidence was insufficient to establish element of sexual contact. State v. Hulshizer, 245 Neb. 244, 512 N.W.2d 372 (1994).

28-352 Adult protective services, defined.

Adult protective services shall mean those services provided by the department for the prevention, correction, or discontinuance of abuse. Such services shall be those necessary and appropriate under the circumstances to protect an abused vulnerable adult, ensure that the least restrictive alternative is provided, prevent further abuse, and promote self-care and independent living. Such services shall include, but not be limited to: (1) Receiving and investigating reports of alleged abuse; (2) developing social service plans; (3) arranging for the provision of services such as medical care, mental health care, legal services, fiscal management, housing, or home health care; (4) arranging for the provision of items such as food, clothing, or shelter; and (5) arranging or coordinating services for caregivers.

Source: Laws 1988, LB 463, § 5.

28-353 Caregiver, defined.

Caregiver shall mean any person or entity which has assumed the responsibility for the care of a vulnerable adult voluntarily, by express or implied contract, or by order of a court of competent jurisdiction.

Source: Laws 1988, LB 463, § 6.

28-354 Cruel punishment, defined.

Cruel punishment shall mean punishment which intentionally causes physical injury to a vulnerable adult.

Source: Laws 1988, LB 463, § 7.

28-355 Denial of essential services, defined.

Denial of essential services shall mean that essential services are denied or neglected to such an extent that there is actual physical injury to a vulnerable adult or imminent danger of the vulnerable adult suffering physical injury or death.

Source: Laws 1988, LB 463, § 8.

28-356 Department, defined.

Department shall mean the Department of Health and Human Services.

Source: Laws 1988, LB 463, § 9; Laws 1996, LB 1044, § 65; Laws 2006, LB 994, § 51; Laws 2007, LB296, § 31.

28-357 Essential services, defined.

Essential services shall mean those services necessary to safeguard the person or property of a vulnerable adult. Such services shall include, but not be limited to, sufficient and appropriate food and clothing, temperate and sanitary shelter, treatment for physical needs, and proper supervision.

Source: Laws 1988, LB 463, § 10.

28-358 Exploitation, defined.

Exploitation shall mean the taking of property of a vulnerable adult by means of undue influence, breach of a fiduciary relationship, deception, or extortion or by any unlawful means.

Source: Laws 1988, LB 463, § 11.

28-359 Law enforcement agency, defined.

Law enforcement agency shall mean the police department or the town marshal in incorporated municipalities, the office of the sheriff in unincorporated areas, and the Nebraska State Patrol.

Source: Laws 1988, LB 463, § 12.

28-360 Least restrictive alternative, defined.

Least restrictive alternative shall mean adult protective services provided in a manner no more restrictive of a vulnerable adult's liberty and no more intrusive than necessary to achieve and ensure essential services.

Source: Laws 1988, LB 463, § 13.

28-361 Living independently, defined.

Living independently shall include, but not be limited to, using the telephone, shopping, preparing food, housekeeping, and administering medications.

Source: Laws 1988, LB 463, § 14.

28-362 Permit, defined.

Permit shall mean to allow a vulnerable adult over whom one has a proximate or direct degree of control to perform an act or acts or be in a situation which the controlling person could have prevented by the reasonable exercise of such control.

Source: Laws 1988, LB 463, § 15.

28-363 Physical injury, defined.

Physical injury shall mean damage to bodily tissue caused by nontherapeutic conduct, including, but not limited to, fractures, bruises, lacerations, internal injuries, or dislocations, and shall include, but not be limited to, physical pain, illness, or impairment of physical function.

Source: Laws 1988, LB 463, § 16.

28-364 Proper supervision, defined.

Proper supervision shall mean care and control of a vulnerable adult which a reasonable and prudent person would exercise under similar facts and circumstances.

Source: Laws 1988, LB 463, § 17.

28-365 Registry, defined.

Registry shall mean the Adult Protective Services Central Registry established by section 28-376.

Source: Laws 1988, LB 463, § 18.

28-366 Self-care, defined.

Self-care shall include, but not be limited to, personal hygiene, eating, and dressing.

Source: Laws 1988, LB 463, § 19.

28-367 Sexual abuse, defined.

Sexual abuse shall include sexual assault as described in section 28-319 or 28-320 and incest as described in section 28-703.

Source: Laws 1988, LB 463, § 20.

Defendant's conviction of sexual abuse of a vulnerable adult reversed because evidence was insufficient to establish element of sexual contact. State v. Hulshizer, 245 Neb. 244, 512 N.W.2d 372 (1994).

28-368 Substantial functional impairment, defined.

Substantial functional impairment shall mean a substantial incapability, because of physical limitations, of living independently or providing self-care as determined through observation, diagnosis, investigation, or evaluation.

Source: Laws 1988, LB 463, § 21.

28-369 Substantial mental impairment, defined.

Substantial mental impairment shall mean a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, or ability to live independently or provide self-care as revealed by observation, diagnosis, investigation, or evaluation.

Source: Laws 1988, LB 463, § 22.

28-370 Unreasonable confinement, defined.

Unreasonable confinement shall mean confinement which intentionally causes physical injury to a vulnerable adult.

Source: Laws 1988, LB 463, § 23.

28-371 Vulnerable adult, defined.

Vulnerable adult shall mean any person eighteen years of age or older who has a substantial mental or functional impairment or for whom a guardian has been appointed under the Nebraska Probate Code.

Source: Laws 1988, LB 463, § 24.

Cross References

Nebraska Probate Code, see section 30-2201.

28-372 Report of abuse; required; contents; notification; toll-free number established.

(1) When any physician, psychologist, physician assistant, nurse, nursing assistant, other medical, developmental disability, or mental health professional, law enforcement personnel, caregiver or employee of a caregiver, operator or employee of a sheltered workshop, owner, operator, or employee of any facility licensed by the department, or human services professional or paraprofessional not including a member of the clergy has reasonable cause to believe that a vulnerable adult has been subjected to abuse or observes such adult being subjected to conditions or circumstances which reasonably would result in abuse, he or she shall report the incident or cause a report to be made to the appropriate law enforcement agency or to the department. Any other person may report abuse if such person has reasonable cause to believe that a vulnerable adult has been subjected to abuse or observes such adult being subjected to conditions or circumstances which reasonably would result in abuse.

(2) Such report may be made by telephone, with the caller giving his or her name and address, and, if requested by the department, shall be followed by a written report within forty-eight hours. To the extent available the report shall contain: (a) The name, address, and age of the vulnerable adult; (b) the address of the caregiver or caregivers of the vulnerable adult; (c) the nature and extent of the alleged abuse or the conditions and circumstances which would reasonably be expected to result in such abuse; (d) any evidence of previous abuse including the nature and extent of the abuse; and (e) any other information which in the opinion of the person making the report may be helpful in establishing the cause of the alleged abuse and the identity of the perpetrator or perpetrators.

(3) Any law enforcement agency receiving a report of abuse shall notify the department no later than the next working day by telephone or mail.

(4) A report of abuse made to the department which was not previously made to or by a law enforcement agency shall be communicated to the appropriate law enforcement agency by the department no later than the next working day by telephone or mail.

(5) The department shall establish a statewide toll-free number to be used by any person any hour of the day or night and any day of the week to make reports of abuse.

Source: Laws 1988, LB 463, § 25; Laws 1996, LB 1044, § 66; Laws 2006, LB 994, § 52; Laws 2007, LB296, § 32.

28-373 Report of abuse; law enforcement agency; duties.

(1) Upon the receipt of a report concerning abuse pursuant to section 28-372, it shall be the duty of the law enforcement agency (a) to make an investigation if deemed warranted because of alleged violations of section 28-386, (b) to take immediate steps, if necessary, to protect the vulnerable adult, and (c) to institute legal proceedings if appropriate. The law enforcement agency shall notify the department if an investigation is undertaken. Such notification shall be made no later than the next working day following receipt of the report.

(2) The law enforcement agency shall make a written report or a case summary to the department of all investigated cases of abuse and action taken with respect to all such cases.

Source: Laws 1988, LB 463, § 26.

28-374 Alleged abuse; department; duties.

(1) The department shall investigate each case of alleged abuse and shall provide such adult protective services as are necessary and appropriate under the circumstances.

(2) In each case of alleged abuse, the department may make a request for further assistance from the appropriate law enforcement agency or initiate such action as may be appropriate under the circumstances.

(3) The department shall make a written report or case summary to the appropriate law enforcement agency and to the registry of all reported cases of abuse and action taken.

(4) The department shall deliver a written report or case summary to the appropriate county attorney if the investigation indicates a reasonable cause to believe that a violation of section 28-386 has occurred.

Source: Laws 1988, LB 463, § 27.

28-375 Immunity from liability; when.

Any person participating in an investigation or the making of a report pursuant to the Adult Protective Services Act or participating in a judicial proceeding resulting therefrom shall be immune from any liability except (1) as otherwise provided in the Adult Protective Services Act, (2) for malfeasance in office or willful or wanton neglect of duty, or (3) for false statements of fact made with malicious intent.

Source: Laws 1988, LB 463, § 28.

28-376 Adult Protective Services Central Registry; established; access.

(1) The department shall establish and maintain an Adult Protective Services Central Registry for recording each report of alleged abuse.

(2) Upon request, a vulnerable adult who is the subject of a report or, if the vulnerable adult is legally incapacitated, the guardian or guardian ad litem of the vulnerable adult shall be entitled to receive a copy of all information contained in the registry pertaining to his or her case. The department shall not release data that would be harmful or detrimental to the vulnerable adult or that would identify or locate a person who, in good faith, made a report or cooperated in a subsequent investigation unless ordered to do so by a court of competent jurisdiction.

(3) The department shall establish classifications for all cases in the registry. All cases determined to be unfounded shall be expunged from the registry.

Source: Laws 1988, LB 463, § 29.

28-377 Records relating to abuse; access.

Except as otherwise provided in sections 28-376 to 28-380, no person, official, or agency shall have access to the records relating to abuse unless in furtherance of purposes directly connected with the administration of the Adult Protective Services Act and section 28-726. Persons, officials, and agencies having access to such records shall include, but not be limited to:

(1) A law enforcement agency investigating a report of known or suspected abuse;

(2) A county attorney in preparation of an abuse petition;

(3) A physician who has before him or her a person whom he or she reasonably suspects may be abused;

(4) An agency having the legal responsibility or authorization to care for, treat, or supervise an abused vulnerable adult;

(5) Defense counsel in preparation of the defense of a person charged with abuse;

(6) Any person engaged in bona fide research or auditing, except that no information identifying the subjects of the report shall be made available to the researcher or auditor. The researcher shall be charged for any costs of such research incurred by the department at a rate established by rules and regulations adopted and promulgated by the department;

(7) The designated protection and advocacy system authorized pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000, as the act existed on September 1, 2001, and the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. 10801, as the act existed on September 1, 2001, acting upon a complaint received from or on behalf of a person with developmental disabilities or mental illness; and

(8) For purposes of licensing providers of child care programs, the department.

Source: Laws 1988, LB 463, § 30; Laws 1992, LB 643, § 1; Laws 2001, LB 214, § 1; Laws 2007, LB296, § 33.

28-378 Records relating to abuse; release of information; when.

The department or appropriate law enforcement agency shall provide requested information to any person legally authorized by sections 28-376 to 28-380 to have access to records relating to abuse when ordered by a court of competent jurisdiction or upon compliance by such person with identification requirements established by rules and regulations of the department or law enforcement agency. Such information shall not include the name and address of the person making the report, except that the county attorney's office may request and receive the name and address of the person making the report with such person's written consent. The name and other identifying data of any person requesting or receiving information from the registry and the dates and

the circumstances under which requests are made or information is released shall be entered in the registry.

Source: Laws 1988, LB 463, § 31.

28-379 Report of abuse; summary by department; when provided.

Upon request, a physician or the person in charge of an institution, facility, or agency making a legally mandated report shall receive a summary of the findings of and actions taken by the department in response to such report. The amount of detail such summary contains and the purposes for which it may be used shall depend on the source of the report and shall be established by rules and regulations adopted and promulgated by the department.

Source: Laws 1988, LB 463, § 32.

28-380 Amendment or expungement of records; inaccurate or inconsistent with act; procedure.

At any time subsequent to the completion of the department's investigation, if a vulnerable adult, the guardian of a vulnerable adult, or a person who allegedly abused a vulnerable adult and who is mentioned in a report believes the information in the report is inaccurate or being maintained in a manner inconsistent with the Adult Protective Services Act, such person may request the department to amend or expunge identifying information from the report or remove the record of such report from the registry. If the department refuses to do so or does not act within thirty days, the vulnerable adult or person who allegedly abused a vulnerable adult shall have the right to a hearing to determine whether the record of the report should be amended, expunged, or removed on the grounds that it is inaccurate or that it is being maintained in a manner inconsistent with such act. Such hearing shall be held within a reasonable time after a request is made and at a reasonable place and hour. At the hearing the burden of proving the accuracy and consistency of the record shall be on the department. The hearing shall be conducted by the chief executive officer of the department or his or her designated representative, who is hereby authorized and empowered to order the amendment, expunction, or removal of the record to make such record accurate or consistent with the requirements of the Adult Protective Services Act. The decision shall be made in writing within thirty days of the close of the hearing and shall state the reasons upon which it is based. Decisions of the department may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.

Source: Laws 1988, LB 463, § 33; Laws 1996, LB 1044, § 67; Laws 2006, LB 994, § 53; Laws 2007, LB296, § 34.

Cross References

Administrative Procedure Act, see section 84-920.

28-381 Amendment or expungement of records; good cause; notice.

At any time, the department may amend, expunge, or remove from the registry any record upon good cause. Upon request, written notice of any amendment, expunction, or removal of any record made pursuant to the Adult Protective Services Act shall be served upon the vulnerable adult who is the subject of the report or the person who allegedly abused the vulnerable adult. The department shall advise any other individuals or agencies who received a

copy of the record pursuant to the Adult Protective Services Act to amend, expunge, or destroy such record. All information identifying the subjects of unsubstantiated reports shall be expunged from the registry.

Source: Laws 1988, LB 463, § 34.

28-382 Law concerning confidentiality; applicability.

(1) No rule of evidence or other provision of law concerning confidential communications shall apply to prevent reports made pursuant to the Adult Protective Services Act unless otherwise specifically mentioned in the act.

(2) Evidence shall not be excluded from any judicial proceeding resulting from a report made pursuant to the Adult Protective Services Act on the ground that it is a confidential communication protected by the privilege granted to husband and wife, patient and physician, or client and professional counselor.

Source: Laws 1988, LB 463, § 35; Laws 1993, LB 130, § 2.

28-383 Treatment by spiritual means alone; not considered abuse.

No person shall be considered to be abused for the sole reason that such person relies upon spiritual means alone for treatment in accordance with the tenets and practices of a recognized church or religious denomination in lieu of medical treatment.

Source: Laws 1988, LB 463, § 36.

28-384 Failure to make report; penalty.

Any person who willfully fails to make any report required by the Adult Protective Services Act shall be guilty of a Class III misdemeanor.

Source: Laws 1988, LB 463, § 37.

28-385 Release of confidential information; penalty.

Any person who knowingly releases information required to be kept confidential by the Adult Protective Services Act, except as provided in the act, shall be guilty of a Class III misdemeanor.

Source: Laws 1988, LB 463, § 38.

28-386 Knowing and intentional abuse of a vulnerable adult; penalty.

(1) A person commits knowing and intentional abuse of a vulnerable adult if he or she through a knowing and intentional act causes or permits a vulnerable adult to be:

(a) Physically injured;

(b) Unreasonably confined;

(c) Sexually abused;

(d) Exploited;

(e) Cruelly punished; or

(f) Denied essential services.

(2) Knowing and intentional abuse of a vulnerable adult is a Class IIIA felony.

Source: Laws 1988, LB 463, § 39; Laws 1997, LB 364, § 7.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

The initial step when determining whether this section has been violated is to determine whether the victim was a vulnerable adult. State v. Stubbs, 252 Neb. 420, 562 N.W.2d 547 (1997).

The initial step when determining if this section has been violated is to determine whether the victim was a vulnerable adult. The State has the burden of proving all essential elements of the crime charged. State v. Janssen, 7 Neb. App. 384, 584 N.W.2d 27 (1998).

In order to convict someone of the crime of exploitation of a vulnerable adult, there must be a nexus between a vulnerable adult's impairment and the exploitation. State v. Stubbs, 5 Neb. App. 38, 555 N.W.2d 55 (1996).

28-387 Short-term protective services; temporary placement; authorized; when; procedure.

(1) A county court may issue an ex parte order authorizing the provision of short-term involuntary adult protective services or temporary placement for a vulnerable adult for up to forty-eight hours, excluding nonjudicial days, pending the hearing for a need for continuing services, after finding on the record that:

(a) The person is a vulnerable adult;

(b) An emergency exists; and

(c) There are compelling reasons for ordering protective services or temporary placement.

(2) An ex parte order shall be issued only if other protective custody services are unavailable or other services provide insufficient protection.

(3) The department shall contact the appropriate county attorney to file an application for short-term involuntary adult protective services or temporary placement if an investigation indicates probable cause to believe that an emergency exists for a vulnerable adult. The department shall not be given legal custody nor be made guardian of such vulnerable adult. A vulnerable adult shall be responsible for the costs of services provided either through his or her own income or other programs for which he or she may be eligible.

(4) A law enforcement officer accompanied by a representative of the department may enter the premises where the vulnerable adult is located after obtaining the court order and announcing his or her authority and purpose. Forcible entry may be made only after the court order has been obtained unless there is probable cause to believe that the delay of such entry would cause the vulnerable adult to be in imminent danger of life-threatening physical injury or the denial of essential services.

(5) When, from the personal observations of a representative of the department and a law enforcement officer, it appears probable that the vulnerable adult is likely to be in imminent danger of life-threatening physical injury or the denial of essential services if he or she is not immediately removed from the premises, the law enforcement agency shall, when authorized by the court order, take into custody and transport the vulnerable adult to an appropriate medical or protective placement facility.

(6) When action is taken under this section, a hearing shall be held within forty-eight hours of the signing of the court order, excluding nonjudicial days, to establish probable cause for short-term involuntary adult protective services or for protective placement. Unless the vulnerable adult has counsel of his or her own choice or has indicated a desire for an attorney of his or her own choice, the court shall appoint an attorney to represent him or her in the proceeding, who shall have the powers and duties of a guardian ad litem.

(7) Notice of the hearing shall be served personally on the vulnerable adult. Waiver of notice by the vulnerable adult shall not be effective unless he or she attends the hearing or such notice is waived by the guardian ad litem. Notice of the hearing shall be given to the following parties whose whereabouts can be readily ascertained: (a) The spouse of the vulnerable adult; (b) children of the vulnerable adult; and (c) any other party specified by the court.

(8) A judgment authorizing continuance of short-term involuntary adult protective services shall prescribe those specific adult protective services which are to be provided, the duration of the services which shall not exceed sixty days, and the person or persons who are authorized or ordered to provide them.

Source: Laws 1988, LB 463, § 40.

(c) HOMICIDE OF THE UNBORN CHILD ACT

28-388 Act, how cited.

Sections 28-388 to 28-394 shall be known and may be cited as the Homicide of the Unborn Child Act.

Source: Laws 2002, LB 824, § 2.

28-389 Terms, defined.

For purposes of the Homicide of the Unborn Child Act, unless the context otherwise requires:

(1) Premeditation means a design formed to do something before it is done; and

(2) Unborn child means an individual member of the species Homo sapiens, at any stage of development in utero, who was alive at the time of the homicidal act and died as a result thereof whether before, during, or after birth.

Source: Laws 2002, LB 824, § 3.

28-390 Applicability of sections.

Sections 28-391 to 28-394 do not apply to an act or conduct causing or contributing to the death of an unborn child when the act or conduct is:

(1) Committed or engaged in by the mother of the unborn child;

(2) Any medical procedure performed with the consent of the mother; or

(3) Dispensing a drug or device in accordance with law or administering a drug or device prescribed in accordance with law.

Source: Laws 2002, LB 824, § 4.

28-391 Murder of an unborn child in the first degree; penalty.

(1) A person commits murder of an unborn child in the first degree if he or she in committing an act or engaging in conduct that causes the death of an unborn child, intends, with deliberate and premeditated malice, to kill the unborn child or the mother of the unborn child with knowledge of the pregnancy.

(2) Murder of an unborn child in the first degree is a Class IA felony.

Source: Laws 2002, LB 824, § 5.

28-392 Murder of an unborn child in the second degree; penalty.

(1) A person commits murder of an unborn child in the second degree if he or she, in committing an act or engaging in conduct that causes the death of an unborn child, intends, but without premeditation, to kill the unborn child or another.

(2) Murder of an unborn child in the second degree is a Class IB felony.

Source: Laws 2002, LB 824, § 6.

28-393 Manslaughter of an unborn child; penalty.

(1) A person commits manslaughter of an unborn child if he or she (a) kills an unborn child without malice upon a sudden quarrel with any person or (b) causes the death of an unborn child unintentionally while in the perpetration of or attempt to perpetrate any criminal assault, any sexual assault, arson, robbery, kidnapping, intentional child abuse, hijacking of any public or private means of transportation, or burglary.

(2) Manslaughter of an unborn child is a Class III felony.

Source: Laws 2002, LB 824, § 7.

28-394 Motor vehicle homicide of an unborn child; penalty.

(1) A person who causes the death of an unborn child unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide of an unborn child.

(2) Except as provided in subsection (3) of this section, motor vehicle homicide of an unborn child is a Class I misdemeanor.

(3)(a) If the proximate cause of the death of an unborn child is the operation of a motor vehicle in violation of section 60-6,213 or 60-6,214, motor vehicle homicide of an unborn child is a Class IV felony.

(b) Except as provided in subdivision (3)(c) of this section, if the proximate cause of the death of an unborn child is the operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06, motor vehicle homicide of an unborn child is a Class IV felony and the court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least sixty days and not more than fifteen years after the date ordered by the court and shall order that the operator's license of such person be revoked for the same period. The revocation shall not run concurrently with any jail term imposed.

(c) If the proximate cause of the death of an unborn child is the operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06 and the defendant has a prior conviction for a violation of section 60-6,196 or a city or village ordinance enacted in conformance with section 60-6,196, motor vehicle homicide of an unborn child is a Class III felony and the court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least sixty days and not more than fifteen years after the date ordered by the court and shall order that the operator's license of such person be revoked for the same period. The revocation shall not run concurrently with any jail term imposed.

Source: Laws 2002, LB 824, § 8; Laws 2004, LB 208, § 2.

(d) ASSAULT OF AN UNBORN CHILD ACT

28-395 Act, how cited.

Sections 28-395 to 28-3,101 shall be known and may be cited as the Assault of an Unborn Child Act.

Source: Laws 2006, LB 57, § 2.

28-396 Unborn child, defined.

For purposes of the Assault of an Unborn Child Act, unborn child means an individual member of the species Homo sapiens at any stage of development in utero.

Source: Laws 2006, LB 57, § 3.

28-397 Assault of an unborn child in the first degree; penalty.

(1) A person commits the offense of assault of an unborn child in the first degree if he or she, during the commission of any criminal assault on a pregnant woman, intentionally or knowingly causes serious bodily injury to her unborn child.

(2) Assault of an unborn child in the first degree is a Class III felony.

Source: Laws 2006, LB 57, § 4.

28-398 Assault of an unborn child in the second degree; penalty.

(1) A person commits the offense of assault of an unborn child in the second degree if he or she, during the commission of any criminal assault on a pregnant woman, recklessly causes serious bodily injury to her unborn child with a dangerous instrument.

(2) Assault of an unborn child in the second degree is a Class IIIA felony.

Source: Laws 2006, LB 57, § 5.

28-399 Assault of an unborn child in the third degree; penalty.

(1) A person commits the offense of assault of an unborn child in the third degree if he or she, during the commission of any criminal assault on a pregnant woman, recklessly causes serious bodily injury to her unborn child.

(2) Assault of an unborn child in the third degree is a Class I misdemeanor.

Source: Laws 2006, LB 57, § 6.

28-3,100 Applicability of act.

The Assault of an Unborn Child Act does not apply to:

(1) Any act or conduct that is committed or engaged in by the mother of the unborn child;

(2) Any medical procedure performed with the consent of the mother; or

(3) Dispensing a drug or device in accordance with law or administering a drug or device prescribed in accordance with law.

Source: Laws 2006, LB 57, § 7.

28-3,101 Prosecution of separate acts.

Assault on a pregnant woman and assault on her unborn child shall be considered as separate acts or conduct for purposes of prosecution.

Source: Laws 2006, LB 57, § 8.

ARTICLE 4
DRUGS AND NARCOTICS

Section

Section
28-437. Uniformity of interpretation.
28-438. Transferred to section 28-401.01.
28-439. Drug paraphernalia, defined; enumerated.
28-440. Drug paraphernalia; determination; factors considered.
28-441. Drug paraphernalia; use or possession; unlawful; penalty.
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28-444. Advertisement of drug paraphernalia; unlawful; penalty.
28-445. Imitation controlled substance; prohibited acts; determination; penalties; seizure.
28-446. Repealed. Laws 1992, LB 1019, § 130.
28-447. Repealed. Laws 1992, LB 1019, § 130.
28-448. Ephedrine; label; requirements.
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28-456. Phenylpropanolamine or pseudoephedrine; sold without a prescription; requirements; enforcement.
28-456.01. Pseudoephedrine or phenylpropanolamine; limitation on acquisition; violation; penalty.
28-457. Methamphetamine; prohibited acts; violation; penalties.

28-401 Terms, defined.

As used in the Uniform Controlled Substances Act, unless the context otherwise requires:

(1) Administer shall mean to directly apply a controlled substance by injection, inhalation, ingestion, or any other means to the body of a patient or research subject;

(2) Agent shall mean an authorized person who acts on behalf of or at the direction of another person but shall not include a common or contract carrier, public warehouse keeper, or employee of a carrier or warehouse keeper;

(3) Administration shall mean the Drug Enforcement Administration, United States Department of Justice;

(4) Controlled substance shall mean a drug, biological, substance, or immediate precursor in Schedules I to V of section 28-405. Controlled substance shall not include distilled spirits, wine, malt beverages, tobacco, or any nonnarcotic substance if such substance may, under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., as such act existed on January 1, 2003, and the law of this state, be lawfully sold over the counter without a prescription;

(5) Counterfeit substance shall mean a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the

product of, or to have been distributed by, such other manufacturer, distributor, or dispenser;

(6) Department shall mean the Department of Health and Human Services;

(7) Division of Drug Control shall mean the personnel of the Nebraska State Patrol who are assigned to enforce the Uniform Controlled Substances Act;

(8) Dispense shall mean to deliver a controlled substance to an ultimate user or a research subject pursuant to a medical order issued by a practitioner authorized to prescribe, including the packaging, labeling, or compounding necessary to prepare the controlled substance for such delivery;

(9) Distribute shall mean to deliver other than by administering or dispensing a controlled substance;

(10) Prescribe shall mean to issue a medical order;

(11) Drug shall mean (a) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them, (b) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals, and (c) substances intended for use as a component of any article specified in subdivision (a) or (b) of this subdivision, but shall not include devices or their components, parts, or accessories;

(12) Deliver or delivery shall mean the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship;

(13) Marijuana shall mean all parts of the plant of the genus cannabis, whether growing or not, the seeds thereof, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds, but shall not include the mature stalks of such plant, hashish, tetrahydrocannabinols extracted or isolated from the plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks, or the sterilized seed of such plant which is incapable of germination. When the weight of marijuana is referred to in the Uniform Controlled Substances Act, it shall mean its weight at or about the time it is seized or otherwise comes into the possession of law enforcement authorities, whether cured or uncured at that time;

(14) Manufacture shall mean the production, preparation, propagation, conversion, or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and shall include any packaging or repackaging of the substance or labeling or relabeling of its container. Manufacture shall not include the preparation or compounding of a controlled substance by an individual for his or her own use, except for the preparation or compounding of components or ingredients used for or intended to be used for the manufacture of methamphetamine, or the preparation, compounding, conversion, packaging, or labeling of a controlled substance: (a) By a practitioner as an incident to his or her prescribing, administering, or dispensing of a controlled substance in the course of his or her professional practice; or (b) by a practitioner, or by his or her authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale;

(15) Narcotic drug shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: (a) Opium, opium poppy and poppy straw, coca leaves, and opiates; (b) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates; or (c) a substance and any compound, manufacture, salt, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subdivisions (a) and (b) of this subdivision, except that the words narcotic drug as used in the Uniform Controlled Substances Act shall not include decocainized coca leaves or extracts of coca leaves, which extracts do not contain cocaine or ecgonine, or isoquinoline alkaloids of opium;

(16) Opiate shall mean any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability. Opiate shall not include the dextrorotatory isomer of 3-methoxy-n methylmorphinan and its salts. Opiate shall include its racemic and levorotatory forms;

(17) Opium poppy shall mean the plant of the species Papaver somniferum L., except the seeds thereof;

(18) Poppy straw shall mean all parts, except the seeds, of the opium poppy after mowing;

(19) Person shall mean any corporation, association, partnership, limited liability company, or one or more individuals;

(20) Practitioner shall mean a physician, a physician assistant, a dentist, a veterinarian, a pharmacist, a podiatrist, an optometrist, a certified nurse midwife, a certified registered nurse anesthetist, a nurse practitioner, a scientific investigator, a pharmacy, a hospital, or any other person licensed, registered, or otherwise permitted to distribute, dispense, prescribe, conduct research with respect to, or administer a controlled substance in the course of practice or research in this state, including an emergency medical service as defined in section 38-1207;

(21) Production shall include the manufacture, planting, cultivation, or harvesting of a controlled substance;

(22) Immediate precursor shall mean a substance which is the principal compound commonly used or produced primarily for use and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit such manufacture;

(23) State shall mean the State of Nebraska;

(24) Ultimate user shall mean a person who lawfully possesses a controlled substance for his or her own use, for the use of a member of his or her household, or for administration to an animal owned by him or her or by a member of his or her household;

(25) Hospital shall have the same meaning as in section 71-419;

(26) Cooperating individual shall mean any person, other than a commissioned law enforcement officer, who acts on behalf of, at the request of, or as agent for a law enforcement agency for the purpose of gathering or obtaining evidence of offenses punishable under the Uniform Controlled Substances Act;

(27) Hashish or concentrated cannabis shall mean: (a) The separated resin, whether crude or purified, obtained from a plant of the genus cannabis; or (b) any material, preparation, mixture, compound, or other substance which contains ten percent or more by weight of tetrahydrocannabinols;

(28) Exceptionally hazardous drug shall mean (a) a narcotic drug, (b) thiophene analog of phencyclidine, (c) phencyclidine, (d) amobarbital, (e) secobarbital, (f) pentobarbital, (g) amphetamine, or (h) methamphetamine;

(29) Imitation controlled substance shall mean a substance which is not a controlled substance but which, by way of express or implied representations and consideration of other relevant factors including those specified in section 28-445, would lead a reasonable person to believe the substance is a controlled substance. A placebo or registered investigational drug manufactured, distributed, possessed, or delivered in the ordinary course of practice or research by a health care professional shall not be deemed to be an imitation controlled substance;

(30)(a) Controlled substance analogue shall mean a substance (i) the chemical structure of which is substantially similar to the chemical structure of a Schedule I or Schedule II controlled substance as provided in section 28-405 or (ii) which has a stimulant, depressant, analgesic, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, analgesic, or hallucinogenic effect on the central nervous system of a Schedule I or Schedule II controlled substance as provided in section 28-405. A controlled substance analogue shall, to the extent intended for human consumption, be treated as a controlled substance under Schedule I of section 28-405 for purposes of the Uniform Controlled Substances Act; and

(b) Controlled substance analogue shall not include (i) a controlled substance, (ii) any substance generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 et seq., as such act existed on January 1, 2003, (iii) any substance for which there is an approved new drug application, or (iv) with respect to a particular person, any substance if an exemption is in effect for investigational use for that person, under section 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 355, as such section existed on January 1, 2003, to the extent conduct with respect to such substance is pursuant to such exemption;

(31) Anabolic steroid shall mean any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids), that promotes muscle growth and includes any controlled substance in Schedule III(d) of section 28-405. Anabolic steroid shall not include any anabolic steroid which is expressly intended for administration through implants to cattle or other nonhuman species and has been approved by the Secretary of Health and Human Services for such administration, but if any person prescribes, dispenses, or distributes such a steroid for human use, such person shall be considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of this subdivision;

(32) Chart order shall mean an order for a controlled substance issued by a practitioner for a patient who is in the hospital where the chart is stored or for a patient receiving detoxification treatment or maintenance treatment pursuant to section 28-412. Chart order shall not include a prescription;

(33) Medical order shall mean a prescription, a chart order, or an order for pharmaceutical care issued by a practitioner;

(34) Prescription shall mean an order for a controlled substance issued by a practitioner. Prescription shall not include a chart order;

(35) Registrant shall mean any person who has a controlled substances registration issued by the state or the administration;

(36) Reverse distributor shall mean a person whose primary function is to act as an agent for a pharmacy, wholesaler, manufacturer, or other entity by receiving, inventorying, and managing the disposition of outdated, expired, or otherwise nonsaleable controlled substances;

(37) Signature shall mean the name, word, or mark of a person written in his or her own hand with the intent to authenticate a writing or other form of communication or a digital signature which complies with section 86-611 or an electronic signature;

(38) Facsimile shall mean a copy generated by a system that encodes a document or photograph into electrical signals, transmits those signals over telecommunications lines, and reconstructs the signals to create an exact duplicate of the original document at the receiving end;

(39) Electronic signature shall have the definition found in section 86-621; and

(40) Electronic transmission shall mean transmission of information in electronic form. Electronic transmission may include computer-to-computer transmission or computer-to-facsimile transmission.

Source: Laws 1977, LB 38, § 61; Laws 1978, LB 276, § 1; Laws 1980, LB 696, § 1; Laws 1985, LB 323, § 1; Laws 1985, LB 406, § 2; Laws 1988, LB 537, § 1; Laws 1988, LB 273, § 3; Laws 1992, LB 1019, § 30; Laws 1993, LB 121, § 175; Laws 1996, LB 1044, § 68; Laws 1996, LB 1108, § 1; Laws 1997, LB 307, § 3; Laws 1999, LB 379, § 1; Laws 2001, LB 398, § 1; Laws 2002, LB 1105, § 428; Laws 2003, LB 200, § 1; Laws 2005, LB 117, § 1; Laws 2005, LB 256, § 16; Laws 2005, LB 382, § 1; Laws 2007, LB247, § 1; Laws 2007, LB296, § 35; Laws 2007, LB463, § 1119.

Under subsection (22) of this section, the term manufacture includes cultivating marijuana. State v. Havlat, 222 Neb. 554, 385 N.W.2d 436 (1986).

A jury instruction as to the technical definition of marijuana need not be given where the defendant is charged with delivery of marijuana, when the evidence at trial presents no factual issue as to whether the substance involved was anything but marijuana. State v. Taylor, 221 Neb. 114, 375 N.W.2d 610 (1985).

The Criminal Code which became effective on January 1, 1979, is not applicable to offenses committed prior to its effective date. State v. Fuller, 203 Neb. 233, 278 N.W.2d 756 (1979).

Aiding and abetting possession is a lesser-included offense of aiding and abetting distribution. State v. McKimmey, 10 Neb. App. 595, 634 N.W.2d 817 (2001).

28-401.01 Act, how cited.

Sections 28-401 to 28-456.01 shall be known and may be cited as the Uniform Controlled Substances Act.

Source: Laws 1977, LB 38, § 98; R.S.1943, (1995), § 28-438; Laws 2001, LB 113, § 17; Laws 2001, LB 398, § 2; Laws 2005, LB 117, § 2; Laws 2007, LB463, § 1120.

28-401.02 Act; how construed.

Nothing in the Uniform Controlled Substances Act shall be construed as authority for a practitioner to perform an act for which he or she is not authorized by the laws of this state.

Source: Laws 2001, LB 398, § 3.

28-402 Repealed. Laws 2001, LB 398, § 97.

28-403 Administering secret medicine; penalty.

If any physician or other person shall prescribe any drug or medicine to another person, the true nature and composition of which he does not, if inquired of, truly make known, but avow the same to be a secret medicine or composition, thereby endangering the life of such other person, he shall be guilty of a Class III misdemeanor.

Source: Laws 1977, LB 38, § 63.

28-404 Controlled substances; declaration.

All drugs and substances or immediate precursors listed in section 28-405 are hereby declared to be controlled substances, whether listed by official name, generic, common, or usual name, chemical name, brand, or trade name.

Source: Laws 1977, LB 38, § 64; Laws 1990, LB 571, § 3; Laws 1992, LB 1019, § 31.

Under this section and section 28-405(c)(10) and (c)(15), marijuana is a Schedule I controlled substance, and thus is a ''drug.'' State v. Finnegan, 232 Neb. 75, 439 N.W.2d 496 (1989).

28-405 Controlled substances; schedules; enumerated.

The following are the schedules of controlled substances referred to in the Uniform Controlled Substances Act:

Schedule I

(a) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol;

(2) Allylprodine;

(3) Alphacetylmethadol, except levo-alphacetylmethadol which is also known as levo-alpha-acetylmethadol, levomethadyl acetate, and LAAM;

(4) Alphameprodine;

(5) Alphamethadol;

(6) Benzethidine;

(7) Betacetylmethadol;

(8) Betameprodine;

(9) Betamethadol;

(10) Betaprodine;

(11) Clonitazene;

(12) Dextromoramide;

(13) Difenoxin;

(14) Diampromide;

(15) Diethylthiambutene;

(16) Dimenoxadol;

(17) Dimepheptanol;

(18) Dimethylthiambutene;

(19) Dioxaphetyl butyrate;

(20) Dipipanone;

(21) Ethylmethylthiambutene;

(22) Etonitazene;

(23) Etoxeridine;

(24) Furethidine;

(25) Hydroxypethidine;

(26) Ketobemidone;

(27) Levomoramide;

(28) Levophenacylmorphan;

(29) Morpheridine;

(30) Noracymethadol;

(31) Norlevorphanol;

(32) Normethadone;

(33) Norpipanone;

(34) Phenadoxone;

(35) Phenampromide;

(36) Phenomorphan;

(37) Phenoperidine;

(38) Piritramide;

(39) Proheptazine;

(40) Properidine;

(41) Propiram;

(42) Racemoramide;

(43) Trimeperidine;

(44) Alpha-methylfentanyl, N-(1-(alpha-methyl-beta-phenyl)ethyl-4-piperidyl) propionanilide, 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine;

(45) Tilidine;

(46) 3-Methylfentanyl, N-(3-methyl-1-(2-phenylethyl)-4-piperidyl)-N-phenyl-propanamide, its optical and geometric isomers, salts, and salts of isomers;

(47) 1-methyl-4-phenyl-4-propionoxypiperidine (MPPP), its optical isomers, salts, and salts of isomers;

(48) PEPAP (1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine), its optical isomers, salts, and salts of isomers;

(49) Acetyl-alpha-methylfentanyl (N-(1-(1-methyl-2-phenethyl)-4-piperidinyl)-N-phenylacetamide), its optical isomers, salts, and salts of isomers;

(50) Alpha-methylthiofentanyl (N-(1-methyl-2-(2-thienyl)ethyl-4-piperidinyl)-N-phenylpropanamide), its optical isomers, salts, and salts of isomers;

(51) Benzylfentanyl (N-(1-benzyl-4-piperidyl)-N-phenylpropanamide), its optical isomers, salts, and salts of isomers;

(52) Beta-hydroxyfentanyl (N-(1-(2-hydroxy-2-phenethyl)-4-piperidinyl)-N-phenylpropanamide), its optical isomers, salts, and salts of isomers;

(53) Beta-hydroxy-3-methylfentanyl (other name: N-(1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl)-N-phenylpropanamide), its optical and geometric isomers, salts, and salts of isomers;

(54) 3-methylthiofentanyl (N-(3-methyl-1-(2-thienyl)ethyl-4-piperidinyl)-N-phenylpropanamide), its optical and geometric isomers, salts, and salts of isomers;

(55) N-(1-(2-thienyl)methyl-4-piperidyl)-N-phenylpropanamide (thenylfentanyl), its optical isomers, salts, and salts of isomers;

(56) Thiofentanyl (N-phenyl-N-(1-(2-thienyl)ethyl-4-piperidinyl)-propanamide), its optical isomers, salts, and salts of isomers; and

(57) Para-fluorofentanyl (N-(4-fluorophenyl)-N-(1-(2-phenethyl)-4-piperidinyl)propanamide), its optical isomers, salts, and salts of isomers.

(b) Any of the following opium derivatives, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;

(2) Acetyldihydrocodeine;

(3) Benzylmorphine;

(4) Codeine methylbromide;

(5) Codeine-N-Oxide;

(6) Cyprenorphine;

(7) Desomorphine;

(8) Dihydromorphine;

(9) Drotebanol;

(10) Etorphine, except hydrochloride salt;

(11) Heroin;

(12) Hydromorphinol;

(13) Methyldesorphine;

(14) Methyldihydromorphine;

(15) Morphine methylbromide;

(16) Morphine methylsulfonate;

(17) Morphine-N-Oxide;

(18) Myrophine;

(19) Nicocodeine;

(20) Nicomorphine;

(21) Normorphine;

(22) Pholcodine; and

(23) Thebacon.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical

designation, and, for purposes of this subdivision only, isomer shall include the optical, position, and geometric isomers:

(1) Bufotenine. Trade and other names shall include, but are not limited to: 3-(B-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N,N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; and mappine;

(2) Diethyltryptamine. Trade and other names shall include, but are not limited to: N,N-diethyltryptamine; and DET;

(3) Dimethyltryptamine. Trade and other names shall include, but are not limited to: DMT;

(4) 4-bromo-2,5-dimethoxyamphetamine. Trade and other names shall include, but are not limited to: 4-bromo-2, 5-dimethoxy-a-methylphenethylamine; and 4-bromo-2,5-DMA;

(5) 4-methoxyamphetamine. Trade and other names shall include, but are not limited to: 4-methoxy-a-methyl-phenethylamine; and paramethoxyamphetamine, PMA;

(6) 4-methyl-2, 5-dimethoxyamphetamine. Trade and other names shall include, but are not limited to: 4-methyl-2,5-dimethoxy-a-methylphenethylamine; DOM; and STP;

(7) 5-methoxy-N-N, dimethyltryptamine;

(8) Ibogaine. Trade and other names shall include, but are not limited to: 7-ethyl-6,6B,7,8,9,10,12,13-octahydro-2-methoxy-6,9-methano-5H-pyrido (1',2':1,2) azepino (5,4-b) indole; and tabernanthe iboga;

(9) Lysergic acid diethylamide;

(10) Marijuana;

(11) Mescaline;

(12) Peyote. Peyote shall mean all parts of the plant presently classified botanically as Lophophora williamsii Lemaire, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant or its seeds or extracts;

(13) Psilocybin;

(14) Psilocyn;

(15) Tetrahydrocannabinols, including, but not limited to, synthetic equivalents of the substances contained in the plant or in the resinous extractives of cannabis, sp. or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following: Delta 1 cis or trans tetrahydrocannabinol and their optical isomers, excluding dronabinol in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the federal Food and Drug Administration; Delta 6 cis or trans tetrahydrocannabinol and their optical isomers; and Delta 3,4 cis or trans tetrahydrocannabinol and its optical isomers. Since nomenclature of these substances is not internationally standardized, compounds of these structures shall be included regardless of the numerical designation of atomic positions covered;

(16) 3,4-methylenedioxy amphetamine;

(17) 5-methoxy-3,4-methylenedioxy amphetamine;

(18) 3,4,5-trimethoxy amphetamine;

(19) N-ethyl-3-piperidyl benzilate;

(20) N-methyl-3-piperidyl benzilate;

(21) Thiophene analog of phencyclidine. Trade and other names shall include, but are not limited to: 1-(1-(2-thienyl)-cyclohexyl)-piperidine; 2-thienyl analog of phencyclidine; TPCP; and TCP;

(22) 2,5-dimethoxyamphetamine. Trade and other names shall include, but are not limited to: 2,5-dimethoxy-a-methylphenethylamine; and 2,5-DMA;

(23) Hashish or concentrated cannabis;

(24) Parahexyl. Trade and other names shall include, but are not limited to: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6, 9-trimethyl-6H-dibenzo(b,d)pyran; and synhexyl;

(25) Ethylamine analog of phencyclidine. Trade and other names shall include, but are not limited to: N-ethyl-1-phenylcyclohexylamine; (1-phenylcyclohexyl)ethylamine; N-(1-phenylcyclohexyl)ethylamine; cyclohexamine; and PCE;

(26) Pyrrolidine analog of phencyclidine. Trade and other names shall include, but are not limited to: 1-(1-phenylcyclohexyl)-pyrrolidine; PCPy; and PHP;

(27) 3,4-methylenedioxymethamphetamine (MDMA), its optical, positional, and geometric isomers, salts, and salts of isomers;

(28) 4-bromo-2,5-dimethoxyphenethylamine. Some trade or other names: 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane; alpha-desmethyl DOB; 2C-B; and Nexus;

(29) Alpha-ethyltryptamine. Some trade or other names: etryptamine; Monase; alpha-ethyl-lH-indole-3-ethanamine; 3-(2-aminobutyl) indole; alpha-ET; and AET;

(30) 2,5-dimethoxy-4-ethylamphet-amine; and DOET;

(31) 1-(1-(2-thienyl)cyclohexyl)pyrrolidine; and TCPy;

(32) Alpha-methyltryptamine, which is also known as AMT; and

(33) 5-Methoxy-N, N-diisopropyltryptamine, which is also known as 5-MeO-DIPT.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Mecloqualone;

(2) Methaqualone; and

(3) Gamma-hydroxybutyric acid. Some other names include: GHB; gamma-hydroxybutyrate; 4-hydroxybutyrate; 4-hydroxybutanoic acid; sodium oxybate; and sodium oxybutyrate.

(e) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

(1) Fenethylline;

(2) N-ethylamphetamine;

(3) Aminorex; aminoxaphen; 2-amino-5-phenyl-2-oxazoline; and 4,5-dihydro-5-phenyl-2-oxazolamine;

(4) Cathinone; 2-amino-1-phenyl-1-propanone; alpha-aminopropiophenone; 2-aminopropiophenone; and norephedrone;

(5) Methcathinone, its salts, optical isomers, and salts of optical isomers. Some other names: 2-(methylamino)-propiophenone; alpha-(methylamino)propiophenone; 2-(methylamino)-1-phenylpropan-1-one; alpha-N-methylaminopropiophenone; methylcathinone; monomethylpropion; ephedrone; N-methylcathinone; AL-464; AL-422; AL-463; and UR1432;

(6) (+/-)cis-4-methylaminorex; and (+/-)cis-4,5-dihydro-4-methyl-5-phenyl-2-oxazolamine; and

(7) N,N-dimethylamphetamine; N,N-alpha-trimethyl-benzeneethanamine; and N,N-alpha-trimethylphenethylamine.

(f) Any controlled substance analogue to the extent intended for human consumption.

Schedule II

(a) Any of the following substances except those narcotic drugs listed in other schedules whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, buprenorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone and their salts, but including the following:

(i) Raw opium;

(ii) Opium extracts;

(iii) Opium fluid;

(iv) Powdered opium;

(v) Granulated opium;

(vi) Tincture of opium;

(vii) Codeine;

(viii) Ethylmorphine;

(ix) Etorphine hydrochloride;

(x) Hydrocodone;

(xi) Hydromorphone;

(xii) Metopon;

(xiii) Morphine;

(xiv) Oxycodone;

(xv) Oxymorphone;

(xvi) Oripavine;

(xvii) Thebaine; and

(xviii) Dihydroetorphine;

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of the substances referred to in subdivision (1) of this subdivision, except that these substances shall not include the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, including cocaine and its salts, optical isomers, and salts of optical isomers, except that the substances shall not include decocainized coca leaves or extractions which do not contain cocaine or ecgonine; and

(5) Concentrate of poppy straw, the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrene alkaloids of the opium poppy.

(b) Unless specifically excepted or unless in another schedule any of the following opiates, including their isomers, esters, ethers, salts, and salts of their isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation, dextrorphan excepted:

(1) Alphaprodine;

(2) Anileridine;

(3) Bezitramide;

(4) Diphenoxylate;

(5) Fentanyl;

(6) Isomethadone;

(7) Levomethorphan;

(8) Levorphanol;

(9) Metazocine;

(10) Methadone;

(11) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;

(12) Moramide-intermediate, 2-methyl-3-morpholino-1,1-diphenylpropane-carboxylic acid;

(13) Pethidine or meperidine;

(14) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

(15) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

(16) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(17) Phenazocine;

(18) Piminodine;

(19) Racemethorphan;

(20) Racemorphan;

(21) Dihydrocodeine;

(22) Bulk propoxyphene in nondosage forms;

(23) Sufentanil;

(24) Alfentanil;

(25) Levo-alphacetylmethadol which is also known as levo-alpha-acetylmethadol, levomethadyl acetate, and LAAM;

(26) Carfentanil; and

(27) Remifentanil.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Phenmetrazine and its salts;

(3) Methamphetamine, its salts, isomers, and salts of its isomers; and

(4) Methylphenidate.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system, including their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designations:

(1) Amobarbital;

(2) Secobarbital;

(3) Pentobarbital;

(4) Phencyclidine; and

(5) Glutethimide.

(e) Hallucinogenic substances known as:

(1) Nabilone. Another name for nabilone: (+/-)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo(b,d)pyran-9-one.

(f) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine: Phenylacetone. Trade and other names shall include, but are not limited to: Phenyl-2-propanone; P2P; benzyl methyl ketone; and methyl benzyl ketone; or

(2) Immediate precursors to phencyclidine, PCP:

(i) 1-phenylcyclohexylamine; or

(ii) 1-piperidinocyclohexanecarbonitrile, PCC.

Schedule III

(a) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system, including their salts, isomers, whether optical, position, or geometric, and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Benzphetamine;

(2) Chlorphentermine;

(3) Clortermine; and

(4) Phendimetrazine.

(b) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid or any salt of a derivative of barbituric acid, except those substances which are specifically listed in other schedules of this section;

(2) Chlorhexadol;

(3) Lysergic acid;

(4) Lysergic acid amide;

(5) Methyprylon;

(6) Sulfondiethylmethane;

(7) Sulfonethylmethane;

(8) Sulfonmethane;

(9) Nalorphine;

(10) Any compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any salt thereof and one or more other active medicinal ingredients which are not listed in any schedule;

(11) Any suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository;

(12) Any drug product containing gamma-hydroxybutyric acid, including its salts, isomers, and salts of isomers, for which an application is approved under section 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 355, as such section existed on July 20, 2002;

(13) Ketamine, its salts, isomers, and salts of isomers. Some other names for ketamine: (+/-)-2-(2-chlorophenyl)-2-(methylamino)-cyclohexanone; and

(14) Tiletamine and zolazepam or any salt thereof. Trade or other names for a tiletamine-zolazepam combination product shall include, but are not limited to: telazol. Trade or other names for tiletamine shall include, but are not limited to: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Trade or other names for zolazepam shall include, but are not limited to: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethylpyrazolo-(3,4-e) (1,4)-diazepin-7(1H)-one, and flupyrazapon.

(c) Unless specifically excepted or unless listed in another schedule:

(1) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(i) Not more than one and eight-tenths grams of codeine per one hundred milliliters or not more than ninety milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(ii) Not more than one and eight-tenths grams of codeine per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(iii) Not more than three hundred milligrams of dihydrocodeinone which is also known as hydrocodone per one hundred milliliters or not more than fifteen milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(iv) Not more than three hundred milligrams of dihydrocodeinone which is also known as hydrocodone per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(v) Not more than one and eight-tenths grams of dihydrocodeine per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vi) Not more than three hundred milligrams of ethylmorphine per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vii) Not more than five hundred milligrams of opium per one hundred milliliters or per one hundred grams, or not more than twenty-five milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts; and

(viii) Not more than fifty milligrams of morphine per one hundred milliliters or per one hundred grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts; and

(2) Any material, compound, mixture, or preparation containing any of the following narcotic drug or its salts, as set forth below:

(i) Buprenorphine.

(d) Unless contained on the administration's list of exempt anabolic steroids as the list existed on June 1, 2007, any anabolic steroid, which shall include any material, compound, mixture, or preparation containing any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts of isomers is possible within the specific chemical designation:

(1) Boldenone;

(2) Chlorotestosterone (4-chlortestosterone);

(3) Clostebol;

(4) Dehydrochlormethyltestosterone;

(5) Dihydrotestosterone (4-dihydrotestosterone);

(6) Drostanolone;

(7) Ethylestrenol;

(8) Fluoxymesterone;

(9) Formebulone (formebolone);

(10) Mesterolone;

(11) Methandienone;

(12) Methandranone;

(13) Methandriol;

(14) Methandrostenolone;

(15) Methenolone;

(16) Methyltestosterone;

(17) Mibolerone;

(18) Nandrolone;

(19) Norethandrolone;

(20) Oxandrolone;

(21) Oxymesterone;

(22) Oxymetholone;

(23) Stanolone;

(24) Stanozolol;

(25) Testolactone;

(26) Testosterone;

(27) Trenbolone; and

(28) Any salt, ester, or isomer of a drug or substance described or listed in this subdivision if the salt, ester, or isomer promotes muscle growth.

(e) Hallucinogenic substances known as:

(1) Dronabinol, synthetic, in sesame oil and encapsulated in a soft gelatin capsule in a Food and Drug Administration approved drug product. Some other names for dronabinol are (6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo (b,d)pyran-1-o1 or (-)-delta-9-(trans)-tetrahydrocannabinol.

Schedule IV

(a) Any material, compound, mixture, or preparation which contains any quantity of the following substances, including their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Barbital;

(2) Chloral betaine;

(3) Chloral hydrate;

(4) Chlordiazepoxide, but not including librax (chlordiazepoxide hydrochloride and clindinium bromide) or menrium (chlordiazepoxide and water soluble esterified estrogens);

(5) Clonazepam;

(6) Clorazepate;

(7) Diazepam;

(8) Ethchlorvynol;

(9) Ethinamate;

(10) Flurazepam;

(11) Mebutamate;

(12) Meprobamate;

(13) Methohexital;

(14) Methylphenobarbital;

(15) Oxazepam;

(16) Paraldehyde;

(17) Petrichloral;

(18) Phenobarbital;

(19) Prazepam;

(20) Alprazolam;

(21) Bromazepam;

(22) Camazepam;

(23) Clobazam;

(24) Clotiazepam;

(25) Cloxazolam;

(26) Delorazepam;

(27) Estazolam;

(28) Ethyl loflazepate;

(29) Fludiazepam;

(30) Flunitrazepam;

(31) Halazepam;

(32) Haloxazolam;

(33) Ketazolam;

(34) Loprazolam;

(35) Lorazepam;

(36) Lormetazepam;

(37) Medazepam;

(38) Nimetazepam;

(39) Nitrazepam;

(40) Nordiazepam;

(41) Oxazolam;

(42) Pinazepam;

(43) Temazepam;

(44) Tetrazepam;

(45) Triazolam;

(46) Midazolam;

(47) Quazepam;

(48) Zolpidem;

(49) Dichloralphenazone; and

(50) Zaleplon.

(b) Any material, compound, mixture, or preparation which contains any quantity of the following substance, including its salts, isomers, whether optical, position, or geometric, and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible: Fenfluramine.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, whether optical, position, or geometric, and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Diethylpropion;

(2) Phentermine;

(3) Pemoline, including organometallic complexes and chelates thereof;

(4) Mazindol;

(5) Pipradrol;

(6) SPA, ((-)-1-dimethylamino- 1,2-diphenylethane);

(7) Cathine. Another name for cathine is ((+)-norpseudoephedrine);

(8) Fencamfamin;

(9) Fenproporex;

(10) Mefenorex;

(11) Modafinil; and

(12) Sibutramine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following narcotic drugs, or their salts or isomers calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(1) Propoxyphene in manufactured dosage forms; and

(2) Not more than one milligram of difenoxin and not less than twenty-five micrograms of atropine sulfate per dosage unit.

(e) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substance, including its salts: Pentazocine.

(f) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substance, including its salts, isomers, and salts of such isomers: Butorphanol.

(g)(1) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substance, including its salts, optical isomers, and salts of such optical isomers: Ephedrine.

(2) The following drug products containing ephedrine, its salts, optical isomers, and salts of such optical isomers are excepted from subdivision (g)(1) of Schedule IV if they may lawfully be sold over the counter without a prescription under the Federal Food, Drug, and Cosmetic Act, as the act existed on September 1, 2001; are labeled and marketed in a manner consistent with the pertinent OTC Tentative Final or Final Monograph; are manufactured and distributed for legitimate medicinal use in a manner that reduces or eliminates the likelihood of abuse; and are not marketed, advertised, or represented in any manner for the indication of stimulation, mental alertness, euphoria, ecstasy, a buzz or high, heightened sexual performance, or increased muscle mass:

(A) Primatene Tablets;

(B) Bronkaid Dual Action Caplets; and

(C) Pazo Hemorrhoidal Ointment.

(3) Food and dietary supplements described in 21 U.S.C. 321, as such section existed on September 1, 2001, containing ephedrine, including its salts, optical isomers, and salts of such optical isomers, are excepted from subdivision (g)(1) of Schedule IV if:

(A) They are labeled in a manner consistent with section 28-448 and bear the statements: ''This statement has not been evaluated by the Food and Drug

Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.'';

(B) Any dosage form of the food or dietary supplements (i) does not contain any hydrochloride or sulfate salts of ephedrine alkaloids, (ii) does not contain more than twenty-five milligrams of ephedrine alkaloids, and (iii) does not contain ephedrine alkaloids in excess of five percent of the total capsule weight;

(C) They are not marketed, advertised, or represented in any manner for the indication of stimulation, mental alertness, euphoria, ecstasy, a buzz or high, heightened sexual performance, or increased muscle mass; and

(D) Analysis of the product is provided to the department to ensure that the product meets the requirements of subdivision (g)(3)(B) of Schedule IV.

Schedule V

(a) Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs or salts calculated as the free anhydrous base or alkaloid, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than two hundred milligrams of codeine per one hundred milliliters or per one hundred grams;

(2) Not more than one hundred milligrams of dihydrocodeine per one hundred milliliters or per one hundred grams;

(3) Not more than one hundred milligrams of ethylmorphine per one hundred milliliters or per one hundred grams;

(4) Not more than two and five-tenths milligrams of diphenoxylate and not less than twenty-five micrograms of atropine sulfate per dosage unit;

(5) Not more than one hundred milligrams of opium per one hundred milliliters or per one hundred grams; and

(6) Not more than five-tenths milligram of difenoxin and not less than twenty-five micrograms of atropine sulfate per dosage unit.

(b) Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers: Pyrovalerone.

Source: Laws 1977, LB 38, § 65; Laws 1978, LB 748, § 50; Laws 1980, LB 696, § 2; Laws 1985, LB 323, § 2; Laws 1985, LB 406, § 3; Laws 1986, LB 1160, § 1; Laws 1987, LB 473, § 1; Laws 1990, LB 571, § 6; Laws 1992, LB 1019, § 32; Laws 1994, LB 1210, § 3; Laws 1995, LB 406, § 5; Laws 1996, LB 1213, § 4; Laws 1998, LB 1073, § 8; Laws 1999, LB 594, § 1; Laws 2000, LB 1115, § 2; Laws 2001, LB 113, § 10; Laws 2002, LB 500, § 1; Laws 2003, LB 245, § 1; Laws 2005, LB 382, § 2; Laws 2007, LB247, § 2; Laws 2008, LB902, § 1.
Operative date July 18, 2008.

An information containing the descriptive language from this section is not deficient if it contains an incorrect trade name description, since the use of said language is unnecessary to constitute a proper charge and is mere surplusage. State v. Spiegel, 239 Neb. 233, 474 N.W.2d 873 (1991).

Under subsections (c)(10) and (c)(15) of this section and section 28-404, marijuana is a Schedule I controlled substance, and thus is a ''drug.'' State v. Finnegan, 232 Neb. 75, 439 N.W.2d 496 (1989).

28-406 Registration; fees.

(1) The department shall issue registrations and reregistrations to manufacture, distribute, prescribe, or dispense controlled substances within this state on a biennial basis.

(2) The various fees to be paid by applicants for registrations and reregistrations, as required under the Uniform Controlled Substances Act, shall be as follows:

(a) Registration or reregistration to manufacture controlled substances, not less than one hundred dollars and not more than three hundred dollars;

(b) Registration or reregistration to distribute controlled substances, not less than one hundred dollars and not more than three hundred dollars;

(c) Registration or reregistration to prescribe, administer, or dispense controlled substances, not less than twenty dollars and not more than one hundred fifty dollars;

(d) Registration or reregistration to engage in research on the use and effects of controlled substances, not less than fifty dollars and not more than two hundred dollars;

(e) Registration or reregistration to engage in laboratory and analytical analysis of controlled substances, not less than fifty dollars and not more than two hundred dollars; and

(f) Registration or reregistration to provide detoxification treatment or maintenance treatment, not less than twenty dollars and not more than one hundred fifty dollars.

(3) The department shall remit the fees to the State Treasurer for credit to the Professional and Occupational Credentialing Cash Fund.

(4) All registrations and reregistrations shall expire on August 31 of each odd-numbered year. Registration shall be automatically denied without a hearing for nonpayment of fees. Any registration or reregistration not renewed by payment of renewal fees by October 1 of odd-numbered years shall be automatically denied and canceled on October 2 of odd-numbered years without a hearing.

(5) The department is authorized to adopt and promulgate rules and regulations necessary to implement this section.

Source: Laws 1977, LB 38, § 66; Laws 1985, LB 323, § 3; Laws 1992, LB 1019, § 33; Laws 1997, LB 307, § 4; Laws 1997, LB 550, § 1; Laws 1999, LB 594, § 2; Laws 2001, LB 398, § 4; Laws 2003, LB 242, § 2.

28-407 Registration required; exceptions.

(1) Except as otherwise provided in this section, every person who manufactures, prescribes, distributes, administers, or dispenses any controlled substance within this state or who proposes to engage in the manufacture, prescribing, administering, distribution, or dispensing of any controlled substance within this state shall obtain a registration issued by the department, except that on and after January 1, 2000, health care providers credentialed by the department and facilities licensed by the department shall not be required

to obtain a separate Nebraska controlled substances registration upon providing proof of a Federal Controlled Substances Registration to the department. Federal Controlled Substances Registration numbers obtained under this section shall not be public information but may be shared by the department for investigative and regulatory purposes if necessary and only under appropriate circumstances to ensure against any unauthorized access to such information.

(2) The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of the Uniform Controlled Substances Act:

(a) An agent, or an employee thereof, of any practitioner, registered manufacturer, distributor, or dispenser of any controlled substance if such agent is acting in the usual course of his or her business or employment;

(b) A common or contract carrier or warehouse keeper, or an employee thereof, whose possession of any controlled substance is in the usual course of his or her business or employment; and

(c) An ultimate user or a person in possession of any controlled substance pursuant to a medical order issued by a practitioner authorized to prescribe.

(3) A separate registration shall be required at each principal place of business of professional practice where the applicant manufactures, distributes, or dispenses controlled substances, except that no registration shall be required in connection with the placement of an emergency box within an institution pursuant to the provisions of the Emergency Box Drug Act.

(4) The department is authorized to inspect the establishment of a registrant or applicant for registration in accordance with the rules and regulations promulgated.

Source: Laws 1977, LB 38, § 67; Laws 1994, LB 1210, § 4; Laws 1997, LB 307, § 5; Laws 1997, LB 550, § 2; Laws 1999, LB 828, § 1; Laws 2001, LB 398, § 5.

Cross References

Emergency Box Drug Act, see section 71-2410.

28-408 Registration to manufacture or distribute controlled substances; factors considered.

(1) The department shall register an applicant to manufacture or distribute controlled substances included in Schedules I to V of section 28-405 unless the department determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest the department shall consider the following factors:

(a) Maintenance of effective controls against diversion of particular controlled substances and any Schedule I or II substance compounded therefrom into other than legitimate medical, scientific, or industrial channels;

(b) Compliance with applicable state and local law;

(c) Whether the applicant has been convicted of a felony under any law of the United States or of any state or has been convicted of a violation relating to any substance defined in the Uniform Controlled Substances Act as a controlled substance under any law of the United States or any state, except that such fact in itself shall not be an automatic bar to registration;

(d) Past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion; and

(e) Such other factors as may be relevant to and consistent with the public health and safety.

(2) Registration granted under subsection (1) of this section shall not entitle a registrant to manufacture or distribute controlled substances in Schedule I or II of section 28-405 other than those specified in the registration.

(3) Except as otherwise provided in this section and section 28-409, practitioners shall be registered to prescribe, administer, or dispense substances in Schedules II to V of section 28-405 if they are authorized to prescribe, administer, or dispense under the laws of this state. A registration application by a practitioner who wishes to conduct research with Schedule I substances shall be referred to the department for approval or disapproval. Registration to prescribe, administer, or dispense substances in Schedules II to V of section 28-405 or registration for the purpose of bona fide research with Schedule I substances by a practitioner may be denied only on a ground specified in subsection (1) of section 28-409 or if there are reasonable grounds to believe that the applicant will abuse or unlawfully transfer such substances or fail to safeguard adequately his or her supply of such substances against diversion from legitimate medical or scientific use.

(4) Compliance by manufacturers and distributors with the Controlled Substances Act, 21 U.S.C. 801 et seq., as such act existed on May 1, 2001, respecting registration, excluding fees, shall be deemed compliance with this section.

Source: Laws 1977, LB 38, § 68; Laws 1985, LB 323, § 4; Laws 1997, LB 307, § 6; Laws 2001, LB 398, § 6.

28-409 Registrant; disciplinary action; grounds; procedure.

(1) A registration pursuant to section 28-408 to prescribe, administer, manufacture, distribute, or dispense a controlled substance may be denied, suspended, revoked, or renewal refused by the department upon a finding that the applicant or registrant:

(a) Has falsified any application filed pursuant to the Uniform Controlled Substances Act or required by the act;

(b) Has been convicted of a felony subsequent to being granted a registration pursuant to section 28-408 under any law of the United States or of any state or has been convicted of a violation relating to any substance defined in the act as a controlled substance subsequent to being granted a registration pursuant to section 28-408 under any law of the United States or of any state;

(c) Has had his or her federal registration suspended or revoked by competent federal authority and is no longer authorized by federal law to engage in the prescribing, manufacturing, distribution, or dispensing of controlled substances;

(d) Is guilty of any of the acts or offenses listed in section 38-178 for which disciplinary measures may be taken against his or her license, certificate, or registration to practice and which have a rational connection with his or her fitness to prescribe, administer, or dispense a controlled substance. The department may automatically revoke or suspend the registration of a practitioner

who has had his or her license, certificate, or registration to practice revoked or suspended and is no longer authorized to prescribe, administer, or dispense under the laws of this state or who has had his or her license, certificate, or registration to practice limited or restricted and is no longer authorized to prescribe, administer, or dispense controlled substances under the laws of this state;

(e) Is habitually intoxicated or is dependent upon or actively addicted to alcohol or any controlled substance or narcotic drug; or

(f) Has violated the Uniform Controlled Substances Act or any rules or regulations adopted and promulgated pursuant to the act.

(2) The department may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(3) A person whose registration or renewal has been denied, revoked, or suspended shall be afforded an opportunity for a hearing in accordance with the Administrative Procedure Act. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under the Uniform Controlled Substances Act or any law of the state, except that such proceedings may be consolidated with proceedings under the Uniform Credentialing Act. Proceedings to refuse renewal of registration shall not abate the existing registration which shall remain in effect pending the outcome of the administrative hearing, except in cases when the department finds that there is an imminent danger to the public health or safety.

(4) The department may suspend any registration simultaneously with the institution of proceedings under this section or when renewal of registration is refused in cases when the department finds that there is an imminent danger to the public health or safety. Such suspension shall continue in effect until the conclusion of such proceedings, including judicial review thereof, unless sooner withdrawn by the department or dissolved by a court of competent jurisdiction.

(5) In the event the department suspends or revokes a registration granted under section 28-408, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may in the discretion of the department be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances may be forfeited to the state.

(6) The administration shall be promptly notified of all orders limiting, suspending, or revoking registration.

Source: Laws 1977, LB 38, § 69; Laws 1985, LB 323, § 5; Laws 1991, LB 456, § 1; Laws 1994, LB 1210, § 5; Laws 2001, LB 398, § 7; Laws 2007, LB463, § 1121.

Cross References

Administrative Procedure Act, see section 84-920.
Uniform Credentialing Act, see section 38-101.

28-410 Records of registrants; inventory; violation; penalty; storage.

(1) Each registrant manufacturing, distributing, or dispensing controlled substances in Schedule I, II, III, IV, or V of section 28-405 shall keep and maintain a complete and accurate record of all stocks of such controlled substances on hand. Such records shall be maintained for five years.

(2) Commencing January 1, 2009, each registrant manufacturing, distributing, storing, or dispensing such controlled substances shall prepare an annual inventory of each controlled substance in his or her possession. Such inventory shall (a) be taken within two years after the previous biennial inventory date but in no event later than December 31, 2009, and each year thereafter be taken within one year after the previous annual inventory date, (b) contain such information as shall be required by the Board of Pharmacy, (c) be copied and such copy forwarded to the department within thirty days after completion, (d) be maintained at the location listed on the registration for a period of five years, (e) contain the name, address, and Drug Enforcement Administration number of the registrant, the date and time of day the inventory was completed, and the signature of the person responsible for taking the inventory, (f) list the exact count or measure of all controlled substances listed in Schedules I, II, III, IV, and V of section 28-405, and (g) be maintained in permanent, read-only format separating the inventory for controlled substances listed in Schedules I and II of section 28-405 from the inventory for controlled substances listed in Schedules III, IV, and V of section 28-405. A registrant whose inventory fails to comply with this subsection shall be guilty of a Class IV misdemeanor.

(3) This section shall not apply to practitioners who prescribe or administer, as a part of their practice, controlled substances listed in Schedule II, III, IV, or V of section 28-405 unless such practitioner regularly engages in dispensing any such drug or drugs to his or her patients.

(4) Controlled substances shall be stored in accordance with the following:

(a) All controlled substances listed in Schedule I of section 28-405 must be stored in a locked cabinet; and

(b) All controlled substances listed in Schedule II, III, IV, or V of section 28-405 must be stored in a locked cabinet or distributed throughout the inventory of noncontrolled substances in a manner which will obstruct theft or diversion of the controlled substances.

Source: Laws 1977, LB 38, § 70; Laws 1996, LB 1108, § 2; Laws 1997, LB 307, § 7; Laws 1997, LB 550, § 3; Laws 2001, LB 398, § 8; Laws 2003, LB 242, § 3; Laws 2008, LB902, § 2.
Operative date January 1, 2009.

28-411 Controlled substances; records; by whom kept; contents.

(1) Every practitioner who is authorized to administer or professionally use controlled substances shall keep a record of such controlled substances received by him or her and a record of all such controlled substances administered or professionally used by him or her, other than by medical order issued by a practitioner authorized to prescribe, in accordance with subsection (4) of this section.

(2) Manufacturers, wholesalers, distributors, and reverse distributors shall keep records of all controlled substances compounded, mixed, cultivated, grown, or by any other process produced or prepared and of all controlled

substances received and disposed of by them, in accordance with subsection (4) of this section.

(3) Pharmacies shall keep records of all controlled substances received and disposed of by them, in accordance with subsection (4) of this section.

(4) The record of controlled substances received shall in every case show (a) the date of receipt, (b) the name, address, and Drug Enforcement Administration number of the person receiving the controlled substances, (c) the name, address, and Drug Enforcement Administration number of the person from whom received, (d) the kind and quantity of controlled substances received, (e) the kind and quantity of controlled substances produced or removed from process of manufacture, and (f) the date of such production or removal from process of manufacture. The record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves received or produced. The record of all controlled substances sold, administered, dispensed, or otherwise disposed of shall show the date of selling, administering, or dispensing, the name and address of the person to whom or for whose use or the owner and species of animal for which the controlled substances were sold, administered, or dispensed, and the kind and quantity of controlled substances. For any lost, destroyed, or stolen controlled substances, the record shall list the kind and quantity of such controlled substances and the discovery date of such loss, destruction, or theft. Every such record shall be kept for a period of five years from the date of the transaction recorded.

Source: Laws 1977, LB 38, § 71; Laws 1988, LB 273, § 4; Laws 1995, LB 406, § 6; Laws 1996, LB 1044, § 69; Laws 2001, LB 398, § 9.

28-412 Narcotic drugs; administration to narcotic-dependent person; violation; penalty.

(1) It is unlawful to prescribe any narcotic drug listed in section 28-405, except buprenorphine, for the purpose of detoxification treatment or maintenance treatment except as provided in this section.

(2) A narcotic drug may be administered or dispensed to a narcotic-dependent person for detoxification treatment or maintenance treatment by a practitioner who is registered to provide detoxification treatment or maintenance treatment pursuant to section 28-406.

(3) A narcotic drug may be administered or dispensed to a narcotic-dependent person when necessary to relieve acute withdrawal symptoms pending the referral of such person for detoxification treatment or maintenance treatment by a physician who is not registered to provide detoxification treatment or maintenance treatment under section 28-406. Not more than one day's supply of narcotic drugs shall be administered or dispensed for such person's use at one time. Such treatment shall not be continued for more than three successive calendar days and may not be renewed or extended.

(4) A narcotic drug may be administered or dispensed in a hospital to maintain or detoxify a person as an incidental adjunct to medical or surgical treatment conditions other than dependence.

(5) Any person who violates this section is guilty of a Class IV felony.

(6) For purposes of this section:

(a) Detoxification treatment means the administering or dispensing of a narcotic drug in decreasing doses to a person for a specified period of time to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and to bring such person to a narcotic drug-free state within such period of time. Detoxification treatment includes short-term detoxification treatment and long-term detoxification treatment;

(b) Long-term detoxification treatment means detoxification treatment for a period of more than thirty days but not more than one hundred eighty days;

(c) Maintenance treatment means the administering or dispensing of a narcotic drug in the treatment of a narcotic-dependent person for a period of more than twenty-one days; and

(d) Short-term detoxification treatment means detoxification treatment for a period of not more than thirty days.

Source: Laws 1977, LB 38, § 72; Laws 1996, LB 1044, § 70; Laws 1996, LB 1108, § 3; Laws 1999, LB 379, § 2; Laws 1999, LB 594, § 3; Laws 2001, LB 398, § 10; Laws 2007, LB247, § 3.

28-413 Distribution to another registrant; order forms.

Controlled substances in Schedules I and II of section 28-405 shall be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of the Controlled Substances Act, 21 U.S.C. 801 et seq., as such act existed on May 1, 2001, respecting order forms shall be deemed compliance with this section.

Source: Laws 1977, LB 38, § 73; Laws 2001, LB 398, § 11.

28-414 Controlled substance; medical order; transfer; destruction; requirements.

(1)(a) Except as otherwise provided in this subsection or section 28-412 or when administered directly by a practitioner to an ultimate user, a controlled substance listed in Schedule II of section 28-405 shall not be dispensed without the written prescription bearing the signature of a practitioner authorized to prescribe. No medical order for a controlled substance listed in Schedule II of section 28-405 shall be filled more than six months from the date of issuance. A prescription for a controlled substance listed in Schedule II of section 28-405 shall not be refilled.

(b) In emergency situations as defined by rule and regulation of the department, a controlled substance listed in Schedule II of section 28-405 may be dispensed pursuant to a facsimile of a written, signed prescription bearing the word ''emergency'' or pursuant to an oral prescription reduced to writing in accordance with subdivision (3)(b) of this section, except for the prescribing practitioner's signature, and bearing the word ''emergency''.

(c) In nonemergency situations:

(i) A controlled substance listed in Schedule II of section 28-405 may be dispensed pursuant to a facsimile of a written, signed prescription if the original written, signed prescription is presented to the pharmacist for review before the controlled substance is dispensed, except as provided in subdivision (1)(c)(ii) or (1)(c)(iii) of this section;

(ii) A narcotic drug listed in Schedule II of section 28-405 may be dispensed pursuant to a facsimile of a written, signed prescription (A) to be compounded for direct parenteral administration to a patient for the purpose of home infusion therapy or (B) for administration to a patient in a hospice licensed under the Health Care Facility Licensure Act or certified under Title XVIII of the federal Social Security Act, as such title existed on May 1, 2001, and bearing the words ''hospice patient'';

(iii) A controlled substance listed in Schedule II of section 28-405 may be dispensed pursuant to a facsimile of a written, signed prescription for administration to a resident of a long-term care facility; and

(iv) For purposes of subdivisions (1)(c)(ii) and (1)(c)(iii) of this section, a facsimile of a written, signed prescription shall serve as the original written prescription and shall be maintained in accordance with subdivision (3)(a) of this section.

(d)(i) A prescription for a controlled substance listed in Schedule II of section 28-405 may be partially filled if the pharmacist does not supply the full quantity prescribed and he or she makes a notation of the quantity supplied on the face of the prescription. The remaining portion of the prescription may be filled within seventy-two hours of the first partial filling. The pharmacist shall notify the prescribing practitioner if the remaining portion of the prescription is not or cannot be filled within such period. No further quantity may be supplied after such period without a new written, signed prescription.

(ii) A prescription for a controlled substance listed in Schedule II of section 28-405 written for a patient in a long-term care facility or for a patient with a medical diagnosis documenting a terminal illness may be partially filled. Such prescription shall bear the words ''terminally ill'' or ''long-term care facility patient'' on its face. If there is any question whether a patient may be classified as having a terminal illness, the pharmacist shall contact the prescribing practitioner prior to partially filling the prescription. Both the pharmacist and the prescribing practitioner have a corresponding responsibility to assure that the controlled substance is for a terminally ill patient. For each partial filling, the dispensing pharmacist shall record on the back of the prescription or on another appropriate record, uniformly maintained and readily retrievable, the date of the partial filling, quantity dispensed, remaining quantity authorized to be dispensed, and the identification of the dispensing pharmacist. The total quantity of controlled substances listed in Schedule II which is dispensed in all partial fillings shall not exceed the total quantity prescribed. A prescription for a Schedule II controlled substance for a patient in a long-term care facility or a patient with a medical diagnosis documenting a terminal illness is valid for sixty days from the date of issuance or until discontinuance of the prescription, whichever occurs first.

(2)(a) Except as otherwise provided in this subsection or when administered directly by a practitioner to an ultimate user, a controlled substance listed in Schedule III, IV, or V of section 28-405 shall not be dispensed without a written or oral medical order. Such medical order is valid for six months after the date of issuance. Authorization from a practitioner authorized to prescribe is required to refill a prescription for a controlled substance listed in Schedule III, IV, or V of section 28-405. Such prescriptions shall not be refilled more than five times within six months after the date of issuance. Original prescription information for any controlled substance listed in Schedule III, IV, or V of

section 28-405 may be transferred between pharmacies for purposes of refill dispensing pursuant to section 38-2871.

(b) A controlled substance listed in Schedule III, IV, or V of section 28-405 may be dispensed pursuant to a facsimile of a written, signed prescription. The facsimile of a written, signed prescription shall serve as the original written prescription for purposes of this subsection and shall be maintained in accordance with the provisions of subdivision (3)(c) of this section.

(c) A prescription for a controlled substance listed in Schedule III, IV, or V of section 28-405 may be partially filled if (i) each partial filling is recorded in the same manner as a refilling, (ii) the total quantity dispensed in all partial fillings does not exceed the total quantity prescribed, and (iii) each partial filling is dispensed within six months after the prescription was issued.

(3)(a) Prescriptions for all controlled substances listed in Schedule II of section 28-405 shall be kept in a separate file by the dispensing practitioner and shall be maintained for a minimum of five years. The practitioner shall make all such files readily available to the department and law enforcement for inspection without a search warrant.

(b) All prescriptions for controlled substances listed in Schedule II of section 28-405 shall contain the name and address of the patient, the name and address of the prescribing practitioner, the Drug Enforcement Administration number of the prescribing practitioner, the date of issuance, and the prescribing practitioner's signature. The practitioner filling such prescription shall write the date of filling and his or her own signature on the face of the prescription. If the prescription is for an animal, it shall also state the name and address of the owner of the animal and the species of the animal.

(c) Prescriptions for all controlled substances listed in Schedule III, IV, or V of section 28-405 shall be filed separately from other prescriptions in a single file by the dispensing practitioner and shall be maintained for a minimum of five years. The practitioner shall make all such files readily available to the department and law enforcement for inspection without a search warrant.

(d) All prescriptions for controlled substances listed in Schedule III, IV, or V of section 28-405 shall contain the name and address of the patient, the name and address of the prescribing practitioner, the Drug Enforcement Administration number of the prescribing practitioner, the date of issuance, and for written prescriptions, the prescribing practitioner's signature. If the prescription is for an animal, it shall also state the owner's name and address and species of the animal.

(e) A registrant who is the owner of a controlled substance may transfer:

(i) Any controlled substance listed in Schedule I or II of section 28-405 to another registrant as provided by law or by rule and regulation of the department; and

(ii) Any controlled substance listed in Schedule III, IV, or V of section 28-405 to another registrant if such owner complies with subsection (4) of section 28-411.

(f)(i) The owner of any stock of controlled substances may cause such controlled substances to be destroyed pursuant to this subdivision when the need for such substances ceases. Complete records of controlled substances destruction pursuant to this subdivision shall be maintained by the registrant for five years from the date of destruction.

(ii) When the owner is a registrant:

(A) Controlled substances listed in Schedule II, III, IV, or V of section 28-405 may be destroyed by a pharmacy inspector, by a reverse distributor, or by the federal Drug Enforcement Administration. Upon destruction, any forms required by the administration to document such destruction shall be completed;

(B) Liquid controlled substances in opened containers which originally contained fifty milliliters or less or compounded liquid controlled substances within the facility where they were compounded may be destroyed if witnessed by two members of the healing arts and recorded in accordance with subsection (4) of section 28-411; or

(C) Solid controlled substances in opened unit-dose containers or which have been adulterated within a hospital where they were to be administered to patients at such hospital may be destroyed if witnessed by two members of the healing arts and recorded in accordance with subsection (4) of section 28-411.

(iii) When the owner is a patient, such owner may transfer the controlled substances to a pharmacy for immediate destruction by two responsible parties acting on behalf of the pharmacy, one of whom must be a member of the healing arts.

(iv) When the owner is a resident of a long-term care facility or hospital, the long-term care facility or hospital shall assure that controlled substances are destroyed as follows:

(A) If the controlled substance is listed in Schedule II or III of section 28-405, the destruction shall be witnessed by an employee pharmacist or a consultant pharmacist and a member of the healing arts; or

(B) If the controlled substance is listed in Schedule IV or V of section 28-405, the destruction shall be witnessed by an employee pharmacist or a consultant pharmacist and another responsible adult.

(g) Before dispensing any controlled substance listed in Schedule II, III, IV, or V of section 28-405, the dispensing practitioner shall affix a label to the container in which the controlled substance is dispensed. Such label shall bear the name and address of the pharmacy or dispensing practitioner, the name of the patient, the date of filling, the consecutive number of the prescription under which it is recorded in the practitioner's prescription files, the name of the prescribing practitioner, and the directions for use of the controlled substance. Unless the prescribing practitioner writes ''do not label'' or words of similar import on the original written prescription or so designates in an oral prescription, such label shall also bear the name of the controlled substance.

(4) For purposes of this section, long-term care facility has the same meaning as long-term care hospital in section 71-422 and includes an intermediate care facility for the mentally retarded as defined in section 71-421.

Source: Laws 1977, LB 38, § 74; Laws 1988, LB 273, § 5; Laws 1995, LB 406, § 7; Laws 1996, LB 1108, § 4; Laws 1997, LB 307, § 8; Laws 1999, LB 594, § 4; Laws 2000, LB 819, § 65; Laws 2001, LB 398, § 12; Laws 2004, LB 1005, § 2; Laws 2005, LB 382, § 3; Laws 2007, LB463, § 1122.

Cross References

Health Care Facility Licensure Act, see section 71-401.

28-415 Narcotic drugs; label; requirements.

(1) A manufacturer, distributor, or packager who sells or dispenses a narcotic drug or a wholesaler who sells or dispenses a narcotic drug in a package prepared by him or her shall securely affix a label to each package in which such drug is contained showing in legible English the name and address of the vendor and the quantity, kind, and form of narcotic drug contained therein. No person, except a pharmacy for the purpose of filling a medical order under the Uniform Controlled Substances Act, shall alter, deface, or remove any label so affixed.

(2) A pharmacy that sells or dispenses any narcotic drug on a prescription issued by a practitioner shall affix a label to the container in which such drug is sold or dispensed pursuant to subdivision (3)(g) of section 28-414. No person shall alter, deface, or remove any label so affixed.

Source: Laws 1977, LB 38, § 75; Laws 1988, LB 273, § 6; Laws 1995, LB 406, § 8; Laws 1999, LB 379, § 3; Laws 1999, LB 594, § 5; Laws 2001, LB 398, § 13.

28-416 Prohibited acts; violations; penalties.

(1) Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance; or (b) to create, distribute, or possess with intent to distribute a counterfeit controlled substance.

(2) Except as provided in subsections (4), (5), (7), (8), (9), and (10) of this section, any person who violates subsection (1) of this section with respect to: (a) A controlled substance classified in Schedule I, II, or III of section 28-405 which is an exceptionally hazardous drug shall be guilty of a Class II felony; (b) any other controlled substance classified in Schedule I, II, or III of section 28-405 shall be guilty of a Class III felony; or (c) a controlled substance classified in Schedule IV or V of section 28-405 shall be guilty of a Class IIIA felony.

(3) A person knowingly or intentionally possessing a controlled substance, except marijuana, unless such substance was obtained directly or pursuant to a medical order issued by a practitioner authorized to prescribe while acting in the course of his or her professional practice, or except as otherwise authorized by the act, shall be guilty of a Class IV felony.

(4)(a) Except as authorized by the Uniform Controlled Substances Act, any person eighteen years of age or older who knowingly or intentionally manufactures, distributes, delivers, dispenses, or possesses with intent to manufacture, distribute, deliver, or dispense a controlled substance or a counterfeit controlled substance (i) to a person under the age of eighteen years, (ii) in, on, or within one thousand feet of the real property comprising a public or private elementary, vocational, or secondary school, a community college, a public or private college, junior college, or university, or a playground, or (iii) within one hundred feet of a public or private youth center, public swimming pool, or video arcade facility shall be punished by the next higher penalty classification than the penalty prescribed in subsection (2), (7), (8), (9), or (10) of this section, depending upon the controlled substance involved, for the first violation and for a second or subsequent violation shall be punished by the next higher penalty classification than that prescribed for a first violation of this subsection, but in

no event shall such person be punished by a penalty greater than a Class IB felony.

(b) For purposes of this subsection:

(i) Playground shall mean any outdoor facility, including any parking lot appurtenant to the facility, intended for recreation, open to the public, and with any portion containing three or more apparatus intended for the recreation of children, including sliding boards, swingsets, and teeterboards;

(ii) Video arcade facility shall mean any facility legally accessible to persons under eighteen years of age, intended primarily for the use of pinball and video machines for amusement, and containing a minimum of ten pinball or video machines; and

(iii) Youth center shall mean any recreational facility or gymnasium, including any parking lot appurtenant to the facility or gymnasium, intended primarily for use by persons under eighteen years of age which regularly provides athletic, civic, or cultural activities.

(5)(a) Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person eighteen years of age or older to knowingly and intentionally employ, hire, use, cause, persuade, coax, induce, entice, seduce, or coerce any person under the age of eighteen years to manufacture, transport, distribute, carry, deliver, dispense, prepare for delivery, offer for delivery, or possess with intent to do the same a controlled substance or a counterfeit controlled substance.

(b) Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person eighteen years of age or older to knowingly and intentionally employ, hire, use, cause, persuade, coax, induce, entice, seduce, or coerce any person under the age of eighteen years to aid and abet any person in the manufacture, transportation, distribution, carrying, delivery, dispensing, preparation for delivery, offering for delivery, or possession with intent to do the same of a controlled substance or a counterfeit controlled substance.

(c) Any person who violates subdivision (a) or (b) of this subsection shall be punished by the next higher penalty classification than the penalty prescribed in subsection (2), (7), (8), (9), or (10) of this section, depending upon the controlled substance involved, for the first violation and for a second or subsequent violation shall be punished by the next higher penalty classification than that prescribed for a first violation of this subsection, but in no event shall such person be punished by a penalty greater than a Class IB felony.

(6) It shall not be a defense to prosecution for violation of subsection (4) or (5) of this section that the defendant did not know the age of the person through whom the defendant violated such subsection.

(7) Any person who violates subsection (1) of this section with respect to cocaine or any mixture or substance containing a detectable amount of cocaine in a quantity of:

(a) One hundred forty grams or more shall be guilty of a Class IB felony;

(b) At least twenty-eight grams but less than one hundred forty grams shall be guilty of a Class IC felony; or

(c) At least ten grams but less than twenty-eight grams shall be guilty of a Class ID felony.

(8) Any person who violates subsection (1) of this section with respect to base cocaine (crack) or any mixture or substance containing a detectable amount of base cocaine in a quantity of:

(a) One hundred forty grams or more shall be guilty of a Class IB felony;

(b) At least twenty-eight grams but less than one hundred forty grams shall be guilty of a Class IC felony; or

(c) At least ten grams but less than twenty-eight grams shall be guilty of a Class ID felony.

(9) Any person who violates subsection (1) of this section with respect to heroin or any mixture or substance containing a detectable amount of heroin in a quantity of:

(a) One hundred forty grams or more shall be guilty of a Class IB felony;

(b) At least twenty-eight grams but less than one hundred forty grams shall be guilty of a Class IC felony; or

(c) At least ten grams but less than twenty-eight grams shall be guilty of a Class ID felony.

(10) Any person who violates subsection (1) of this section with respect to amphetamine, its salts, optical isomers, and salts of its isomers, or with respect to methamphetamine, its salts, optical isomers, and salts of its isomers, in a quantity of:

(a) One hundred forty grams or more shall be guilty of a Class IB felony;

(b) At least twenty-eight grams but less than one hundred forty grams shall be guilty of a Class IC felony; or

(c) At least ten grams but less than twenty-eight grams shall be guilty of a Class ID felony.

(11) Any person knowingly or intentionally possessing marijuana weighing more than one ounce but not more than one pound shall be guilty of a Class III misdemeanor.

(12) Any person knowingly or intentionally possessing marijuana weighing more than one pound shall be guilty of a Class IV felony.

(13) Any person knowingly or intentionally possessing marijuana weighing one ounce or less shall:

(a) For the first offense, be guilty of an infraction, receive a citation, be fined three hundred dollars, and be assigned to attend a course as prescribed in section 29-433 if the judge determines that attending such course is in the best interest of the individual defendant;

(b) For the second offense, be guilty of a Class IV misdemeanor, receive a citation, and be fined four hundred dollars and may be imprisoned not to exceed five days; and

(c) For the third and all subsequent offenses, be guilty of a Class IIIA misdemeanor, receive a citation, be fined five hundred dollars, and be imprisoned not to exceed seven days.

(14) Any person convicted of violating this section, if placed on probation, shall, as a condition of probation, satisfactorily attend and complete appropriate treatment and counseling on drug abuse provided by a program authorized under the Nebraska Behavioral Health Services Act or other licensed drug treatment facility.

(15) Any person convicted of violating this section, if sentenced to the Department of Correctional Services, shall attend appropriate treatment and counseling on drug abuse.

(16) Any person knowingly or intentionally possessing a firearm while in violation of subsection (1) of this section shall be punished by the next higher penalty classification than the penalty prescribed in subsection (2), (7), (8), (9), or (10) of this section, but in no event shall such person be punished by a penalty greater than a Class IB felony.

(17) A person knowingly or intentionally in possession of money used or intended to be used to facilitate a violation of subsection (1) of this section shall be guilty of a Class IV felony.

Source: Laws 1977, LB 38, § 76; Laws 1978, LB 808, § 2; Laws 1980, LB 696, § 3; Laws 1985, LB 406, § 4; Laws 1986, LB 504, § 1; Laws 1989, LB 592, § 2; Laws 1991, LB 742, § 1; Laws 1993, LB 117, § 2; Laws 1995, LB 371, § 6; Laws 1997, LB 364, § 8; Laws 1999, LB 299, § 1; Laws 2001, LB 398, § 14; Laws 2003, LB 46, § 1; Laws 2004, LB 1083, § 86; Laws 2005, LB 117, § 3; Laws 2008, LB844, § 1.
Effective date July 18, 2008.

Cross References

Nebraska Behavioral Health Services Act, see section 71-801.

1. Elements
2. Evidence
3. Generally
4. Jury instruction
5. Plain view doctrine
6. Possession
7. Possession with intent to deliver
8. Sentencing

1. Elements

Unless a statute specifically provides otherwise, the quantity possessed of a controlled substance is not an essential element of the crime. State v. Thompson, 244 Neb. 189, 505 N.W.2d 673 (1993).

The weight or amount of marijuana possessed is not an element of the substantive offense of possession of marijuana, and the weight or amount of marijuana only determines the grade of the offense and relates to the punishment which may be imposed on conviction for the offense of simple possession. Simple possession of marijuana is a lesser-included offense of possession of marijuana with intent to distribute. State v. Malone, 4 Neb. App. 904, 552 N.W.2d 772 (1996).

2. Evidence

Evidence which was seized during a search based solely on an illegal wiretap must be suppressed and a conviction based on that evidence reversed, where it was agreed that the defendant had waived his rights under the fourth amendment to the U.S. Constitution, but had not waived his rights under section 86-701 et seq. (recodified in 2002 as section 86-271 et seq.). State v. Aulrich, 209 Neb. 546, 308 N.W.2d 739 (1981).

3. Generally

Subsection (6) of this section and section 77-4301(2) address different types of misconduct and are not inconsistent. State v. Garza, 242 Neb. 573, 496 N.W.2d 448 (1993).

A party claiming that the sale of a controlled substance was exempt has the burden of proof that an exemption was applicable. State v. Taylor, 221 Neb. 114, 375 N.W.2d 610 (1985).

Subsection (6)(a) merely authorizes the issuance of a citation for certain violations; it does not prohibit an arrest for the same violation when otherwise authorized by law. State v. Watts, 209 Neb. 371, 307 N.W.2d 816 (1981).

4. Jury instruction

The statutory elements neither solely control nor exclusively dictate whether a lesser-included offense instruction for simple possession is required along with an instruction on possession of a controlled substance with intent to deliver. State v. Massa, 242 Neb. 70, 493 N.W.2d 175 (1992).

5. Plain view doctrine

Plain view doctrine circumvents need for a search warrant when contraband is inadvertently found while arresting officer is legally present at physical examination of accused. State v. Brockman, 231 Neb. 982, 439 N.W.2d 84 (1989).

6. Possession

Under subsection (1) of this section, a defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance. State v. Lonnecker, 237 Neb. 207, 465 N.W.2d 737 (1991).

Under subsection (1) of this section, a defendant's control or dominion over premises where a controlled substance is located may establish the defendant's constructive possession of the controlled substance. State v. Lonnecker, 237 Neb. 207, 465 N.W.2d 737 (1991).

Pursuant to subsection (3) of this section, there is sufficient evidence to convict the defendant of knowingly or intentionally possessing a controlled substance when he approaches an undercover officer, asks to buy drugs, physically examines the drugs, and then hands over money to pay for the drugs. State v. Clark, 236 Neb. 475, 461 N.W.2d 576 (1990).

7. Possession with intent to deliver

Conviction of possession with intent to deliver a controlled substance affirmed in case where police officers noticed defendant in bar making a furtive gesture by pulling both hands from underneath bar; the officers subsequently found a bag with 11 snow seals behind the carpet under the bar within arm's distance from defendant; and defendant could not adequately account for the money he had in his possession. State v. Alcorn, 240 Neb. 400, 481 N.W.2d 921 (1992).

Possession with intent to deliver a controlled substance is not a victimless crime. State v. Rodgers, 237 Neb. 506, 466 N.W.2d 537 (1991).

8. Sentencing

Sentence of 3 to 5 years' imprisonment was not excessive for conviction under subsection (1)(a) of this statute. State v. Hodge and Carpenter, 225 Neb. 94, 402 N.W.2d 867 (1987).

28-417 Unlawful acts; violations; penalty.

(1) It shall be unlawful for any person:

(a) To omit, remove, alter, or obliterate a symbol required by the federal Controlled Substances Act, 21 U.S.C. 801 et seq., as the act existed on September 1, 2001, or required by the laws of this state;

(b) To alter, deface, or remove any label affixed to a package of narcotic drugs;

(c) To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under the Uniform Controlled Substances Act;

(d) To refuse any entry into any premises for inspection authorized by the act;

(e) To keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or place whatever which such person knows or should know is resorted to by persons using controlled substances in violation of the Uniform Controlled Substances Act for the purpose of using such substances or which is used for the keeping or selling of the same in violation of the act;

(f) To whom or for whose use any controlled substance has been prescribed, sold, or dispensed by a practitioner or the owner of any animal for which any such substance has been prescribed, sold, or dispensed by a veterinarian to possess it in a container other than which it was delivered to him or her by the practitioner; or

(g) To be under the influence of any controlled substance for a purpose other than the treatment of a sickness or injury as prescribed or administered by a practitioner. In a prosecution under this subdivision, it shall not be necessary for the state to prove that the accused was under the influence of any specific controlled substance, but it shall be sufficient for a conviction under this subdivision for the state to prove that the accused was under the influence of some controlled substance by proving that the accused did manifest physical and physiological symptoms or reactions caused by the use of any controlled substance.

(2) Any person who violates this section shall be guilty of a Class III misdemeanor.

Source: Laws 1977, LB 38, § 77; Laws 1978, LB 920, § 1; Laws 1988, LB 273, § 7; Laws 2001, LB 113, § 11; Laws 2001, LB 398, § 15.

28-418 Intentional violations; penalty.

(1) It shall be unlawful for any person knowingly or intentionally:

(a) Who is a registrant to distribute a controlled substance classified in Schedule I or II of section 28-405 in the course of his or her legitimate business except pursuant to an order form as required by section 28-413;

(b) To use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(c) To acquire or obtain or to attempt to acquire or obtain possession of a controlled substance by theft, misrepresentation, fraud, forgery, deception, or subterfuge;

(d) To furnish false or fraudulent material information in or omit any material information from any application, report, or other document required to be kept or filed under the Uniform Controlled Substances Act or any record required to be kept by the act;

(e) To make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit controlled substance;

(f) Who is subject to sections 28-406 to 28-414 to distribute or dispense a controlled substance in violation of section 28-414;

(g) Who is a registrant to manufacture a controlled substance not authorized by his or her registration or to distribute or dispense a controlled substance not authorized by his or her registration to another registrant or authorized person;

(h) To possess a false or forged medical order for a controlled substance issued by a practitioner authorized to prescribe, except that this subdivision shall not apply to law enforcement officials, practitioners, or attorneys in the performance of their official lawful duties; or

(i) To communicate information to a practitioner in an effort to unlawfully procure a controlled substance, the administration of a controlled substance, or a medical order for a controlled substance issued by a practitioner authorized to prescribe.

(2) Any person who violates this section shall be guilty of a Class IV felony.

Source: Laws 1977, LB 38, § 78; Laws 1988, LB 273, § 8; Laws 2001, LB 113, § 12; Laws 2001, LB 398, § 16.

28-419 Inhaling or drinking certain intoxicating substances; unlawful.

No person shall breathe, inhale, or drink any compound, liquid, or chemical containing acetate, acetone, benzene, butyl alcohol, cyclohexanone, ethyl acetate, ethyl alcohol, ethylene dichloride, ethylene trichloride, hexane, isopropanol, isopropyl alcohol, methyl alcohol, methyl cellosolve acetate, methyl ethyl ketone, methyl isobutyl ketone, pentachlorophenol, petroleum ether, toluene, toluol, trichloroathane, trichloroethylene, or any other substance for the purpose of inducing a condition of intoxication, stupefaction, depression, giddiness, paralysis, inebriation, excitement, or irrational behavior, or in any manner changing, distorting, or disturbing the auditory, visual, mental, or nervous processes. For the purposes of sections 28-419 to 28-424, any such condition so induced shall be deemed an intoxicated condition.

Source: Laws 1977, LB 38, § 79; Laws 2007, LB424, § 1.

28-420 Selling or offering for sale certain compounds; use; knowledge of seller; unlawful.

No person shall knowingly sell or offer for sale, deliver or give to any person any compound, liquid or chemical or any other substance which will induce an intoxicated condition as defined in section 28-419, when the seller, offerer or deliverer knows or has reason to know that such compound is intended for use to induce such condition.

Source: Laws 1977, LB 38, § 80.

28-421 Act, exceptions.

The provisions of sections 28-419 to 28-424 shall not apply to the use or sale of such substances, as defined in sections 28-419 and 28-420, when such use or sale is administered or prescribed for medical or dental purposes, nor shall the provisions of sections 28-419 to 28-424 apply to the use or sale of alcoholic liquors as defined by section 53-103.

Source: Laws 1977, LB 38, § 81.

28-422 Selling or offering for sale certain compounds; register; maintain for one year.

Every person selling or offering for sale at retail any of the substances as defined in section 28-419, shall maintain a register in which are recorded the date of each sale, the quantity sold, and the name and address of the purchaser. The record of each sale shall be available for inspection by any peace officer for at least one year.

Source: Laws 1977, LB 38, § 82.

28-423 Inducing or enticing; violation.

No person shall induce or entice any person to violate the provisions of section 28-419, 28-420, or 28-422.

Source: Laws 1977, LB 38, § 83.

28-424 Violations; penalty.

Any person who violates any provision of section 28-419, 28-420, 28-422, or 28-423 shall be guilty of a Class III misdemeanor.

Source: Laws 1977, LB 38, § 84.

28-425 Embalming fluids; use of arsenic or strychnine prohibited; label required; violation; penalty.

(1) No person, firm, corporation, partnership, or limited liability company shall manufacture, give away, sell, expose for sale, or deliver any embalming fluid or other fluids of whatsoever name, to be used for or intended for use in the embalming of dead human bodies, which contain arsenic or strychnine, or preparations, compounds, or salts thereof, without having the words arsenic contained herein or strychnine contained herein, as the case may be, written or printed upon a label pasted on the bottle, cask, flask, or carboy in which such fluid shall be contained.

(2) No undertaker or other person shall embalm with, inject into, or place upon any dead human body, any fluid or preparation of any kind which contains arsenic or strychnine, or preparations, compounds, or salts thereof.

(3) Any person, firm, corporation, partnership, or limited liability company violating any of the provisions of subsection (1) or (2) of this section shall be guilty of a Class III misdemeanor.

Source: Laws 1977, LB 38, § 85; Laws 1993, LB 121, § 176.

28-426 Repealed. Laws 1978, LB 748, § 61.

28-427 Additional penalties.

Any penalty imposed for violation of the Uniform Controlled Substances Act shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law. A conviction or acquittal under federal law or the law of another state having a substantially similar law shall be a bar to prosecution in this state for the same act. If any person is convicted for violation of the Uniform Controlled Substances Act, in addition to any penalty imposed by the court, the court may order that such person make restitution to any law enforcement agency for reasonable expenditures made in the purchase of any controlled substances from such person or his or her agent as part of the investigation leading to such conviction.

Source: Laws 1977, LB 38, § 87; Laws 2001, LB 113, § 13.

The plain and ordinary meaning of the words ''as part of the investigation leading to such conviction'' limits the amount of restitution ordered to the reasonable law enforcement expenses incurred in connection with the purchase of the controlled substance for the sale of which the defendant was convicted. State v. Rios, 237 Neb. 232, 465 N.W.2d 611 (1991).

An order of restitution under this section can be made at the time of sentencing, but there is no statutory requirement that it be made at that time. State v. Holmes, 221 Neb. 629, 379 N.W.2d 765 (1986).

Restitution imposed under this section is not a criminal penalty to be imposed as punishment for the crime, but is in the nature of a civil or administrative penalty or sanction. State v. Holmes, 221 Neb. 629, 379 N.W.2d 765 (1986).

Restitution imposed under this section is not a part of the sentence; therefore, the trial court had jurisdiction to make an order of restitution after sentencing. State v. Holmes, 221 Neb. 629, 379 N.W.2d 765 (1986).

The heading, or catchline, is supplied in the compilation of the statutes and does not constitute any part of the law. State v. Holmes, 221 Neb. 629, 379 N.W.2d 765 (1986).

A defendant may be ordered to make restitution for law enforcement expenses incurred during controlled buys that were part of the investigation leading to a conviction arising from a subsequent controlled buy. State v. Thomas, 6 Neb. App. 510, 574 N.W.2d 542 (1998).

28-428 Controlled premises, defined; inspection; procedure.

(1) Administrative inspections of controlled premises are authorized in accordance with the following provisions:

(a) For purposes of the Uniform Controlled Substances Act only, controlled premises shall mean: (i) Places where persons registered or exempted from registration requirements under the act are required to keep records; and (ii) places including factories, warehouses, establishments, and conveyances where persons registered or exempted from registration requirements under the act are permitted to hold, manufacture, compound, process, sell, deliver, or otherwise dispose of any controlled substance;

(b) When so authorized by an administrative inspection or an officer of the Division of Drug Control or an authorized agent of the department, upon presenting the warrant and appropriate credentials to the owner, operator, or agent in charge, shall have the right to enter controlled premises for the purpose of conducting an administrative inspection;

(c) When so authorized by an administrative inspection warrant, an officer of the Division of Drug Control or an authorized agent of the department shall have the right: (i) To inspect and copy records required by the act to be kept; (ii) to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, con-

tainers, and labeling found therein, and, except as otherwise provided in subdivision (1)(e)(ii) of this section, all other things therein, including records, files, papers, processes, controls, and facilities, bearing on any violation of the act; and (iii) to inventory any stock of any controlled substance therein and obtain samples of any such substance;

(d) This section shall not be construed to prevent entries and administrative inspections including seizures of property without a warrant: (i) With the consent of the owner, operator, or agent in charge of the controlled premises; (ii) in situations presenting imminent danger to health or safety; (iii) in situations involving inspection of any conveyance when there is reasonable cause to believe that such conveyance contains substances possessed or carried in violation of the act; (iv) in any other exceptional or emergency circumstance when time or opportunity to apply for a warrant is lacking; and (v) in all other situations when a warrant is not constitutionally required; and

(e) Except when the owner, operator, or agent in charge of the controlled premises so consents in writing, no inspection authorized by this section shall extend to (i) financial data; (ii) sales data other than shipment data; or (iii) pricing data.

(2) For the purpose of the execution of administrative inspection warrants, an authorized agent of the department shall be deemed to be a peace officer.

(3) Issuance and execution of administrative inspection warrants for controlled premises shall be in accordance with the provisions of sections 29-830 to 29-835, except that inspection warrants for the purpose of the act shall be issued not only upon a showing that consent to entry for inspection purposes has been refused, but also in all cases when the judge of a court of record has been given reason to believe that consent would be refused if requested.

Source: Laws 1977, LB 38, § 88; Laws 1997, LB 307, § 9.

28-429 Division of Drug Control; established; personnel; powers and duties; Nebraska State Patrol Drug Control and Education Cash Fund; created; use; investment; report; contents.

(1) There is hereby established in the Nebraska State Patrol a Division of Drug Control. The division shall consist of such personnel as may be designated by the Superintendent of Law Enforcement and Public Safety. It shall be the duty of the division to enforce all of the provisions of the Uniform Controlled Substances Act and any other provisions of the law dealing with controlled substances and to conduct drug education activities as directed by the superintendent. The Nebraska State Patrol shall cooperate with federal agencies, the department, other state agencies, elementary and secondary schools, and County Drug Law Enforcement and Education Fund Boards in discharging their responsibilities concerning traffic in controlled substances, in suppressing the abuse of controlled substances, and in conducting drug education activities. To this end the division is authorized to: (a) Arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances; (b) coordinate and cooperate in training programs on controlled substance law enforcement and education at the local and state levels; (c) establish a centralized unit which will accept, catalog, file, and collect statistics, including records of drug dependent persons and other controlled substance law offenders within the state, and make such information available for federal, state, and local law enforcement purposes on request; (d) cooperate in locat-

ing, eradicating, and destroying wild or illicit growth of plant species from which controlled substances may be extracted, and for these purposes a peace officer is hereby authorized to enter onto property upon which there are no buildings or upon which there are only uninhabited buildings without first obtaining a search warrant or consent; (e) develop a priority program so as to focus the bulk of its efforts on the reduction and elimination of the most damaging drugs including narcotic drugs, depressant and stimulant drugs, and hallucinogenic drugs; and (f) develop and conduct drug education activities in cooperation with elementary and secondary schools in Nebraska and with County Drug Law Enforcement and Education Fund Boards.

(2) There is hereby created the Nebraska State Patrol Drug Control and Education Cash Fund which shall be used for the purposes of (a) obtaining evidence for enforcement of any state law relating to the control of drug abuse and (b) drug education activities conducted pursuant to subsection (1) of this section. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

(3) For the purpose of establishing and maintaining legislative oversight and accountability, the Appropriations Committee of the Legislature shall formulate record-keeping procedures to be adhered to by the Nebraska State Patrol for all expenditures, disbursements, and transfers of cash from the Nebraska State Patrol Drug Control and Education Cash Fund. Based on these record-keeping procedures, the Nebraska State Patrol shall prepare and deliver to the Clerk of the Legislature at the commencement of each succeeding session a detailed report which shall contain, but not be limited to: (a) Current total in the cash fund; (b) total amount of expenditures; (c) purpose of the expenditures to include: (i) Salaries and any expenses of all agents and informants; (ii) front money for drug purchases; (iii) names of drugs and quantity of purchases; (iv) amount of front money recovered; and (v) drug education activities; (d) total number of informers on payroll; (e) amounts delivered to patrol supervisors for distribution to agents and informants and the method of accounting for such transactions and the results procured through such transactions; and (f) a description of the drug education activities conducted since the date of the previous report. Each member of the Legislature shall receive a copy of such report by making a request for it to the superintendent.

(4) The superintendent shall adopt and promulgate rules and regulations to carry out this section.

Source: Laws 1977, LB 38, § 89; Laws 1979, LB 322, § 8; Laws 1991, LB 773, § 1; Laws 1994, LB 1066, § 19; Laws 2001, LB 398, § 17.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

This section permits law enforcement officers to enter onto property without a search warrant or consent for the purpose of locating and eradicating wild or illicit weeds from which a controlled substance could be extracted. State v. Havlat, 222 Neb. 554, 385 N.W.2d 436 (1986).

28-430 Department; enforce act; powers.

The department shall enforce the Uniform Controlled Substances Act and shall cooperate with federal agencies, the Division of Drug Control, and other

state agencies in discharging their responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, it is authorized to: (1) Arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances; (2) cooperate with the Drug Enforcement Administration and the Federal Bureau of Investigation; (3) do drug accountability audits of all registered practitioners in accordance with the act; (4) provide laboratory analysis; (5) provide drug abuse education to schools, courts, and persons requesting it; and (6) rely on results, information, and evidence received from the Drug Enforcement Administration and the Federal Bureau of Investigation relating to the regulatory functions of the act, including results of inspections conducted by that agency, which may be acted upon by the department and the Division of Drug Control in the performance of their regulatory functions under the act.

Source: Laws 1977, LB 38, § 90; Laws 1984, LB 403, § 1; Laws 1997, LB 307, § 10.

28-431 Seized without warrant; subject to forfeitures; disposition; manner; when; accepted as evidence; court costs and expenses.

(1) The following shall be seized without warrant by an officer of the Division of Drug Control or by any peace officer and the same shall be subject to forfeiture: (a) All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of the Uniform Controlled Substances Act; (b) all raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, administering, delivering, importing, or exporting any controlled substance in violation of the act; (c) all property which is used, or is intended for use, as a container for property described in subdivisions (a) and (b) of this subsection; (d) all drug paraphernalia defined in section 28-439; (e) all books, records, and research, including, but not limited to, formulas, microfilm, tapes, and data, which are used, or intended for use, in violation of the act; (f) all conveyances including, but not limited to, aircraft, vehicles, or vessels which are used, or intended for use, in transporting any controlled substance with intent to manufacture, distribute, deliver, dispense, export, or import such controlled substance in violation of the act; and (g) all money used, or intended to be used, to facilitate a violation of the act.

(2) Any property described in subdivision (1)(f) of this section which is used, or intended for use, to transport any property described in subdivision (1)(a) or (b) of this section is hereby declared to be a common nuisance, and any peace officer having probable cause to believe that such property is so used, or intended for such use, shall make a search thereof with or without a warrant.

(3) All money that a law enforcement agency proves was furnished by such agency shall be returned to the agency. All property seized without a search warrant shall not be subject to a replevin action and: (a) All property described in subdivisions (1)(a) to (1)(e) of this section shall be kept by the property division of the law enforcement agency which employs the officer who seized such property for so long as it is needed as evidence in any trial; and (b) when no longer required as evidence, all property described in subdivision (1)(e) of this section shall be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct, and all property

described in subdivisions (1)(a), (b), (c), and (d) of this section, that has been used or is intended to be used in violation of the act, when no longer needed as evidence shall be destroyed by the law enforcement agency holding the same or turned over to the department for custody or destruction, except that a law enforcement agency may keep a small quantity of the property described in subdivisions (1)(a), (b), (c), and (d) of this section for training purposes or use in investigations. Any large quantity of property described in subdivisions (1)(a), (b), (c), and (d) of this section, whether seized under a search warrant or validly seized without a warrant, may be disposed of on order of a court of record of this state in such manner as the court in its sound discretion shall direct. Such an order may be given only after a proper laboratory examination and report of such property has been completed and after a hearing has been held by the court after notice to the defendant of the proposed disposition of the property. The findings in such court order as to the nature, kind, and quantity of the property so disposed of may be accepted as evidence at subsequent court proceedings in lieu of the property ordered destroyed by the court order.

(4) When any property described in subdivision (1)(f) or (g) of this section is seized, the person seizing the same shall cause to be filed, within ten days thereafter, in the district court of the county in which seizure was made, petition for disposition of such property. The proceedings shall be brought in the name of the state by the county attorney of the county in which such property was seized. The petition shall describe the property, state the name of the owner if known, allege the essential elements of the violation which is claimed to exist, and conclude with a prayer for disposition. The county attorney shall have a copy of the petition served upon the owner of or any person having an interest in the property, if known, in person or by registered or certified mail at his or her last-known address. If the owner is unknown or there is a reasonable probability that there are unknown persons with interests in the property, the county attorney shall provide notice of the seizure and petition for disposition by publication once a week for four consecutive weeks in a newspaper of general circulation in the county of the seizure. At least five days shall elapse between each publication of notice.

At any time after seizure and prior to court disposition, the owner of record of such property may petition the district court of the county in which seizure was made to release such property, and the court shall order the release of the property upon a showing by the owner that he or she had no knowledge that such property was being used in violation of the Uniform Controlled Substances Act.

Any person having an interest in the property proceeded against or any person against whom civil or criminal liability would exist if such property is in violation of the act may, within thirty days after seizure, appear and file an answer or demurrer to the petition. The answer or demurrer shall allege the claimant's interest in or liability involving such property. At least thirty but not more than ninety days after seizure, there shall be a hearing before the court. If the claimant proves by a preponderance of the evidence that he or she (a) has not used or intended to use the property to facilitate an offense in violation of the act, (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any knowledge that such property was being or would be used in, or to facilitate, the violation of the act, the court shall order that such property or the value of the claimant's interest in such property be returned to the claimant. If there are no claims, if

all claims are denied, or if the value of the property exceeds all claims granted and it is shown beyond a reasonable doubt that such property was used in violation of the act, the court shall order disposition of such property at such time as the property is no longer required as evidence in any criminal proceeding. The court may order that property described in subdivision (1)(f) of this section be sold or put to official use by the confiscating agency for a period of not more than one year and that when such property is no longer necessary for official use or at the end of two years, whichever comes first, such property shall be sold. Proceeds from the sale of the property and any money described in subdivision (1)(g) of this section shall be distributed pursuant to section 28-1439.02. Official use shall mean use directly in connection with enforcement of the act.

Any court costs and fees and storage and other proper expenses shall be charged against any person intervening as claimant or owner of the property unless such person shall establish his or her claim. If a sale is ordered, the officer holding the sale shall make a return to the court showing to whom the property was sold and for what price. This return together with the court order shall authorize the county clerk to issue a title to the purchaser of the property if such title is required under the laws of this state.

Source: Laws 1977, LB 38, § 91; Laws 1980, LB 991, § 7; Laws 1985, LB 247, § 1; Laws 1997, LB 307, § 11.

1. Double jeopardy
2. Miscellaneous

1. Double jeopardy

Forfeiture actions pursuant to this section are criminal in character and double jeopardy principles apply. State v. Spotts, 257 Neb. 44, 595 N.W.2d 259 (1999).

Forfeiture proceedings brought pursuant to this section are not in rem proceedings, but are criminal proceedings entitled to double jeopardy protection. State v. Franco, 257 Neb. 15, 594 N.W.2d 633 (1999).

This section is criminal in character; therefore, double jeopardy principles apply. State v. One 1987 Toyota Pickup, 233 Neb. 670, 447 N.W.2d 243 (1989).

2. Miscellaneous

Pursuant to subsection (4) of this section, the time limitations of this section are directory rather than mandatory, and the State's failure to strictly conform to them is not fatal to a forfeiture action. State v. $1,947, 255 Neb. 290, 583 N.W.2d 611 (1998).

Appellate review concerning the sufficiency of the evidence to forfeit a motor vehicle to the State under this section should not be treated differently than review of the sufficiency of evidence in a criminal case. State v. One 1985 Mercedes 190D Automobile, 247 Neb. 335, 526 N.W.2d 657 (1995).

Subsection (4) of this section requires the State to prove beyond a reasonable doubt that seized property was used in violation of Chapter 28, article 4. State v. 1987 Jeep Wagoneer, 241 Neb. 397, 488 N.W.2d 546 (1992).

Failure to claim some legal or equitable interest in the money seized pursuant to a search warrant is fatal to some real interest in the subject matter in controversy. State v. $15,518, 239 Neb. 100, 474 N.W.2d 659 (1991).

Forfeitures of property under this section are considered punitive and criminal in nature because property forfeited under this section is not contraband per se, but rather ordinary, legal items used to facilitate illegal drug transactions. Appellate review of the sufficiency of the evidence to support a forfeiture of a motor vehicle under this section is to be treated the same as the review of the sufficiency of the evidence in the appeal of a criminal case. State v. $3,067.65 in U.S. Currency, 4 Neb. App. 443, 545 N.W.2d 129 (1996).

The State's ability to appeal a forfeiture action which is criminal and punitive is limited to the terms of sections 29-2315.01 to 29-2316. State v. One 1986 Toyota 4-Runner, 1 Neb. App. 1138, 510 N.W.2d 556 (1993).

Provision for civil forfeiture of drug paraphernalia is constitutional. Provision authorizing civil forfeiture of drug paraphernalia with strict time limit for filing of complaint for condemnation by law enforcement personnel when ''conveyances'' are seized allows forfeiture provision to satisfy procedural due process, and procedural due process is not violated by provisions for seizure of drug paraphernalia without opportunity for prior hearing. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

28-432 Complaint, pleading, or proceeding; burden of proof.

(1) It shall not be necessary for the state to negate any exemption or exception set forth in the Uniform Controlled Substances Act in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under the provisions of the act, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

(2) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under the Uniform Controlled

Substances Act, the person shall be presumed not to be the holder of such registration or form, and the burden of proof shall be upon him or her to rebut such presumption.

Source: Laws 1977, LB 38, § 92; Laws 2001, LB 113, § 14.

A party claiming that the sale of a controlled substance was exempt has the burden of proof that an exemption was applicable. State v. Taylor, 221 Neb. 114, 375 N.W.2d 610 (1985).

28-433 Appeal; procedure.

All final determinations, findings, and conclusions of the department under the Uniform Controlled Substances Act shall be final and conclusive decisions of the matters involved, except that any person aggrieved by such decision may appeal the decision, and the appeal shall be in accordance with the Administrative Procedure Act.

Source: Laws 1977, LB 38, § 93; Laws 1988, LB 352, § 27; Laws 2001, LB 113, § 15.

Cross References

Administrative Procedure Act, see section 84-920.

28-434 Education and research.

(1) The department and the Division of Drug Control shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with such programs they may: (a) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations; (b) assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances; (c) consult with interested groups and organizations to aid them in solving administrative and organizational problems; (d) evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances; (e) disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them; and (f) assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(2) The department may encourage research on misuse and abuse of controlled substances. In connection with such research and in furtherance of the enforcement of the Uniform Controlled Substances Act, it may: (a) Establish methods to assess accurately the effects of controlled substances and to identify and characterize controlled substances with potential for abuse; (b) make studies and undertake programs of research to (i) develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of the act, (ii) determine patterns of misuse and abuse of controlled substances and the social effects thereof, and (iii) improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and (c) enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(3) The department may enter into contracts for educational and research activities without performance bonds.

(4) The department shall cooperate with the Division of Drug Control providing technical advice and information, including all evidence of violations of the act disclosed by drug accountability inspections. The criminalistics laboratory of the Nebraska State Patrol shall provide laboratory analysis for the Division of Drug Control and other peace officers of this state when requested for the effective administration and enforcement of the act.

(5) The department may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of persons who are subjects of such research. Persons who obtain such authorization may not be compelled in any state, civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

(6) The department may authorize the possession and distribution of controlled substances by persons engaged in research. Persons who obtain this authorization shall be exempt from state prosecution for possession and distribution of controlled substances to the extent authorized by the department.

Source: Laws 1977, LB 38, § 94; Laws 1984, LB 403, § 2; Laws 1997, LB 307, § 12.

28-435 Licensee; reporting and investigation duties.

Every licensee subject to the Uniform Controlled Substances Act shall be subject to and comply with sections 38-1,124 to 38-1,126 relating to reporting and investigations.

Source: Laws 2007, LB463, § 1123.

28-435.01 Health care facility; peer review organization or professional association; report required; contents; confidentiality; immunity; failure to report; civil penalty; disposition.

(1) A health care facility licensed under the Health Care Facility Licensure Act or a peer review organization or professional association relating to a profession regulated under the Uniform Controlled Substances Act shall report to the department, on a form and in the manner specified by the department, any facts known to the facility, organization, or association, including, but not limited to, the identity of the credential holder and consumer, when the facility, organization, or association:

(a) Has made payment due to adverse judgment, settlement, or award of a professional liability claim against it or a licensee, including settlements made prior to suit, arising out of the acts or omissions of the licensee; or

(b) Takes action adversely affecting the privileges or membership of a licensee in such facility, organization, or association due to alleged incompetence, professional negligence, unprofessional conduct, or physical, mental, or chemical impairment.

The report shall be made within thirty days after the date of the action or event.

(2) A report made to the department under this section shall be confidential. The facility, organization, association, or person making such report shall be completely immune from criminal or civil liability of any nature, whether direct

or derivative, for filing a report or for disclosure of documents, records, or other information to the department under this section. Nothing in this subsection shall be construed to require production of records protected by section 25-12,123, 71-2048, or 71-7903 or patient safety work product under the Patient Safety Improvement Act except as otherwise provided in any of such sections or such act.

(3) Any health care facility, peer review organization, or professional association that fails or neglects to make a report or provide information as required under this section is subject to a civil penalty of five hundred dollars for the first offense and a civil penalty of up to one thousand dollars for a subsequent offense. Any civil penalty collected under this subsection shall be remitted to the State Treasurer to be disposed of in accordance with Article VII, section 5, of the Constitution of Nebraska.

(4) For purposes of this section, the department shall accept reports made to it under the Nebraska Hospital-Medical Liability Act or in accordance with national practitioner data bank requirements of the federal Health Care Quality Improvement Act of 1986, as the act existed on January 1, 2007, and may require a supplemental report to the extent such reports do not contain the information required by the department.

Source: Laws 2007, LB463, § 1124.

Cross References

Health Care Facility Licensure Act, see section 71-401.
Nebraska Hospital-Medical Liability Act, see section 44-2855.
Patient Safety Improvement Act, see section 71-8701.

28-435.02 Insurer; duty to report violations.

(1) Unless such knowledge or information is based on confidential medical records protected by the confidentiality provisions of the federal Public Health Services Act, 42 U.S.C. 290dd-2, and federal administrative rules and regulations, as such act and rules and regulations existed on January 1, 2007:

(a) Any insurer having knowledge of any violation of any provision of the Uniform Controlled Substances Act governing the profession of the person being reported whether or not such person is licensed shall report the facts of such violation as known to such insurer to the department; and

(b) All insurers shall cooperate with the department and provide such information as requested by the department concerning any possible violations by any person required to be licensed whether or not such person is licensed.

(2) Such reporting shall be done on a form and in the manner specified pursuant to sections 38-1,130 and 38-1,131. Such reports shall be subject to sections 38-1,132 to 38-1,136.

Source: Laws 2007, LB463, § 1125.

28-435.03 Clerk of county or district court; report convictions and judgments; Attorney General or city or county prosecutor; provide information.

The clerk of any county or district court in this state shall report to the department the conviction of any person licensed by the department under the Uniform Controlled Substances Act of any felony or of any misdemeanor involving the use, sale, distribution, administration, or dispensing of a controlled substance, alcohol or chemical impairment, or substance abuse and

shall also report a judgment against any such licensee arising out of a claim of professional liability. The Attorney General or city or county prosecutor prosecuting any such criminal action and plaintiff in any such civil action shall provide the court with information concerning the license of the defendant or party. Notice to the department shall be filed within thirty days after the date of conviction or judgment in a manner agreed to by the Director of Public Health of the Division of Public Health and the State Court Administrator.

Source: Laws 2007, LB463, § 1126.

28-436 Repealed. Laws 1993, LB 627, § 26.

28-437 Uniformity of interpretation.

The Uniform Controlled Substances Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of the act among those states which enact it.

Source: Laws 1977, LB 38, § 97; Laws 2001, LB 113, § 16.

28-438 Transferred to section 28-401.01.

28-439 Drug paraphernalia, defined; enumerated.

As used in sections 28-101, 28-431, and 28-439 to 28-444, unless the context otherwise requires, drug paraphernalia shall mean all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in manufacturing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of sections 28-101, 28-431, and 28-439 to 28-444 or the Uniform Controlled Substances Act. It shall include, but not be limited to, the following:

(1) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting controlled substances;

(2) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

(3) Hypodermic syringes, needles, and other objects used, intended for use, and designed for use in parenterally injecting controlled substances into the human body; and

(4) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, which shall include but not be limited to the following:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, which has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs; and

(m) Ice pipes or chillers.

Source: Laws 1980, LB 991, § 1.

Neither fourth amendment rights nor privacy rights are implicated in ''drug paraphernalia'' statutes, and thus, strict scrutiny standard of review is inapplicable to constitutional challenge. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

Use of term ''designed'' does not refer to physical attributes of object but to intent of person charged with violation, and thus does not render statute unconstitutionally vague. List of items exemplary of drug paraphernalia is not vague and overbroad on ground that it includes numerous innocent items, where no item is drug paraphernalia absent requisite intent to use it with controlled substances. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

28-440 Drug paraphernalia; determination; factors considered.

In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this act;

(4) The proximity of the object to any controlled substance;

(5) The existence of any residue of a controlled substance on the object;

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to any person whom he or she knows, or should reasonably know, intends to use the object to facilitate a violation of sections 28-101, 28-431, and 28-439 to 28-444. The innocence of an owner, or of anyone in control of the object, as to a direct violation of sections 28-101, 28-431, and 28-439 to 28-444 shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;

(7) Instructions, oral or written, provided with the object concerning its use;

(8) Descriptive materials accompanying the object which explain or depict its use;

(9) National and local advertising concerning its use;

(10) The manner in which the object is displayed for sale;

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(12) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;

(13) The existence and scope of any legitimate use for the object in the community; and

(14) Expert testimony concerning its use.

Source: Laws 1980, LB 991, § 2.

The factors listed in this section are used to determine if the objects are actually drug paraphernalia, not whether officer had probable cause to believe they were drug paraphernalia. The list in this section is illustrative, not exclusive. State v. Sassen, 240 Neb. 773, 484 N.W.2d 469 (1992).

List of items exemplary of drug paraphernalia is not unconstitutional on ground that several factors would permit conviction based on transferred intent and guilt by association where, although actions of third parties are relevant in determining paraphernalia, evidence regarding third-party actions is but one step in prosecutorial scheme, and if third-party actions tend to indicate the item is drug paraphernalia, focus of inquiry must necessarily shift to intent of individual involved. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

Reference to ''other authority'' is not unconstitutionally vague since ''other authority'' certainly refers to law enforcement personnel, and fact that statute attempts to guide such personnel in their enforcement duties lessens, rather than increases, danger of arbitrary enforcement. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

28-441 Drug paraphernalia; use or possession; unlawful; penalty.

(1) It shall be unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of sections 28-101, 28-431, and 28-439 to 28-444.

(2) Any person who violates this section shall be guilty of an infraction.

Source: Laws 1980, LB 991, § 3.

Evidence that defendant invited police to her motel room and let them in, wherein police found two syringes, cigarette papers, and a small plastic spoon in close proximity to cocaine and marijuana, was sufficient to sustain convictions for possession of drug paraphernalia. State v. Garza, 239 Neb. 98, 474 N.W.2d 246 (1991).

Possession of drug paraphernalia is an infraction. State v. Petersen, 12 Neb. App. 445, 676 N.W.2d 65 (2004).

Where statute includes requirement of intent in definition of drug paraphernalia and enumerates factors which officer has to consider in determining whether object is drug paraphernalia, statute does not alter requirement that searches and seizures be based on probable cause and is thus not violative of fourth amendment. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

28-442 Drug paraphernalia; deliver or manufacture; unlawful; exception; penalty.

(1) It shall be unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances in which one reasonably should know, that it will be used to manufacture, inject, ingest, or inhale or otherwise be used to introduce into the human body a controlled substance in violation of sections 28-101, 28-431, and 28-439 to 28-444.

(2) This section shall not apply to pharmacists who sell hypodermic syringes or needles for the prevention of the spread of infectious diseases.

(3) Any person who violates this section shall be guilty of a Class II misdemeanor.

Source: Laws 1980, LB 991, § 4; Laws 2001, LB 398, § 18.

Sections of drug paraphernalia statute making it unlawful to deliver, possess with intent to deliver, manufacture with intent to deliver, or advertise drug paraphernalia in circumstances where one knows or ''reasonably should know'' that items will be used with drugs or that purpose of advertisement is to promote sale of drug paraphernalia are not unconstitutional on ground that they would permit conviction under impermissibly vague negligence standard and would leave innocent sellers in untenable posture of trying to divine intentions of their buyers where, under sections, seller has to already have intended that item be sold for drug use before his knowledge of its use by a buyer came into play. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

Where statute includes requirement of intent in definition of drug paraphernalia and enumerates factors which officer has to consider in determining whether object is drug paraphernalia, statute does not alter requirement that searches and seizures be based on probable cause and is thus not violative of fourth amendment. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

28-443 Delivery of drug paraphernalia to a minor; penalty.

Any person eighteen years of age or older who violates section 28-442 by delivering drug paraphernalia to a person under eighteen years of age who is at least three years his or her junior shall be guilty of a Class I misdemeanor.

Source: Laws 1980, LB 991, § 5.

28-444 Advertisement of drug paraphernalia; unlawful; penalty.

(1) It shall be unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

(2) Any person who violates this section shall be guilty of a Class III misdemeanor.

Source: Laws 1980, LB 991, § 6.

Sections of drug paraphernalia statute making it unlawful to deliver, possess with intent to deliver, manufacture with intent to deliver, or advertise drug paraphernalia in circumstances where one knows or ''reasonably should know'' that items will be used with drugs or that purpose of advertisement is to promote sale of drug paraphernalia are not unconstitutional on ground that they would permit conviction under impermissibly vague negligence standard and would leave innocent sellers in untenable posture of trying to divine intentions of their buyers where, under sections, seller has to already have intended that item be sold for drug use before his knowledge of its use by a buyer came into play. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

The prohibition of advertising that promotes, in whole or in part, sale of objects designed or intended for use as drug paraphernalia regulates commercial speech in its narrowest sense, i.e., speech which proposes a commercial transaction and which is entitled to lesser protection than other constitutionally guaranteed expression where statute facially does not reach speech which merely glorifies drug culture without direct invitation to purchase specific items. Advertising promoting sale of drug paraphernalia encourages activities which are otherwise crimes under Nebraska law and is thus analogous to advertisements promoting sale of narcotics or soliciting prostitution and can constitutionally be prohibited. Although this statute prohibits advertisements that ''only in part'' have purpose of promoting sale of drug paraphernalia, court of appeals is obliged to presume legislative intent to act within constitutional bounds, and thus, under statute, where drug paraphernalia is advertised along with innocent items, statute forbids only that part of the advertisement relating to drug paraphernalia and remainder of advertisement is not condemned. Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981).

28-445 Imitation controlled substance; prohibited acts; determination; penalties; seizure.

(1) Any person who knowingly and intentionally manufactures, distributes, delivers, or possesses with intent to distribute or deliver an imitation controlled substance shall:

(a) For the first offense, be guilty of a Class III misdemeanor; and

(b) For the second and all subsequent offenses, be guilty of a Class II misdemeanor.

(2) In determining whether a substance is an imitation controlled substance the court or other authority concerned shall consider all relevant factors, including but not limited to the following:

(a) Whether the substance is represented as having an effect similar to or the same as an illicit controlled substance;

(b) Whether the substance is represented by way of terminology which is deceptively similar to or the same as that describing a particular controlled substance;

(c) Whether the dosage unit price substantially exceeds the reasonable price of a similar dosage unit of like chemical composition sold over the counter with packaging and labeling approved by the federal Food and Drug Administration;

(d) Whether the substance is packaged in a manner and quantity similar to or the same as that commonly used for illicit controlled substances;

(e) Whether the dosage unit appearance of the substance is deceptively similar to that of a particular controlled substance; and

(f) Whether the substance is distributed to persons who represent it as a controlled substance, under circumstances which indicate the distributor knows, intends, or should know that his or her distributee is making or will make such representations.

(3) Any substance possessed, distributed, or delivered in violation of this section shall be subject to seizure and forfeiture as provided in section 28-431.

Source: Laws 1985, LB 406, § 5.

28-446 Repealed. Laws 1992, LB 1019, § 130.

28-447 Repealed. Laws 1992, LB 1019, § 130.

28-448 Ephedrine; label; requirements.

Food or dietary supplements containing ephedrine as described in subdivision (g)(3) of Schedule IV of section 28-405 shall be packaged with a prominent label securely affixed to each package that legibly states:

(1) The total amount in milligrams of ephedrine or ephedrine group alkaloids in a serving or dosage unit and a dose limitation of not more than twenty-five milligrams of ephedrine or ephedrine alkaloids;

(2) The amount of the food or dietary supplement that constitutes a serving or dosage unit;

(3) That the maximum recommended twenty-four-hour serving or dosage for an adult human is one hundred milligrams;

(4) That consumption of more than the recommended serving or dosage for the food or dietary supplement, or that consumption of a serving or dosage at a more frequent interval than recommended, may increase the risk of adverse effects; and

(5) The following warning:

WARNING: Not intended for use by anyone under the age of 18. Do not use this product if you are pregnant or nursing. Consult a health care professional before using this product if you have heart disease, thyroid disease, diabetes, high blood pressure, depression or other psychiatric condition, glaucoma, difficulty in urinating, prostate enlargement, or seizure disorder, if you are using a monoamine oxidase inhibitor (MAOI) or any other prescription drug, or if you are using an over-the-counter drug containing ephedrine, pseudoephedrine, or phenylpropanolamine (ingredients found in certain allergy, asthma, cough/cold, and weight control products). Discontinue use and call a health care professional immediately if you experience rapid heartbeat, dizziness, severe headache, shortness of breath, or other similar symptoms.

Source: Laws 2001, LB 113, § 1.

28-449 Crystalline iodine; sale; requirements.

Any person who sells crystalline iodine to another person shall require photo identification of the purchaser and shall maintain a written record for a period of five years after the sale, including the date of the sale, the name, address, and date of birth of the purchaser, and the quantity purchased.

Source: Laws 2001, LB 113, § 2.

28-450 Ephedrine, pseudoephedrine, or phenylpropanolamine; immediate precursor; prohibited acts; violation; penalty.

No person shall sell, distribute, or otherwise transfer any drug product containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, if the person knows that the transferee will

use the drug product as an immediate precursor to any controlled substance. No person shall unlawfully sell, distribute, or otherwise transfer such a product with reckless disregard as to how the drug product will be used. Any person who violates this section is guilty of a Class III misdemeanor.

Source: Laws 2001, LB 113, § 3; Laws 2005, LB 117, § 4.

28-451 Anhydrous ammonia; possession; penalty.

No person shall possess anhydrous ammonia with the intent to manufacture methamphetamine. Any person who violates this section is guilty of a Class IV felony.

Source: Laws 2001, LB 113, § 4.

28-452 Ephedrine, pseudoephedrine, or phenylpropanolamine; possession; penalty.

No person shall possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to manufacture methamphetamine. Any person who violates this section is guilty of a Class IV felony.

Source: Laws 2001, LB 113, § 5.

28-453 Methamphetamine; retailer education program.

The Nebraska State Patrol may develop and maintain a program to inform retailers about illicit methamphetamine production, distribution, and use in Nebraska and devise procedures and forms for retailers to use in reporting to the patrol suspicious purchases, thefts, or other transactions involving any products under the retailers' control which contain ephedrine, pseudoephedrine, phenylpropanolamine, or ephedra. Reporting under this section shall be voluntary. Retailers reporting information to the patrol in good faith shall be immune from civil liability.

Source: Laws 2001, LB 113, § 6.

28-454 Ephedrine; manufacturer or wholesale distributor; duties; fee; enforcement; Ephedra Registration Fund; created; use; investment.

(1) Any manufacturer or wholesale distributor, as indicated on the product label in conformance with the Federal Food, Drug, and Cosmetic Act, as the act existed on September 1, 2001, who sells food products or dietary supplements containing ephedrine as described in subdivision (g)(3) of Schedule IV of section 28-405 for resale in this state shall register with the department for each product line containing ephedrine sold for resale in this state. The department shall register the manufacturer or wholesale distributor upon application and payment of a one-thousand-dollar application fee. The registration shall expire twelve months after issuance and shall be renewed for a twelve-month period upon payment of a one-thousand-dollar renewal fee. The registration shall be subject to revocation for violations of the Uniform Controlled Substances Act. The requirements to register and to pay a fee shall terminate upon the federal Food and Drug Administration's publication in the Federal Register of a final rule establishing good manufacturing practices for dietary supplements or five years after September 1, 2001, whichever date occurs first.

(2) Any manufacturer or wholesale distributor, as indicated on the product label in conformance with the Federal Food, Drug, and Cosmetic Act, as the act existed on September 1, 2001, who sells food products or dietary supplements described in subsection (1) of this section for resale in this state without being registered shall be subject to a civil penalty of five thousand dollars and any such food products and dietary supplements shall be seized and destroyed upon the finding of a violation of this section. The department, in conjunction with the Attorney General, the Nebraska State Patrol, and local law enforcement agencies, shall have authority to make inspections and investigations to enforce the registration requirements of this section. In addition, the department may seek injunctive relief for suspected violations of this section.

(3) The department shall remit fees collected under this section to the State Treasurer for credit to the Ephedra Registration Fund. The fund is created. The department shall use the fund to administer the provisions of this section. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source: Laws 2001, LB 113, § 7.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

28-455 Methamphetamine Awareness and Education Fund; created; use; investment.

The Methamphetamine Awareness and Education Fund is created. The Nebraska Commission on Law Enforcement and Criminal Justice shall use the fund to support projects relating to educating retailers and the public on the dangers of methamphetamine. The commission may accept contributions, gifts, grants, and bequests for such purposes and remit them to the State Treasurer for credit to the fund. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source: Laws 2001, LB 113, § 8.

Cross References

Nebraska Capital Expansion Act, see section 72-1269.
Nebraska State Funds Investment Act, see section 72-1260.

28-456 Phenylpropanolamine or pseudoephedrine; sold without a prescription; requirements; enforcement.

(1) Any drug products containing phenylpropanolamine, pseudoephedrine, or their salts, optical isomers, or salts of such optical isomers may be sold without a prescription only if they are:

(a) Labeled and marketed in a manner consistent with the pertinent OTC Tentative Final or Final Monograph;

(b) Manufactured and distributed for legitimate medicinal use in a manner that reduces or eliminates the likelihood of abuse;

(c) Packaged as follows:

(i) Except for liquids, sold in package sizes of not more than three and six-tenths grams of pseudoephedrine base or three and six-tenths grams of phenyl-

propanolamine base, in blister packs, each blister containing not more than two dosage units, or if the use of blister packs is technically infeasible, in unit dose packets or pouches; and

(ii) For liquids, sold in package sizes of not more than three and six-tenths grams of pseudoephedrine base or three and six-tenths grams of phenylpropanolamine base;

(d) Sold by a person, eighteen years of age or older, in the course of his or her employment to a customer, eighteen years of age or older, with the following restrictions:

(i) No customer shall be allowed to purchase, receive, or otherwise acquire more than three and six-tenths grams of pseudoephedrine base or three and six-tenths grams of phenylpropanolamine base during a twenty-four-hour period;

(ii) No customer shall purchase, receive, or otherwise acquire more than nine grams of pseudoephedrine base or nine grams of phenylpropanolamine base during a thirty-day period; and

(iii) The customer shall display a valid driver's or operator's license, a Nebraska state identification card, a military identification card, an alien registration card, or a passport as proof of identification; and

(e) Stored behind a counter, in an area not accessible to customers, or in a locked case so that a customer needs assistance from an employee to access the drug product, except that this requirement does not apply to liquid pediatric formulations. For the purposes of this subdivision, liquid pediatric formulation means a liquid formulation with pseudoephedrine doses of fifteen milligrams or less that is manufactured and marketed for children twelve years of age or younger. If it is documented by a law enforcement agency to the Nebraska State Patrol that a liquid pediatric formulation has been found at a methamphetamine manufacturing site, the patrol shall present the documentation to the chief medical officer, as described in section 81-3115, who shall issue an order removing the exemption.

(2) Any person who sells drug products in violation of this section may be subject to a civil penalty of fifty dollars per day, and for a second or any subsequent violation, the penalty may be one hundred dollars per day. Any such drug products shall be seized and destroyed upon the finding of a violation of this section. The department, in conjunction with the Attorney General, the Nebraska State Patrol, and local law enforcement agencies, shall have authority to make inspections and investigations to enforce this section. In addition, the department may seek injunctive relief for suspected violations of this section.

Source: Laws 2001, LB 113, § 9; Laws 2005, LB 117, § 5; Laws 2007, LB218, § 1; Laws 2007, LB296, § 36.

28-456.01 Pseudoephedrine or phenylpropanolamine; limitation on acquisition; violation; penalty.

No person shall purchase, receive, or otherwise acquire, other than wholesale acquisition by a retail business in the normal course of its trade or business, any drug product containing more than one thousand four hundred forty milligrams of pseudoephedrine base or one thousand four hundred forty milligrams of phenylpropanolamine base during a twenty-four-hour period unless

purchased pursuant to a medical order. Any person who violates this section shall be guilty of an infraction as defined in section 29-431.

Source: Laws 2005, LB 117, § 6.

28-457 Methamphetamine; prohibited acts; violation; penalties.

(1) For purposes of this section:

(a) Bodily injury has the same meaning as in section 28-109;

(b) Chemical substance means a substance intended to be used as an immediate precursor or reagent in the manufacture of methamphetamine or any other chemical intended to be used in the manufacture of methamphetamine. Intent for purposes of this subdivision may be demonstrated by the substance's use, quantity, manner of storage, or proximity to other precursors or manufacturing equipment;

(c) Child means a person under the age of nineteen years;

(d) Methamphetamine means methamphetamine, its salts, optical isomers, and salts of its isomers;

(e) Paraphernalia means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in manufacturing, injecting, ingesting, inhaling, or otherwise introducing methamphetamine into the human body;

(f) Prescription has the same meaning as in section 28-401;

(g) Serious bodily injury has the same meaning as in section 28-109; and

(h) Vulnerable adult has the same meaning as in section 28-371.

(2) Any person who knowingly or intentionally causes or permits a child or vulnerable adult to inhale or have contact with methamphetamine, a chemical substance, or paraphernalia is guilty of a Class I misdemeanor. For any second or subsequent conviction under this subsection, any person so offending is guilty of a Class IV felony.

(3) Any person who knowingly or intentionally causes or permits a child or vulnerable adult to ingest methamphetamine, a chemical substance, or paraphernalia is guilty of a Class I misdemeanor. For any second or subsequent conviction under this subsection, any person so offending shall be guilty of a Class IIIA felony.

(4) Any child or vulnerable adult who resides with a person violating subsection (2) or (3) of this section shall be taken into protective custody as provided in the Adult Protective Services Act or the Nebraska Juvenile Code.

(5) Any person who violates subsection (2) or (3) of this section and a child or vulnerable adult actually suffers serious bodily injury by ingestion of, inhalation of, or contact with methamphetamine, a chemical substance, or paraphernalia is guilty of a Class IIIA felony unless the ingestion, inhalation, or contact results in the death of the child or vulnerable adult, in which case the person is guilty of a Class IB felony.

(6) It is an affirmative defense to a violation of this section that the chemical substance was provided by lawful prescription for the child or vulnerable adult and that it was administered to the child or vulnerable adult in accordance with the prescription instructions provided with the chemical substance.

Source: Laws 2003, LB 43, § 9.

Cross References

Adult Protective Services Act, see section 28-348.
Nebraska Juvenile Code, see section 43-2,129.

ARTICLE 5
OFFENSES AGAINST PROPERTY

Section

28-501 Building, defined.

As used in this article, unless the context otherwise requires, building shall mean a structure which has the capacity to contain, and is designed for the shelter of man, animals, or property, and includes ships, trailers, sleeping cars, aircraft, or other vehicles or places adapted for overnight accommodations of persons or animals, or for carrying on of business therein, whether or not a person or animal is actually present. If a building is divided into units for separate occupancy, any unit not occupied by the defendant is a building of another.

Source: Laws 1977, LB 38, § 100.

28-502 Arson, first degree; penalty.

(1) A person commits arson in the first degree if he or she intentionally damages a building by starting a fire or causing an explosion when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable probability.

(2) A person commits arson in the first degree if a fire is started or an explosion is caused in the perpetration of any robbery, burglary, or felony criminal mischief when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable probability.

(3) Arson in the first degree is a Class II felony.

Source: Laws 1977, LB 38, § 101; Laws 1981, LB 83, § 1.

The crime of arson in the first degree requires that some damage occur to a building as a result of a fire ignited when someone is present in the building. Ignition of the building is not required. State v. Hohnstein, 213 Neb. 296, 328 N.W.2d 777 (1983).

28-503 Arson, second degree; penalty.

(1) A person commits arson in the second degree if he or she intentionally damages a building by starting a fire or causing an explosion or if a fire is started or an explosion is caused in the perpetration of any robbery, burglary, or felony criminal mischief.

(2) The following affirmative defenses may be introduced into evidence upon prosecution for a violation of this section:

(a) No person other than the accused has a security or proprietary interest in the damaged building, or, if other persons have such interests, all of them consented to his or her conduct; or

(b) The accused's sole intent was to destroy or damage the building for a lawful and proper purpose.

(3) Arson in the second degree is a Class III felony.

Source: Laws 1977, LB 38, § 102; Laws 1981, LB 83, § 2.

To sustain a conviction for arson, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible beyond a reasonable doubt. State v. Workman, 213 Neb. 479, 329 N.W.2d 571 (1983).

28-504 Arson, third degree; penalty.

(1) A person commits arson in the third degree if he intentionally sets fire to, burns, causes to be burned, or by the use of any explosive, damages or destroys, or causes to be damaged or destroyed, any property of another without his consent, other than a building or occupied structure.

(2) Arson in the third degree is a Class IV felony if the damages amount to one hundred dollars or more.

(3) Arson in the third degree is a Class I misdemeanor if the damages are less than one hundred dollars.

Source: Laws 1977, LB 38, § 103.

Under this section, the amount of damages involved in the crime of third degree arson affects the severity of the punishment. Although the amount of damages is not an element of arson, the State must prove by evidence beyond a reasonable doubt the amount of damages to the property that was damaged by arson in order to prove that the arson was a Class IV felony. State v. Arellano, 262 Neb. 866, 636 N.W.2d 616 (2001).

28-505 Burning to defraud insurer; penalty.

Any person who, with the intent to deceive or harm an insurer, sets fire to or burns or attempts so to do, or who causes to be burned, or who aids, counsels or procures the burning of any building or personal property, of whatsoever class or character, whether the property of himself or of another, which shall at the time be insured by any person, company or corporation against loss or damage by fire, commits a Class IV felony.

Source: Laws 1977, LB 38, § 104.

28-506 Lawful burning of property; training and safety promotion purposes; permit.

Property may be lawfully destroyed by burning such structures as condemned by law, structures no longer having any value for habitation or business or no longer serving any useful value in the area in which situated, and any other combustible material that will serve to be used for test fires to educate and train members of organized fire departments and promote fire safety anywhere in Nebraska. Before any structure may be destroyed by fire for training and educational purposes it must be reported to the State Fire Marshal and a permit issued for that purpose. Any expense incurred in burning a structure shall be assumed by the organized fire department requesting this type of training for members of its department.

Source: Laws 1977, LB 38, § 105.

28-507 Burglary; penalty.

(1) A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.

(2) Burglary is a Class III felony.

Source: Laws 1977, LB 38, § 106.

1. Breaking
2. Elements
3. Evidence
4. Intent
5. Lesser-included offense

1. Breaking

It was not plain error for the trial court to not specifically instruct the jury that removal of an obstacle to entry was required to constitute breaking when trial court gave examples of the application of physical force which required the removal of an obstacle. State v. Greer, 257 Neb. 208, 596 N.W.2d 296 (1999).

The opening of a closed door is a ''breaking'' within the definition of burglary. State v. Tyrrell, 234 Neb. 901, 453 N.W.2d 104 (1990).

Evidence of any act of physical force by which the obstruction to entering is removed, such as opening a closed screen door to enter an apartment, is sufficient to prove a breaking under subsection (1) of this section. State v. Zemunski, 230 Neb. 613, 433 N.W.2d 170 (1988).

Evidence of any act of physical force by which the obstruction to entering is removed, such as opening a closed screen door to enter an apartment, is sufficient to prove a breaking under this statute. State v. Sutton, 220 Neb. 128, 368 N.W.2d 492 (1985).

Breaking requires both the use of physical force, however slight, and the removal of an obstruction to entering. State v. Greer, 7 Neb. App. 770, 586 N.W.2d 654 (1998).

2. Elements

One commits burglary in violation of subsection (1) of this section when one, in the proscribed manner, breaks and enters any real property or improvements thereon with the proscribed intent; no actual theft or asportation of property is required. State v. Sardeson, 231 Neb. 586, 437 N.W.2d 473 (1989).

3. Evidence

Circumstantial evidence is sufficient to support a criminal conviction if such evidence and reasonable inferences drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. State v. Zemunski, 230 Neb. 954, 434 N.W.2d 520 (1989).

4. Intent

Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, and no actual theft or asportation of property is required. State v. Vaughn, 225 Neb. 38, 402 N.W.2d 300 (1987).

5. Lesser-included offense

Criminal trespass in violation of section 28-520(1) is not a lesser-included offense of burglary as defined in subsection (1) of this section. State v. Gonzales, 218 Neb. 43, 352 N.W.2d 571 (1984).

Criminal trespass is not a lesser-included offense of burglary. State v. Miller, 215 Neb. 145, 337 N.W.2d 424 (1983).

28-508 Possession of burglar's tools; penalty.

(1) A person commits the offense of possession of burglar's tools if:

(a) He knowingly possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking; and

(b) He intends to use the explosive, tool, instrument, or article, or knows some person intends ultimately to use it, in the commission of an offense of the nature described in subdivision (1)(a) of this section.

(2) Possession of burglar's tools is a Class IV felony.

Source: Laws 1977, LB 38, § 107.

28-509 Terms, defined.

As used in sections 28-509 to 28-518, unless the context otherwise requires:

(1) Deprive shall mean:

(a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or

(b) To dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was when the actor obtained it;

(2) Financial institution shall mean a bank, insurance company, credit union, building and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment;

(3) Movable property shall mean property the location of which can be changed, including things growing on, affixed to, or found in land, and documents although the rights represented thereby may have no physical location. Immovable property shall mean all other property;

(4) Obtain shall mean:

(a) In relation to property, to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another; or

(b) In relation to labor or service, to secure performance thereof;

(5) Property shall mean anything of value, including real estate, tangible and intangible personal property, contract rights, credit cards, charge plates, or any other instrument which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer, choses in action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, and electric or other power;

(6) Property of another shall mean property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement;

(7) Receiving shall mean acquiring possession, control, or title, or lending on the security of the property; and

(8) Stolen shall mean property which has been the subject of theft or robbery or a vehicle which is received from a person who is then in violation of section 28-517.

Source: Laws 1977, LB 38, § 108; Laws 1982, LB 126, § 1.

28-510 Consolidation of theft offenses.

Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under sections 28-509 to 28-518, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to insure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

Source: Laws 1977, LB 38, § 110; Laws 1982, LB 126, § 2.

A defendant is foreclosed from defending on the basis that his conduct supported one type of theft but that he was charged with another. State v. Jonusas, 269 Neb. 644, 694 N.W.2d 651 (2005).

A defendant was not denied his right to due process when he was charged with theft by deception and tried for theft by unlawful taking or disposition. State v. Jonusas, 269 Neb. 644, 694 N.W.2d 651 (2005).

This section creates a single offense of ''theft'' which may be committed by the violation of sections 28-509 to 28-517. State v. Jonusas, 269 Neb. 644, 694 N.W.2d 651 (2005).

This section gives adequate notice to a defendant that he may be charged with one manner of theft and convicted of theft by a different manner. State v. Jonusas, 269 Neb. 644, 694 N.W.2d 651 (2005).

This section has subsumed various forms of unlawful acquisitive behavior into a single offense of theft which may be committed by taking part in any one of several activities described in sections 28-509 to 28-517. State v. Jonusas, 269 Neb. 644, 694 N.W.2d 651 (2005).

This section provides that the offense of theft may be supported by evidence that it was committed via any manner described in sections 28-509 to 28-517, regardless of the manner by which the information alleges the theft occurred. State v. Jonusas, 269 Neb. 644, 694 N.W.2d 651 (2005).

The first sentence of this section does not purport to define but a single crime for which only one punishment may be imposed, as evidenced by the sundry statutes defining a variety of conduct as constituting thefts subjecting one to different consequences. State v. Schwab, 235 Neb. 972, 458 N.W.2d 459 (1990).

28-511 Theft by unlawful taking or disposition.

(1) A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.

(2) A person is guilty of theft if he or she transfers immovable property of another or any interest therein with the intent to benefit himself or herself or another not entitled thereto.

(3) Except as provided in subsection (4) of this section, it shall be presumed that a lessee's failure to return leased or rented movable property to the lessor after the expiration of a written lease or written rental agreement is done with intent to deprive if such lessee has been mailed notice by certified mail that such lease or rental agreement has expired and he or she has failed within ten days after such notice to return such property.

(4) A person is guilty of theft if he or she (a) rents or leases a motor vehicle under a written lease or rental agreement specifying the time and place for the return of the vehicle and fails to return the vehicle within seventy-two hours of written demand for return of the vehicle made upon him or her by certified mail to the address given by him or her for such purpose or (b) uses a fraudulent or stolen credit card to rent or lease a vehicle. Nothing in this subsection shall apply to any person who (i) through inadvertence, mistake, act of God, or other natural occurrence has unintentionally failed to return a rented motor vehicle or to inform the owner of the location of the vehicle or (ii) has had a rented motor vehicle stolen or otherwise converted from his or her possession and has filed the appropriate report with law enforcement authorities.

Source: Laws 1977, LB 38, § 110; Laws 1980, LB 696, § 4; Laws 1988, LB 606, § 1.

Sufficient evidence was presented to support a conviction of theft by unlawful taking or disposition where the defendant, who was contractually obligated to place money in escrow, did not place the money in escrow and subsequently lost the money through an investment. State v. Jonusas, 269 Neb. 644, 694 N.W.2d 651 (2005).

Subsection (1) of this section proscribes or condemns only that conduct in which criminal intent is present, distinguishing theft from activity which is otherwise permissible as noncriminal conduct. Consent is a valid defense to a charge of theft by taking. State v. Fahlk, 246 Neb. 834, 524 N.W.2d 39 (1994).

A series of separate acts, each of which is a theft proscribed by subsection (2) of this section, does not constitute one criminal act or a continuing offense of theft. State v. Schaaf, 234 Neb. 144, 449 N.W.2d 762 (1989).

Neither the value of the property stolen nor the time at which it was appropriated are essential elements of the crime of theft. State v. Schaaf, 234 Neb. 144, 449 N.W.2d 762 (1989).

Under subsection (2) of this section, the elements of theft by unlawful disposition are (1) a person's unauthorized transfer of another's immovable property (2) with the intent to benefit himself, herself, or another not entitled to the property or any interest in the property. State v. Schaaf, 234 Neb. 144, 449 N.W.2d 762 (1989).

The value of the property stolen is no longer an element of the crime and is important only in determining the penalty. State v. Culver, 233 Neb. 228, 444 N.W.2d 662 (1989).

When a person found guilty of a substantive crime as well as being a habitual criminal is improperly sentenced, both sentences must be set aside and the case remanded for proper sentencing. State v. Rolling, 209 Neb. 243, 307 N.W.2d 123 (1981).

28-511.01 Theft by shoplifting; penalty; photographic evidence.

(1) A person commits the crime of theft by shoplifting when he or she, with the intent of appropriating merchandise to his or her own use without paying for the same or to deprive the owner of possession of such property or its retail value, in whole or in part, does any of the following:

(a) Conceals or takes possession of the goods or merchandise of any store or retail establishment;

(b) Alters the price tag or other price marking on goods or merchandise of any store or retail establishment;

(c) Transfers the goods or merchandise of any store or retail establishment from one container to another;

(d) Interchanges the label or price tag from one item of merchandise with a label or price tag for another item of merchandise; or

(e) Causes the cash register or other sales recording device to reflect less than the retail price of the merchandise.

(2) In any prosecution for theft by shoplifting, photographs of the shoplifted property may be accepted as prima facie evidence as to the identity of the property. Such photograph shall be accompanied by a written statement containing the following:

(a) A description of the property;

(b) The name of the owner or owners of the property;

(c) The time, date, and location where the shoplifting occurred;

(d) The time and date the photograph was taken;

(e) The name of the photographer; and

(f) Verification by the arresting officer.

The purpose of this subsection is to allow the owner or owners of shoplifted property the use of such property during pending criminal prosecutions.

Prior to allowing the use of the shoplifted property as provided in this section, legal counsel for the alleged shoplifter shall have a reasonable opportunity to inspect and appraise the property and may file a motion for retention of the property, which motion shall be granted if there is any reasonable basis for believing that the photographs and accompanying affidavit may be misleading.

Source: Laws 1982, LB 126, § 4.

This section does not apply equally to lawful and unlawful conduct, and in that context is not unconstitutional. State v. Sexton, 240 Neb. 466, 482 N.W.2d 567 (1992).

Where a defendant was convicted by a jury of shoplifting merchandise valued at $787 and the only evidence of value was the price at which the merchandise was offered for sale, such evidence was insufficient to prove value. State v. Ybarra, 9 Neb. App. 230, 609 N.W.2d 696 (2000).

28-511.02 Theft of rented or leased motor vehicle; where tried.

In any criminal prosecution for theft pursuant to subsection (4) of section 28-511, the accused shall be tried in the county where the motor vehicle was rented or leased or where the motor vehicle was recovered except as otherwise provided in section 25-412.03.

Source: Laws 1995, LB 371, § 28.

28-512 Theft by deception.

A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:

(1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or

(2) Prevents another from acquiring information which would affect his judgment of a transaction; or

(3) Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

(4) Uses a credit card, charge plate, or any other instrument which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer (a) where such instrument has been stolen, forged, revoked, or canceled, or where for any other reason its use by the actor is unauthorized, or (b) where the actor does not have the intention and ability to meet all obligations to the issuer arising out of his use of the instrument.

The word deceive does not include falsity as to matters having no pecuniary significance, or statements unlikely to deceive ordinary persons in the group addressed.

Source: Laws 1977, LB 38, § 111.

Under subsection (1) of this section, the offense of theft by deception may take place over a period of time. State v. Grell, 233 Neb. 314, 444 N.W.2d 911 (1989).

It is the required element of guilty knowledge, criminal intent, which distinguishes a civil breach of contract from theft by deception—a person's knowingly creating a false impression in order to obtain another's property. State v. Ladehoff, 228 Neb. 812, 424 N.W.2d 361 (1988).

Subsection (2) of this section is constitutional. State v. Scott, 225 Neb. 146, 403 N.W.2d 351 (1987).

Another's property is obtained by deception if an actor, by a statement or conduct, creates or reinforces a false impression in that person with the result that such false impression, alone or with other influences, effectively induces another to part with his or her property. State v. Fleming, 223 Neb. 169, 388 N.W.2d 497 (1986).

Subsection (1) of this section is not unconstitutionally vague. State v. Sailors, 217 Neb. 693, 352 N.W.2d 860 (1984).

28-513 Theft by extortion.

(1) A person commits theft if he obtains property of another by threatening to:

(a) Inflict bodily injury on anyone or commit any other criminal offense; or

(b) Accuse anyone of a criminal offense; or

(c) Expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) Take or withhold action as an official, or cause an official to take or withhold action; or

(e) Bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(f) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

(2) It is an affirmative defense to prosecution based on subdivision (1)(b), (1)(c), or (1)(d) of this section that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.

Source: Laws 1977, LB 38, § 112.

28-514 Theft of property lost, mislaid, or delivered by mistake; penalty.

A person who comes into control of property of another that he or she knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient commits theft if, with intent to deprive the owner thereof, he or she fails to take reasonable measures to restore the property to a person entitled to have it. Any person violating the provisions of this section shall, upon conviction thereof, be punished by the penalty prescribed in the next lower classification below the value of the item lost, mislaid, or delivered under a mistake pursuant to section 28-518. Any person convicted pursuant to this section when the value of the property is two hundred dollars or less shall be guilty of a Class III misdemeanor for the first conviction, a Class II misdemeanor for the second conviction, and a Class I misdemeanor for the third or subsequent conviction.

Source: Laws 1977, LB 38, § 113; Laws 1989, LB 200, § 1; Laws 1992, LB 111, § 1.

This section prohibits a person from taking control of lost or mislaid property and doing nothing to restore the property to its owner. State v. Beyer, 260 Neb. 670, 619 N.W.2d 213 (2000).

28-515 Theft of services.

(1) A person commits theft if he or she obtains services, which he or she knows are available only for compensation, by deception or threat or by false token or other means to avoid payment for the service. Services include labor, professional service, telephone service, electric service, cable television service, or other public service, accommodation in hotels, restaurants, or elsewhere, admission to exhibitions, and use of vehicles or other movable property. When compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay.

(2) A person commits theft if, having control over the disposition of services of others to which he or she is not entitled, he or she diverts such services to his or her own benefit or to the benefit of another not entitled thereto.

Source: Laws 1977, LB 38, § 114; Laws 1982, LB 126, § 3; Laws 1986, LB 464, § 1; Laws 2002, LB 1105, § 429.

28-515.01 Theft of telecommunications service; penalty.

(1) It is unlawful for any person to:

(a) Knowingly make or possess any device designed to or commonly used to obtain telecommunications service fraudulently from a licensed cable television franchisee with the intent to use such device in the commission of an offense described in subsection (1) of section 28-515;

(b) Knowingly tamper with, interfere with, or connect to any cables, wires, converters, or other devices used for the distribution of telecommunications service by any mechanical, electrical, acoustical, or other means without authority from the operator of the service with the intent of obtaining telecommunications service fraudulently; or

(c) Sell, give, transfer, or offer or advertise for sale a device which such person knows or should know is intended to be used for the purpose of obtaining telecommunications service fraudulently.

(2) For purposes of this section:

(a) Telecommunications service includes, but is not limited to, telephone service and cable television service; and

(b) Device includes, but is not limited to, instrument, apparatus, equipment, and plans or instructions for making or assembling the instrument, apparatus, or equipment.

(3) A violation of this section is a Class II misdemeanor.

Source: Laws 2002, LB 1105, § 430.

28-515.02 Electric current, gas, and water; avoiding meter measurement; reconnection; penalty.

(1) It is unlawful for any person:

(a) To connect any instrument, device, or contrivance with any wire supplying or intended to supply electricity or electric current or to connect any pipe or conduit supplying gas or water, without the knowledge and consent of the supplier of such products, in such manner that any portion thereof may be supplied to any instrument by or at which electricity, electric current, gas, or water may be consumed without passing through the meter made or provided for measuring or registering the amount or quantity thereof passing through it;

(b) To knowingly use or knowingly permit the use of electricity, electric current, gas, or water obtained unlawfully pursuant to this section;

(c) To reconnect electrical, gas, or water service without the knowledge and consent of the supplier of such service if the service has been disconnected pursuant to sections 70-1601 to 70-1615; or

(d) To willfully injure, alter, or by any instrument, device, or contrivance in any manner interfere with or obstruct the action or operation of any meter made or provided for measuring or registering the amount or quantity of electricity, electric current, gas, or water passing through it, without the

knowledge and consent of the supplier of the electricity, electric current, gas, or water passing or intended to pass through such meter.

(2) Proof of the existence of any wire, pipe, or conduit connection or reconnection or of any injury, alteration, interference, or obstruction of a meter is prima facie evidence of the guilt of the person in possession of the premises where such connection, reconnection, injury, alteration, interference, or obstruction is proved to exist.

(3) A violation of this section is a Class III misdemeanor.

Source: Laws 1911, c. 47 §§ 1, 2, 4, 6, pp. 228, 229, 230, 231; R.S.1913, §§ 7423, 7424, 7426, 7427; C.S.1922, §§ 7116, 7117, 7119, 7120; Laws 1923, c. 86, § 1, p. 228; C.S.1929, §§ 86-320, 86-321, 86-323, 86-324; R.S.1943, § 86-329; Laws 1977, LB 39, § 327; Laws 1995, LB 92, § 1; R.S.1943, (1999), § 86-329; Laws 2002, LB 1105, § 431.

28-516 Unauthorized use of a propelled vehicle; affirmative defense; penalties.

(1) A person commits the offense of unauthorized use of a propelled vehicle if he or she intentionally exerts unauthorized control over another's propelled vehicle by operating it without the owner's consent.

(2) Propelled vehicle shall mean an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

(3) It is an affirmative defense to prosecution under this section that the defendant reasonably believed that the owner would have authorized the use had he or she known of it.

(4) Unauthorized use of a propelled vehicle is a Class III misdemeanor for the first offense, a Class I misdemeanor for the second offense, and a Class IV felony for the third and any subsequent offenses.

Source: Laws 1977, LB 38, § 115; Laws 1993, LB 430, § 2; Laws 1995, LB 371, § 7.

28-517 Theft by receiving stolen property.

A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner.

Source: Laws 1977, LB 38, § 116.

The Nebraska Legislature has not made the offense of ''theft by receiving'' a continuous offense. State v. Nuss, 235 Neb. 107, 454 N.W.2d 482 (1990).

Applying subsection (8) of section 25-518, value is an essential element of the crime of theft by receiving stolen property. In re Interest of Shea B., 3 Neb. App. 750, 532 N.W.2d 52 (1995).

28-518 Grading of theft offenses; aggregation allowed; when.

(1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand five hundred dollars.

(2) Theft constitutes a Class IV felony when the value of the thing involved is five hundred dollars or more, but not over one thousand five hundred dollars.

(3) Theft constitutes a Class I misdemeanor when the value of the thing involved is more than two hundred dollars, but less than five hundred dollars.

(4) Theft constitutes a Class II misdemeanor when the value of the thing involved is two hundred dollars or less.

(5) For any second or subsequent conviction under subsection (3) of this section, any person so offending shall be guilty of a Class IV felony.

(6) For any second conviction under subsection (4) of this section, any person so offending shall be guilty of a Class I misdemeanor, and for any third or subsequent conviction under subsection (4) of this section, the person so offending shall be guilty of a Class IV felony.

(7) Amounts taken pursuant to one scheme or course of conduct from one person may be aggregated in the indictment or information in determining the classification of the offense, except that amounts may not be aggregated into more than one offense.

(8) In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt.

Source: Laws 1977, LB 38, § 117; Laws 1978, LB 748, § 7; Laws 1982, LB 347, § 8; Laws 1992, LB 111, § 2.

While subsection (8) of this section now requires that intrinsic value be proved beyond a reasonable doubt as an element of the offense, proof of a specific value at the time of the theft is necessary only for gradation of the offense. State v. Gartner, 263 Neb. 153, 638 N.W.2d 849 (2002).

The degree of the crime for grading purposes of this section must be measured by the value of the thing involved as obtained by defendant through deception, and the value of the thing involved as to the victim is immaterial. State v. Roche, Inc., 246 Neb. 568, 520 N.W.2d 539 (1994).

An act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the offense under this section. State v. Garza, 241 Neb. 256, 487 N.W.2d 551 (1992).

The greater the value of the property involved in a theft, the more severe the punishment which may be imposed on conviction for the theft; and the determination of value is a question for the fact finder, whose finding will not be set aside unless clearly erroneous. State v. Garza, 241 Neb. 256, 487 N.W.2d 551 (1992).

In a theft charge, the value of the thing involved is an element of the charge against defendant and must be proved by the State beyond a reasonable doubt and must be established by the jury. State v. Scott, 225 Neb. 146, 403 N.W.2d 351 (1987).

A conviction under subsection (2) or (3) of this section does not include a conviction of a lesser offense under subsection (4) of this section for purposes of enhancement. State v. Long, 4 Neb. App. 126, 539 N.W.2d 443 (1995).

Pursuant to subsection (8) of this section, value is an essential element of the crime of theft by receiving stolen property. In re Interest of Shea B., 3 Neb. App. 750, 532 N.W.2d 52 (1995).

28-519 Criminal mischief; penalty.

(1) A person commits criminal mischief if he or she:

(a) Damages property of another intentionally or recklessly; or

(b) Intentionally tampers with property of another so as to endanger person or property; or

(c) Intentionally or maliciously causes another to suffer pecuniary loss by deception or threat.

(2) Criminal mischief is a Class IV felony if the actor intentionally or maliciously causes pecuniary loss of one thousand five hundred dollars or more, or a substantial interruption or impairment of public communication, transportation, supply of water, gas, or power, or other public service.

(3) Criminal mischief is a Class I misdemeanor if the actor intentionally or maliciously causes pecuniary loss of five hundred dollars or more but less than one thousand five hundred dollars.

(4) Criminal mischief is a Class II misdemeanor if the actor intentionally or maliciously causes pecuniary loss of two hundred dollars or more but less than five hundred dollars.

(5) Criminal mischief is a Class III misdemeanor if the actor intentionally, maliciously, or recklessly causes pecuniary loss in an amount of less than two hundred dollars, or if his or her action results in no pecuniary loss.

Source: Laws 1977, LB 38, § 118; Laws 1982, LB 347, § 9; Laws 2002, LB 82, § 4.

Cross References

Unlawful interference with utility poles and wires, penalty, see section 76-2325.01.

Ownership of property is not an essential element of criminal mischief and is immaterial except to identify property as not that of the accused. State v. Flye, 245 Neb. 495, 513 N.W.2d 526 (1994).

Regarding the grades of criminal mischief, existence and amount of pecuniary loss are questions for the fact finder. A specific monetary amount, alleged in conjunction with ''pecuniary loss'' resulting from criminal mischief informs the court and the defendant the grade of offense charged and the potential punishment on conviction. ''Pecuniary loss'' as used in this section means monetary loss suffered by another as the result of the defendant's conduct which constitutes criminal mischief. State v. Pierce, 231 Neb. 966, 439 N.W.2d 435 (1989).

A violation of subsection (4) of this section is a petty offense for which a defendant has a statutory, but not constitutional, right to a jury trial. State v. Lafler, 224 Neb. 613, 399 N.W.2d 808 (1987).

A factual basis existed for the finding that property alleged to have been feloniously destroyed exceeded three hundred dollars in value when, in the presentence report, damage caused by the defendant was estimated to total in excess of two thousand two hundred dollars. State v. Richter, 220 Neb. 551, 371 N.W.2d 125 (1985).

28-520 Criminal trespass, first degree; penalty.

(1) A person commits first degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or secretly remains in any building or occupied structure, or any separately secured or occupied portion thereof.

(2) First degree criminal trespass is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 119.

Criminal trespass in violation of subsection (1) of this section is not a lesser-included offense of burglary as defined in section 28-507(1). State v. Gonzales, 218 Neb. 43, 352 N.W.2d 571 (1984).

Criminal trespass is not a lesser-included offense of burglary. State v. Miller, 215 Neb. 145, 337 N.W.2d 424 (1983).

28-521 Criminal trespass, second degree; penalty.

(1) A person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

(a) Actual communication to the actor; or

(b) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or

(c) Fencing or other enclosure manifestly designed to exclude intruders.

(2) Second degree criminal trespass is a Class III misdemeanor, except as provided for in subsection (3) of this section.

(3) Second degree criminal trespass is a Class II misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person.

Source: Laws 1977, LB 38, § 120.

An automobile, by itself, is not a ''place'' as to which notice against trespass may be given within the meaning of subsection (1)(c) of this section. In re Interest of W.D., 232 Neb. 581, 441 N.W.2d 608 (1989).

Criminal trespass is not a lesser-included offense of burglary. State v. Miller, 215 Neb. 145, 337 N.W.2d 424 (1983).

28-522 Criminal trespass; affirmative defenses.

It is an affirmative defense to prosecution under sections 28-520 and 28-521 that:

(1) A building or occupied structure involved in an offense under section 28-520 was abandoned; or

(2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

(3) The actor reasonably believed that the owner of the premises or other person empowered to license access thereto would have licensed him to enter or remain; or

(4) The actor was in the process of navigating or attempting to navigate with a nonpowered vessel any stream or river in this state and found it necessary to portage or otherwise transport the vessel around any fence or obstructions in such stream or river.

Source: Laws 1977, LB 38, § 121.

Criminal trespass is not a lesser-included offense of burglary. State v. Miller, 215 Neb. 145, 337 N.W.2d 424 (1983).

Whether at the time of taking an automobile, the defendant, had the intent of permanently depriving the owner of its use or whether he intended to return it is a question of fact. State v. King, 204 Neb. 47, 281 N.W.2d 226 (1979).

28-523 Littering of public and private property; penalty.

(1) Any person who deposits, throws, discards, or otherwise disposes of any litter on any public or private property or in any waters commits the offense of littering unless:

(a) Such property is an area designated by law for the disposal of such material and such person is authorized by the proper public authority to so use such property; or

(b) The litter is placed in a receptacle or container installed on such property for such purpose.

(2) The word litter as used in this section shall mean all waste material susceptible of being dropped, deposited, discarded, or otherwise disposed of by any person upon any property in the state but does not include wastes of primary processes of farming or manufacturing. Waste material as used in this subsection shall mean any material appearing in a place or in a context not associated with that material's function or origin.

(3) Whenever litter is thrown, deposited, dropped, or dumped from any motor vehicle or watercraft in violation of this section, the operator of such motor vehicle or watercraft commits the offense of littering.

(4) A person who commits the offense of littering shall be guilty of a Class III misdemeanor. A person convicted of the offense of littering for the second time shall be guilty of a Class II misdemeanor. A person convicted of the offense of littering for the third or a subsequent time shall be guilty of a Class I misdemeanor.

Source: Laws 1977, LB 38, § 122; Laws 1978, LB 920, § 2; Laws 1979, LB 120, § 34; Laws 1981, LB 253, § 1; Laws 1994, LB 570, § 1; Laws 1997, LB 495, § 3.

ARTICLE 6

OFFENSES INVOLVING FRAUD

Section
28-601. Terms, defined.

Section

28-601 Terms, defined.

As used in sections 28-601 to 28-605, unless the context otherwise requires:

(1) Written instrument shall mean any paper, document, or other instrument containing written or printed matter used for purposes of reciting, embodying, conveying, or recording information, and any money, credit card, token, stamp, seal, badge, trademark, or any evidence or symbol of value, right, privilege, or identification which is capable of being used to the advantage or disadvantage of some person;

(2) Complete written instrument shall mean a written instrument which purports to be genuine and fully drawn with respect to every essential feature thereof;

(3) Incomplete written instrument shall mean one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument;

(4) To falsely make a written instrument shall mean to make or draw a written instrument, whether complete or incomplete, which purports to be an authentic creation of its ostensible maker, but which is not, either because the ostensible maker is fictitious or because, if real, he did not authorize the making or the drawing thereof;

(5) To falsely complete a written instrument shall mean to transform an incomplete written instrument into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant such authority, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker;

(6) To falsely alter a written instrument shall mean to change a written instrument without the authority of anyone entitled to grant such authority, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or by any other means, so that such instrument in its thus altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker;

(7) Forged instrument shall mean a written instrument which has been falsely made, completed, endorsed or altered. The terms forgery and counterfeit and their variants are intended to be synonymous in legal effect as used in this article;

(8) Possess shall mean to receive, conceal, or otherwise exercise control over; and

(9) Utter shall mean to issue, authenticate, transfer, sell, transmit, present, use, pass, or deliver, or to attempt or cause such uttering.

Source: Laws 1977, LB 38, § 123.

Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harrington, 202 Neb. 356, 275 N.W.2d 294 (1979).

28-602 Forgery, first degree; penalty.

(1) A person commits forgery in the first degree if, with intent to deceive or harm, he falsely makes, completes, endorses, alters, or utters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:

(a) Part of an issue of money, stamps, securities, or other valuable instruments issued by a government or governmental agency; or

(b) Part of an issue of stock, bonds, bank notes, or other instruments representing interests in or claims against a corporate or other organization or its property.

(2) Forgery in the first degree is a Class III felony.

Source: Laws 1977, LB 38, § 124.

28-603 Forgery, second degree; penalty.

(1) Whoever, with intent to deceive or harm, falsely makes, completes, endorses, alters, or utters any written instrument which is or purports to be, or which is calculated to become or to represent if completed, a written instrument which does or may evidence, create, transfer, terminate, or otherwise

affect a legal right, interest, obligation, or status, commits forgery in the second degree.

(2) Forgery in the second degree is a Class III felony when the face value, or purported face value, or the amount of any proceeds wrongfully procured or intended to be procured by the use of such instrument, is one thousand dollars or more.

(3) Forgery in the second degree is a Class IV felony when the face value or amount of proceeds exceeds three hundred dollars but is less than one thousand dollars.

(4) Forgery in the second degree is a Class I misdemeanor when the face value or amount of proceeds is three hundred dollars or less.

Source: Laws 1977, LB 38, § 125; Laws 2003, LB 17, § 7.

To sustain a conviction for forgery, it is not sufficient for the State to show that a signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his or her authority. State v. Castor, 262 Neb. 423, 632 N.W.2d 298 (2001).

The elements of the crime of uttering a forged instrument are (1) the offering of a forged instrument with the representation by words or acts that it is true or genuine, (2) the knowledge that same is false, forged, or counterfeited, and (3) the intent to defraud. State v. Tate, 222 Neb. 586, 385 N.W.2d 456 (1986).

28-604 Criminal possession of a forged instrument; penalty.

(1) Whoever, with knowledge that it is forged and with intent to deceive or harm, possesses any forged instrument covered by section 28-602 or 28-603 commits criminal possession of a forged instrument.

(2) Criminal possession of a forged instrument prohibited by section 28-602 is a Class IV felony.

(3) Criminal possession of a forged instrument prohibited by section 28-603, the amount or value of which is one thousand dollars or more, is a Class IV felony.

(4) Criminal possession of a forged instrument prohibited by section 28-603, the amount or value of which is more than three hundred dollars but less than one thousand dollars, is a Class I misdemeanor.

(5) Criminal possession of a forged instrument prohibited by section 28-603, the amount or value of which is three hundred dollars or less, is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 126; Laws 2003, LB 17, § 8.

Where the evidence offered no rational basis for convicting defendant of what he claimed to be the ''lesser-included'' offense of criminal possession of forged instrument, trial court did not err in refusing requested instruction. State v. Ebert, 212 Neb. 629, 324 N.W.2d 812 (1982).

28-605 Criminal possession of forgery devices; penalty.

(1) A person commits criminal possession of forgery devices when:

(a) He makes or possesses with knowledge of its character any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting, unlawfully simulating, or otherwise forging written instruments; or

(b) He makes or possesses any device, apparatus, equipment, or article capable of or adaptable to a use specified in subdivision (1)(a) of this section, with intent to use it himself, or to aid or permit another to use it, for purposes of forgery; or

(c) Illegally possesses a genuine plate, die, or other device used in the production of written instruments, with intent to deceive or harm.

(2) Criminal possession of forgery devices is a Class IV felony.

Source: Laws 1977, LB 38, § 127.

28-606 Criminal simulation; penalty.

(1) A person commits a criminal simulation when:

(a) With intent to deceive or harm, he makes, alters, or represents an object in such fashion that it appears to have an antiquity, rarity, source or authorship, ingredient, or composition which it does not in fact have; or

(b) With knowledge of its true character and with intent to use to deceive or harm, he utters, misrepresents, or possesses any object so simulated.

(2) Criminal simulation is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 128.

28-607 Making, using, or uttering slugs; terms, defined; penalty.

(1) A person commits the offense of unlawfully using slugs, if he makes, uses, or utters a slug or slugs with intent to deprive a supplier of property or service sold or offered by means of a coin machine or with knowledge that he is facilitating such a deprivation by another person.

(2) As used in this section, unless the context otherwise requires:

(a) Slug shall mean an object which by size, shape, or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill, or token;

(b) Coin machine shall mean a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin or bill of a specified denomination or a token made for the purpose and in return for the insertion or deposit thereof to mechanically offer, provide, assist in providing or permit the acquisition of property or a public or private service; and

(c) Value of the slug or slugs shall mean the value of the coins, bills, or tokens for which they are being substituted.

(3) The making, using, or uttering of slugs of the value of one hundred dollars or more is a Class I misdemeanor.

(4) The making, using, or uttering of slugs of the value of less than one hundred dollars is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 129.

28-608 Criminal impersonation; penalty; restitution.

(1) A person commits the crime of criminal impersonation if he or she:

(a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;

(b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another;

(c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or

(d) Without the authorization or permission of another and with the intent to deceive or harm another:

(i) Obtains or records personal identification documents or personal identifying information; and

(ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

(2)(a) Criminal impersonation is a Class III felony if the credit, money, goods, services, or other thing of value that was gained or was attempted to be gained was one thousand five hundred dollars or more.

(b) Criminal impersonation is a Class IV felony if the credit, money, goods, services, or other thing of value that was gained or was attempted to be gained was five hundred dollars or more but less than one thousand five hundred dollars.

(c) Criminal impersonation is a Class I misdemeanor if the credit, money, goods, services, or other thing of value that was gained or was attempted to be gained was two hundred dollars or more but less than five hundred dollars. Any second or subsequent conviction under this subdivision is a Class IV felony.

(d) Criminal impersonation is a Class II misdemeanor if no credit, money, goods, services, or other thing of value was gained or was attempted to be gained, or if the credit, money, goods, services, or other thing of value that was gained or was attempted to be gained was less than two hundred dollars. Any second conviction under this subdivision is a Class I misdemeanor, and any third or subsequent conviction under this subdivision is a Class IV felony.

(e) A person found guilty of violating this section may, in addition to the penalties under this subsection, be ordered to make restitution pursuant to sections 29-2280 to 29-2289.

(3) Criminal impersonation does not mean:

(a) The lawful obtaining of credit information in the course of a bona fide consumer or commercial transaction;

(b) The lawful, good faith exercise of a security interest or a right of setoff by a creditor or a financial institution; or

(c) The lawful, good faith compliance by any person when required by any warrant, levy, garnishment, attachment, court order, or other judicial or administrative order, decree, or directive.

(4) For purposes of this section:

(a) Personal identification document means a birth certificate, motor vehicle operator's license, state identification card, public, government, or private employment identification card, social security card, visa work permit, firearm owner's identification card, certificate issued under section 69-2404, or passport or any document made or altered in a manner that it purports to have been made on behalf of or issued to another person or by the authority of a person who did not give that authority. Personal identification document does not include a financial transaction device as defined in section 28-618;

(b) Personal identifying information means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person including a person's: (i) Name; (ii) date of birth; (iii) address; (iv) motor vehicle operator's license number or state identification card number as assigned by the State of Nebraska or another state; (v) social security number

or visa work permit number; (vi) public, private, or government employer, place of employment, or employment identification number; (vii) maiden name of a person's mother; (viii) number assigned to a person's credit card, charge card, or debit card, whether issued by a financial institution, corporation, or other business entity; (ix) number assigned to a person's depository account, savings account, or brokerage account; (x) personal identification number as defined in section 8-157.01; (xi) electronic identification number, address, or routing code used to access financial information; (xii) digital signature; (xiii) telecommunications identifying information or access device; (xiv) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; and (xv) other number or information which can be used to access a person's financial resources; and

(c) Telecommunications identifying information or access device means a card, plate, code, account number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with other telecommunications identifying information or another telecommunications access device may be used to: (i) Obtain money, goods, services, or any other thing of value; or (ii) initiate a transfer of funds other than a transfer originated solely by a paper instrument.

Source: Laws 1977, LB 38, § 130; Laws 2002, LB 276, § 2.

28-609 Impersonating a public servant; penalty.

(1) A person commits the offense of impersonating a public servant if he falsely pretends to be a public servant other than a peace officer and performs any act in that pretended capacity.

(2) It is no defense to a prosecution under this section that the office the actor pretended to hold did not in fact exist.

(3) Impersonating a public servant is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 131.

28-610 Impersonating a peace officer; penalty.

(1) A person commits the offense of impersonating a peace officer if he falsely pretends to be a peace officer and performs any act in that pretended capacity.

(2) Impersonating a peace officer is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 132.

28-611 Issuing or passing a bad check or similar order; penalty; collection procedures.

(1) Whoever obtains property, services, or present value of any kind by issuing or passing a check, draft, assignment of funds, or similar signed order for the payment of money, knowing that he or she has no account with the drawee at the time the check, draft, assignment of funds, or order is issued or, if he or she has an account, knowing that he or she does not have sufficient funds in or credit with the drawee for the payment of the check, draft, assignment of funds, or order in full upon presentation, commits the offense of issuing a bad check. Issuing a bad check is:

(a) A Class III felony if the amount of the check, draft, assignment of funds, or order is one thousand five hundred dollars or more;

(b) A Class IV felony if the amount of the check, draft, assignment of funds, or order is five hundred dollars or more, but less than one thousand five hundred dollars;

(c) A Class I misdemeanor if the amount of the check, draft, assignment of funds, or order is one hundred dollars or more, but less than five hundred dollars; and

(d) A Class II misdemeanor if the amount of the check, draft, assignment of funds, or order is less than one hundred dollars.

The aggregate amount of any series of checks, drafts, assignments, or orders issued or passed within a sixty-day period in one county may be used in determining the classification of the offense pursuant to this subsection, except that checks, drafts, assignments, or orders may not be aggregated into more than one offense.

(2) For any second or subsequent offense under subdivision (1)(c) or (1)(d) of this section, any person so offending shall be guilty of a Class IV felony.

(3) Whoever otherwise issues or passes a check, draft, assignment of funds, or similar signed order for the payment of money, knowing that he or she has no account with the drawee at the time the check, draft, assignment of funds, or order is issued or, if he or she has an account, knowing that he or she does not have sufficient funds in or credit with the drawee for the payment of the check, draft, assignment of funds, or order in full upon its presentation, shall be guilty of a Class II misdemeanor.

(4) Any person in violation of this section who makes voluntary restitution to the injured party for the value of the check, draft, assignment of funds, or order shall also pay ten dollars to the injured party and any reasonable handling fee imposed on the injured party by a financial institution.

(5) In any prosecution when the person issuing the check, draft, assignment of funds, or order has an account with the drawee, he or she shall be presumed to have known that he or she did not have sufficient funds in or credit with the drawee for the payment of the check, draft, assignment of funds, or order in full upon presentation if, within thirty days after issuance of the check, draft, assignment of funds, or order, he or she was notified that the drawee refused payment for lack of funds and he or she failed within ten days after such notice to make the check, draft, assignment of funds, or order good or, in the absence of such notice, he or she failed to make the check, draft, assignment of funds, or order good within ten days after notice that such check, draft, assignment of funds, or order has been returned to the depositor was sent to him or her by the county attorney or his or her deputy, by United States mail addressed to such person at his or her last-known address. Upon request of the depositor and the payment of ten dollars for each check, draft, assignment of funds, or order, the county attorney or his or her deputy shall be required to mail notice to the person issuing the check, draft, assignment of funds, or order as provided in this subsection. The ten-dollar payment shall be payable to the county treasurer and credited to the county general fund. No such payment shall be collected from any county office to which such a check, draft, assignment of funds, or order is issued in the course of the official duties of the office.

(6) Any person convicted of violating this section may, in addition to a fine or imprisonment, be ordered to make restitution to the party injured for the value of the check, draft, assignment of funds, or order and to pay ten dollars to the injured party and any reasonable handling fee imposed on the injured party by

a financial institution. If the court, in addition to sentencing any person to imprisonment under this section, also enters an order of restitution, the time permitted to make such restitution shall not be concurrent with the sentence of imprisonment.

(7) The fact that restitution to the party injured has been made and that ten dollars and any reasonable handling fee imposed on the injured party by a financial institution have been paid to the injured party shall be a mitigating factor in the imposition of punishment for any violation of this section.

Source: Laws 1977, LB 38, § 133; Laws 1978, LB 748, § 8; Laws 1983, LB 208, § 1; Laws 1985, LB 445, § 1; Laws 1987, LB 254, § 1; Laws 1992, LB 111, § 3.

In order to violate subsection (3) of this section, an intent to defraud must exist at the time one issues an insufficient-fund check. State v. Hruza, 223 Neb. 837, 394 N.W.2d 643 (1986).

The presumption contained in subsection (4) of this section that the drawer of an insufficient-fund check who, after notice, does not make it good knew of the insufficiency when issuing the check is only a permissible inference of fact. State v. Hruza, 223 Neb. 837, 394 N.W.2d 643 (1986).

In order for the State to convict under this statute, the State must prove that the check was issued with the intent to defraud, and such intent must occur at the time the check is drawn. The maker of a postdated check will not be guilty of violating this statute when he or she has informed the payee at the time of its delivery that funds in the bank are not adequate to pay the check if presented immediately after issuance. State v. Papillon, 223 Neb. 325, 389 N.W.2d 553 (1986).

The essential elements of the crime defined in subsection (1)(a) of this section are the issuance of a check for more than one thousand dollars and obtaining of property of value, with no particular amount required (subject, of course, to the requirement that the act is done with the intent to defraud). State v. Wiley, 219 Neb. 740, 365 N.W.2d 844 (1985).

In prosecution under this section, trial court's instruction defining ''thing of value'' as definition appears in section 28-109(22) was correct. Trial court correctly refused defendant's request for instruction defining value as definition appears in U.C.C. section 3-303 in prosecution under this section. State v. Spaulding, 211 Neb. 575, 319 N.W.2d 449 (1982).

The prosecutor may relate the underlying facts upon which the court can find the defendant guilty when a plea of ''no contest'' has been entered. State v. Johnson, 209 Neb. 308, 307 N.W.2d 525 (1981).

By its terms, this section requires proof that one intended to defraud by obtaining property, services, or present value of any kind in exchange for a check or other order, knowing at the time of issuing such check or order that he has no account with the drawee, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation. State v. Kock, 207 Neb. 731, 300 N.W.2d 824 (1981).

In order to warrant the imposition of the enhanced penalties for issuing a bad check under section 28-611(2), R.R.S.1943, prior convictions must have occurred under subdivision (1)(c) or (1)(d) of that statute. Prior convictions under previous ''bad check'' statutes may not be used to enhance the penalties under the ''bad check'' statute currently in effect. State v. Suhr, 207 Neb. 553, 300 N.W.2d 25 (1980).

28-612 False statement or book entry; destruction or secretion of records; penalty.

(1) A person commits a Class IV felony if he or she:

(a) Willfully and knowingly subscribes to, makes, or causes to be made any false statement or entry in the books of an organization; or

(b) Knowingly subscribes to or exhibits false papers with the intent to deceive any person or persons authorized to examine into the affairs of any such organization; or

(c) Makes, states, or publishes any false statement of the amount of the assets or liabilities of any such organization; or

(d) Fails to make true and correct entry in the books and records of such organization of its business and transactions in the manner and form prescribed by the Department of Banking and Finance; or

(e) Mutilates, alters, destroys, secretes, or removes any of the books or records of such organization, without the consent of the Director of Banking and Finance.

(2) As used in this section, organization means:

(a) Any trust company transacting a business under the Nebraska Trust Company Act;

(b) Any association organized for the purpose set forth in section 8-302;

(c) Any bank as defined in section 8-101; or

(d) Any credit union transacting business in this state under the Credit Union Act.

Source: Laws 1977, LB 38, § 134; Laws 1983, LB 440, § 1; Laws 1984, LB 979, § 1; Laws 1995, LB 384, § 16; Laws 1996, LB 948, § 122; Laws 1998, LB 1321, § 77; Laws 2002, LB 1094, § 13; Laws 2003, LB 131, § 24.

Cross References

Credit Union Act, see section 21-1701.
Nebraska Trust Company Act, see section 8-201.01.

28-613 Commercial bribery and breach of duty to act disinterestedly; penalty.

(1) A person commits a Class I misdemeanor if he or she solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he or she is subject as:

(a) Agent or employee; or

(b) Trustee, guardian, or other fiduciary; or

(c) Lawyer, physician, accountant, appraiser, or other professional advisor; or

(d) Officer, director, partner, limited liability company member, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or

(e) Duly elected or appointed representative or trustee of a labor organization or employee of a welfare trust fund; or

(f) Arbitrator or other purportedly disinterested adjudicator or referee.

(2) A person who holds himself or herself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities, property, or services commits a Class I misdemeanor if he or she solicits, accepts, or agrees to accept any benefit to alter, modify, or change his or her selection, appraisal, or criticism.

(3) A person commits a Class I misdemeanor if he or she confers or offers or agrees to confer any benefit the acceptance of which would be an offense under subsection (1) or (2) of this section.

Source: Laws 1977, LB 38, § 135; Laws 1993, LB 121, § 177; Laws 1994, LB 884, § 54.

28-614 Tampering with publicly exhibited contest; penalty; contest, participant, official, defined.

(1) A person commits the offense of tampering with a publicly exhibited contest if:

(a) He confers, or offers or agrees to confer, directly or indirectly, any benefit upon:

(i) A contest participant with intent to influence him not to give his best efforts in a publicly exhibited contest; or

(ii) A contest official with intent to influence him to perform improperly his duties in connection with a publicly exhibited contest;

(b) Being a contest participant or contest official, he intentionally solicits, accepts, or agrees to accept, directly or indirectly, any benefit from another person with intent that he will thereby be influenced:

(i) In the case of a contest participant, not to give his best efforts in a publicly exhibited contest; or

(ii) In the case of a contest official, to perform improperly his duties in connection with a publicly exhibited contest; or

(c) With intent to influence the outcome of a publicly exhibited contest he:

(i) Tampers with any contest participant, contest official, animal, equipment, or other thing involved in the conduct or operation of the contest, in a manner contrary to the rules and usages purporting to govern the contest in question; or

(ii) Substitutes a contest participant, animal, equipment, or other thing involved in the conduct or operation of the contest, for the genuine person, animal, or thing.

(2) In this section:

(a) Publicly exhibited contest shall mean any professional or amateur sport, athletic game or contest, or race or contest involving machines, persons, or animals, viewed by the public, but shall not include an exhibition which does not purport to be and which is not represented as being such a sport, game, contest, or race;

(b) Contest participant shall mean any person who participates or expects to participate in a publicly exhibited contest as a player, contestant, or member of a team, or as a coach, manager, trainer, or other person directly associated with a player, contestant, or team; and

(c) Contest official shall mean any person who acts or expects to act in a publicly exhibited contest as an umpire, referee, or judge, or otherwise to officiate at a publicly exhibited contest.

(3) Tampering with a publicly exhibited contest is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 136.

28-615 Identification number, obscure, and article, defined.

As used in sections 28-615 to 28-617:

(1) Identification number shall mean a serial or motor number placed by a manufacturer upon an article as a permanent individual identifying mark;

(2) Obscure shall mean to destroy, remove, alter, conceal, or deface so as to render illegible by ordinary means of inspection; and

(3) Article shall mean any product made by a manufacturer and includes but is not limited to any appliance, radio, television, motor vehicle, tractor or other farm machinery.

Source: Laws 1977, LB 38, § 137.

28-616 Altering identification number; penalty.

(1) A person commits the offense of altering an identification number if, with the intent to deceive or harm, he obscures an identification number or in the course of business he sells, offers for sale, leases or otherwise disposes of an article knowing that an identification number thereon is obscured.

(2) Altering an identification number is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 138.

28-617 Receiving an altered article; penalty.

(1) A person commits the offense of receiving an altered article if, with the intent to deceive or harm another, he buys or receives any article knowing that an identification number thereon is obscured, without first ascertaining that the person so selling or delivering the same has a legal right to do so.

(2) Receiving an altered article is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 139.

28-618 Financial transactions; terms, defined.

For purposes of sections 28-618 to 28-630:

(1) Account holder shall mean the person or business entity named on the face of a financial transaction device for whose benefit the financial transaction device is issued by an issuer;

(2) Acquirer shall mean any business organization, financial institution, or agent of such organization or institution which authorizes a merchant to accept payment by financial transaction device for money, property, services, or anything else of value;

(3) Automated banking device shall mean any machine which, when properly activated by a financial transaction device or a personal identification code, may be used for any purpose for which a financial transaction device is issued;

(4) Counterfeit financial transaction device shall mean any financial transaction device which is fictitious, altered, forged, stolen, obtained as part of a scheme to defraud, or otherwise unlawfully obtained and which may or may not be embossed with account information or a company logo or any facsimile, false representation, depiction, or component of a financial transaction device;

(5) Embossing shall mean any process in which account numbers are placed on financial transaction devices that results in the number being raised from the surface of the device;

(6) Expired financial transaction device shall mean a financial transaction device which is no longer valid because the term shown on it has elapsed;

(7) Financial transaction device shall mean any instrument or device whether known as a credit card, credit plate, bank service card, banking card, check guarantee card, debit card, electronic funds transfer card, or account number representing a financial account. Such device shall affect the financial interest, standing, or obligation of the financial account for services or financial payments for money, credit, property, or services;

(8) Financial-transaction-device-making equipment shall mean any equipment, impression, machine, mechanism, plate, or other device designed, used, or capable of being used to produce a financial transaction device, a counterfeit financial transaction device, or any aspect or component of a financial transaction device;

(9) Holographic shall mean a photographic method that uses laser light to produce three-dimensional images;

(10) Intent to defraud shall mean an unlawful attempt to secure money, credit, property, or services from an issuer, without permission of the account holder, for the benefit of any person other than the account holder;

(11) Issuer shall mean any person or any financial or business entity that acquires financial rights by issuing, canceling, controlling, or distributing a financial transaction device;

(12) Magnetic encoding shall mean any electronically encoded account holder information which is placed on a magnetic strip on the financial transaction device and is capable of being read by an electronic terminal such as an automatic teller machine or an electronic terminal at a merchant location also known as a point-of-sale terminal;

(13) Personal identification code shall mean any grouping of letters, numbers, or symbols assigned to the account holder of a financial transaction device by the issuer to permit authorized electronic access of that account;

(14) Receives or receiving shall mean acquiring possession or control of or accepting as security for a loan a financial transaction device;

(15) Revoked financial transaction device shall mean a financial transaction device which is no longer valid because permission to use it has been suspended or terminated by the issuer;

(16) Sales form shall mean any written, electronic, magnetic, or printed record of a financial transaction involving use of a financial transaction device;

(17) Sales form processing services shall mean services provided to enable a person to obtain payment or credit for sales forms;

(18) Sales form processor shall mean any bank, financial institution, or other entity which with authority from a bona fide association of issuers provides sales form processing services;

(19) Service mark shall mean a word, name, symbol, or other device or any combination thereof to identify the goods or services of the entity from the goods and services of another entity;

(20) To falsely alter a financial transaction device shall mean to change such device without the authority of anyone entitled to grant such authority, whether in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or any other means, so that such device in its altered form falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer;

(21) To falsely complete a financial transaction device shall mean to transform an incomplete device into a complete one by adding, inserting, or changing matter without the authority of anyone entitled to grant such authority, so that the complete device falsely appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible issuer;

(22) To falsely make a financial transaction device shall mean to make or manufacture a device, whether complete or incomplete, which purports to be an authentic creation of its ostensible issuer but which is fictitious or, if real, the ostensible issuer did not authorize the making or the manufacturing thereof; and

(23) Traffic shall mean to distribute, dispense, sell, transfer, or otherwise dispose of property or to buy, receive, possess, obtain control of, or use

property with the intent to dispense, distribute, sell, transfer, or otherwise dispose of such property.

Source: Laws 1989, LB 372, § 2; Laws 1993, LB 81, § 55.

By the plain language of subsection (7) of this section, the Legislature intended to include both tangible items such as credit cards and the account numbers reflected on such cards within the definition of a financial transaction device. As defined in subsection (7) of this section, a ''financial transaction device'' must be something which is capable of being used to execute a transaction in a financial account. State v. Rhea, 262 Neb. 886, 636 N.W.2d 364 (2001).

28-619 Issuing a false financial statement for purposes of obtaining a financial transaction device; penalties.

(1) A person commits the offense of issuing a false financial statement for purposes of obtaining a financial transaction device if, upon filing an application for a financial transaction device with an issuer, such person (a) knowingly makes or causes to be made a statement or report which is false in some material respect and reasonably relied upon relative to his or her name, occupation, financial condition, assets, or liabilities, (b) willfully and materially overvalues any assets, or (c) willfully omits or materially undervalues any indebtedness with the intent of influencing the issuer to issue a financial transaction device.

(2) Any person issuing a false financial statement for the purposes of obtaining a financial transaction device, when such device is used in violation of this section to obtain money, property, or services, shall be guilty of a Class I misdemeanor.

(3) Any person issuing two or more false financial statements for purposes of obtaining two or more financial transaction devices, when such devices are used in violation of this section to obtain money, property, or services, shall be guilty of a Class IV felony.

Source: Laws 1989, LB 372, § 3; Laws 1996, LB 899, § 1.

28-620 Unauthorized use of a financial transaction device; penalties; prosecution of offense.

(1) A person commits the offense of unauthorized use of a financial transaction device if such person uses such device in an automated banking device, to imprint a sales form, or in any other manner:

(a) For the purpose of obtaining money, credit, property, or services or for making financial payment, with intent to defraud;

(b) With notice that the financial transaction device is expired, revoked, or canceled;

(c) With notice that the financial transaction device is forged, altered, or counterfeited; or

(d) When for any reason his or her use of the financial transaction device is unauthorized either by the issuer or by the account holder.

(2) For purposes of this section, notice shall mean either notice given in person or notice given in writing to the account holder, by registered or certified mail, return receipt requested, duly stamped and addressed to such account holder at his or her last address known to the issuer. Such notice shall be evidenced by a returned receipt signed by the account holder which shall be prima facie evidence that the notice was received.

(3) Any person committing the offense of unauthorized use of a financial transaction device shall be guilty of:

(a) A Class II misdemeanor if the total value of the money, credit, property, or services obtained or the financial payments made are less than two hundred dollars within a six-month period from the date of the first unauthorized use;

(b) A Class I misdemeanor if the total value of the money, credit, property, or services obtained or the financial payments made are two hundred dollars or more but less than five hundred dollars within a six-month period from the date of the first unauthorized use;

(c) A Class IV felony if the total value of the money, credit, property, or services obtained or the financial payments made are five hundred dollars or more but less than one thousand five hundred dollars within a six-month period from the date of the first unauthorized use; and

(d) A Class III felony if the total value of the money, credit, property, or services obtained or the financial payments made are one thousand five hundred dollars or more within a six-month period from the date of the first unauthorized use.

(4) Any prosecution under this section may be conducted in any county where the person committed the offense or any one of a series of offenses to be aggregated.

(5) Once aggregated and filed, no separate prosecution for an offense arising out of the same series of offenses aggregated and filed shall be allowed in any county.

Source: Laws 1989, LB 372, § 4; Laws 1994, LB 379, § 1; Laws 2002, LB 276, § 3.

28-621 Criminal possession of a financial transaction device; penalties.

(1) A person commits the offense of criminal possession of a financial transaction device if, with the intent to defraud, such person has in his or her possession or under his or her control any financial transaction device issued to a different account holder or which he or she knows or reasonably should know to be lost, stolen, forged, altered, or counterfeited.

(2) Any person committing the offense of criminal possession of one financial transaction device shall be guilty of a Class III misdemeanor.

(3) Any person committing the offense of criminal possession of two or three financial transaction devices, each issued to different account holders, shall be guilty of a Class IV felony.

(4) Any person committing the offense of criminal possession of four or more financial transaction devices, each issued to different account holders, shall be guilty of a Class III felony.

Source: Laws 1989, LB 372, § 5.

Under this section and section 28-622, an employee is deemed to have ''stolen'' credit card statements if he or she physically removes such statements from his or her employer's premises with the knowledge that such statements will be used unlawfully and without the employer's authorization or knowledge. State v. Rhea, 262 Neb. 886, 636 N.W.2d 364 (2001).

28-622 Unlawful circulation of a financial transaction device in the first degree; penalty.

(1) A person commits the offense of unlawful circulation of a financial transaction device in the first degree if such person sells or has in his or her

possession or under his or her control with the intent to deliver, circulate, or sell two or more financial transaction devices which he or she knows or reasonably should know to be lost, stolen, forged, altered, counterfeited, or delivered under a mistake as to the identity or address of the account holder.

(2) Any person committing the offense of unlawful circulation of a financial transaction device in the first degree shall be guilty of a Class III felony.

Source: Laws 1989, LB 372, § 7.

Under section 28-621 and this section, an employee is deemed to have ''stolen'' credit card statements if he or she physically removes such statements from his or her employer's premises with the knowledge that such statements will be used unlawfully and without the employer's authorization or knowledge. State v. Rhea, 262 Neb. 886, 636 N.W.2d 364 (2001).

28-623 Unlawful circulation of a financial transaction device in the second degree; penalty.

(1) A person commits the offense of unlawful circulation of a financial transaction device in the second degree if such person sells or has in his or her possession or under his or her control with the intent to deliver, circulate, or sell any financial transaction device which he or she knows or reasonably should know to be lost, stolen, forged, altered, counterfeited, or delivered under a mistake as to the identity or address of the account holder.

(2) Any person committing the offense of unlawful circulation of a financial transaction device in the second degree shall be guilty of a Class IV felony.

Source: Laws 1989, LB 372, § 6.

28-624 Criminal possession of a blank financial transaction device; penalties.

(1) A person commits the offense of criminal possession of a blank financial transaction device if, without the authorization of the issuer or manufacturer, such person has in his or her possession, has under his or her control, or receives from another person a blank financial transaction device, with intent to use or to cause the use of such device.

(2) Any person committing the offense of criminal possession of a blank financial transaction device shall be guilty of a Class I misdemeanor.

(3) Any person committing the offense of criminal possession of two or more blank financial transaction devices shall be guilty of a Class IV felony.

Source: Laws 1989, LB 372, § 8.

28-625 Criminal sale of a blank financial transaction device; penalties; blank financial transaction device, defined.

(1) A person commits the offense of criminal sale of a blank financial transaction device if, without the authorization of the issuer or manufacturer, such person has in his or her possession, has under his or her control, or receives from another person a blank financial transaction device, with intent to deliver, circulate, or sell or to cause the delivery, circulation, or sale of such device.

(2) Any person committing the offense of criminal sale of one blank financial transaction device shall be guilty of a Class IV felony.

(3) Any person committing the offense of criminal sale of two or more blank financial transaction devices shall be guilty of a Class III felony.

For purposes of section 28-624 and this section, a blank financial transaction device shall mean a device that has at least one or more characteristics of a financial transaction device but does not contain all of the characteristics of a financial transaction device including, but not limited to, a financial transaction device which has not been embossed or magnetically encoded with the name of the account holder, personal identification code, expiration date, or other proprietary institutional information.

Source: Laws 1989, LB 372, § 9.

28-626 Criminal possession of a forgery device; penalty.

(1) A person commits the offense of criminal possession of a forgery device if (a) such person possesses any tool, photographic equipment, printing equipment, or any other device or group or combination of devices adapted, designed, or commonly used for committing or facilitating the commission of an offense involving the unauthorized manufacturing, printing, embossing, or magnetic encoding of a financial transaction device or the altering or addition of any service marks or holographic images to a financial transaction device and (b) intends to use the device or devices possessed or knows that some person intends to use the device or devices possessed in the commission of such an offense.

(2) Any person committing the offense of criminal possession of a forgery device shall be guilty of a Class IV felony.

Source: Laws 1989, LB 372, § 10.

28-627 Unlawful manufacture of a financial transaction device; penalty.

(1) A person commits the offense of unlawful manufacture of a financial transaction device if, with intent to defraud, such person:

(a) Falsely makes or manufactures, by printing, embossing, or magnetically encoding, a financial transaction device;

(b) Falsely alters or adds service marks, optical characters, or holographic images to a device which is, purports to be, or is circulated to become or represent if completed a financial transaction device; or

(c) Falsely completes a financial transaction device by adding to an incomplete device to make it appear to be a complete one.

(2) Any person committing the offense of unlawful manufacture of a financial transaction device shall be guilty of a Class III felony.

Source: Laws 1989, LB 372, § 11.

28-628 Laundering of sales forms; penalty.

A person other than a sales form processor commits the offense of laundering of sales forms if such person presents for payment to any sales form processor a sales form which was not originated as a result of a sales transaction between such person and the account holder named on such sales form.

Any person committing the offense of laundering of sales forms shall be guilty of a Class IV felony.

Source: Laws 1989, LB 372, § 12.

28-629 Unlawful acquisition of sales form processing services; penalty.

A person commits the offense of unlawful acquisition of sales form processing services if, upon applying for such services with a sales form processor, such person makes or causes to be made a statement or report which is false in some material respect relative to the type of goods or services provided by such person to his or her customers or the method by which such person solicits or concludes sales transactions with his or her customers.

Any person committing the offense of unlawful acquisition of sales form processing services shall be guilty of a Class IV felony.

Source: Laws 1989, LB 372, § 13.

28-630 Unlawful factoring of a financial transaction device; penalty.

(1) A person commits the offense of unlawful factoring of a financial transaction device if such person or any agent or employee of such person is authorized by any acquirer to furnish money, property, services, or anything else of value and, with intent to defraud the account holder, acquirer, or issuer, presents for payment a financial transaction device transaction record to the issuer or acquirer.

(2) Any person committing the offense of unlawful factoring of a financial transaction device shall be guilty of a Class IV felony.

Source: Laws 1989, LB 372, § 14.

28-631 Fraudulent insurance act; penalties.

(1) A person or entity commits a fraudulent insurance act if he or she:

(a) Knowingly and with intent to defraud or deceive presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, or any agent of an insurer, any statement as part of, in support of, or in denial of a claim for payment or other benefit from an insurer or pursuant to an insurance policy knowing that the statement contains any false, incomplete, or misleading information concerning any fact or thing material to a claim;

(b) Assists, abets, solicits, or conspires with another to prepare or make any statement that is intended to be presented to or by an insurer or person in connection with or in support of any claim for payment or other benefit from an insurer or pursuant to an insurance policy knowing that the statement contains any false, incomplete, or misleading information concerning any fact or thing material to the claim;

(c) Makes any false or fraudulent representations as to the death or disability of a policy or certificate holder or a covered person in any statement or certificate for the purpose of fraudulently obtaining money or benefit from an insurer;

(d) Knowingly and willfully transacts any contract, agreement, or instrument which violates this section;

(e) Receives money for the purpose of purchasing insurance and converts the money to the person's own benefit;

(f) Willfully embezzles, abstracts, purloins, misappropriates, or converts money, funds, premiums, credits, or other property of an insurer or person engaged in the business of insurance;

(g) Knowingly and with intent to defraud or deceive issues fake or counterfeit insurance policies, certificates of insurance, insurance identification cards, or insurance binders;

(h) Knowingly and with intent to defraud or deceive possesses fake or counterfeit insurance policies, certificates of insurance, insurance identification cards, or insurance binders;

(i) Knowingly and with intent to defraud or deceive makes any false entry of a material fact in or pertaining to any document or statement filed with or required by the Department of Insurance;

(j) Knowingly and with intent to defraud or deceive removes, conceals, alters, diverts, or destroys assets or records of an insurer or person engaged in the business of insurance or attempts to remove, conceal, alter, divert, or destroy assets or records of an insurer or person engaged in the business of insurance;

(k) Willfully operates as or aids and abets another operating as a discount medical plan organization in violation of subsection (1) of section 44-8306; or

(l) Willfully collects fees for purported membership in a discount medical plan organization but purposefully fails to provide the promised benefits.

(2)(a) A violation of subdivisions (1)(a) through (f) of this section is a Class III felony when the amount involved is one thousand five hundred dollars or more.

(b) A violation of subdivisions (1)(a) through (f) of this section is a Class IV felony when the amount involved is five hundred dollars or more but less than one thousand five hundred dollars.

(c) A violation of subdivisions (1)(a) through (f) of this section is a Class I misdemeanor when the amount involved is two hundred dollars or more but less than five hundred dollars.

(d) A violation of subdivisions (1)(a) through (f) of this section is a Class II misdemeanor when the amount involved is less than two hundred dollars.

(e) For any second or subsequent conviction under subdivision (2)(c) of this section, the violation is a Class IV felony.

(f) A violation of subdivisions (1)(g), (i), (j), (k), and (l) of this section is a Class IV felony.

(g) A violation of subdivision (1)(h) of this section is a Class I misdemeanor.

(3) Amounts taken pursuant to one scheme or course of conduct from one person, entity, or insurer may be aggregated in the indictment or information in determining the classification of the offense, except that amounts may not be aggregated into more than one offense.

(4) In any prosecution under this section, if the amounts are aggregated pursuant to subsection (3) of this section, the amount involved in the offense shall be an essential element of the offense that must be proved beyond a reasonable doubt.

(5) A prosecution under this section shall be in lieu of an action under section 44-6607.

(6) For purposes of this section:

(a) Insurer means any person or entity transacting insurance as defined in section 44-102 with or without a certificate of authority issued by the Director of Insurance. Insurer also means health maintenance organizations, legal service insurance corporations, prepaid limited health service organizations,

dental and other similar health service plans, discount medical plan organizations, and entities licensed pursuant to the Intergovernmental Risk Management Act and the Comprehensive Health Insurance Pool Act. Insurer also means an employer who is approved by the Nebraska Workers' Compensation Court as a self-insurer; and

(b) Statement includes, but is not limited to, any notice, statement, proof of loss, bill of lading, receipt for payment, invoice, account, estimate of property damages, bill for services, diagnosis, prescription, hospital or medical records, X-rays, test result, or other evidence of loss, injury, or expense, whether oral, written, or computer-generated.

Source: Laws 1995, LB 385, § 10; Laws 1997, LB 272, § 1; Laws 2000, LB 930, § 1; Laws 2002, LB 547, § 1; Laws 2008, LB855, § 2. Operative date July 18, 2008.

Cross References

Comprehensive Health Insurance Pool Act, see section 44-4201.
Intergovernmental Risk Management Act, see section 44-4301.

28-632 Payment cards; terms, defined.

For purposes of this section and sections 28-633 and 28-634:

(1) Merchant means an owner or operator of any retail mercantile establishment or any agent, employee, lessee, consignee, officer, director, franchisee, or independent contractor of such owner or operator. Merchant also includes a person who receives from an authorized user of a payment card, or someone the person believes to be an authorized user, a payment card or information from a payment card, or what the person believes to be a payment card or information from a payment card, as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from the person;

(2) Payment card means a credit card, charge card, or debit card that is issued to an authorized card user and that allows the user to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant;

(3) Person means an individual, firm, partnership, association, corporation, limited liability company, or other business entity;

(4) Reencoder means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different payment card; and

(5) Scanning device means a scanner, a reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card.

Source: Laws 2002, LB 276, § 4.

28-633 Payment cards; prohibited acts; violation; penalty.

(1) A person that accepts a payment card for the transaction of business shall print no more than the last five digits of the payment card account number upon any receipt provided to the payment card holder.

(2) This section applies only to receipts that are electronically printed and does not apply to any transaction in which the only means of recording the payment card number is by handwriting or by an imprint or copy of the payment card.

(3) A violation of this section is a Class III misdemeanor for the first offense and a Class I misdemeanor for a second or subsequent offense.

(4)(a) This section becomes operative on January 1, 2004, with respect to any cash register or other machine or device that electronically prints receipts for payment card transactions and that is originally put into use on or after January 1, 2004.

(b) This section becomes operative on January 1, 2007, with respect to any cash register or other machine or device that electronically prints receipts for payment card transactions and that is originally put into use before January 1, 2004.

Source: Laws 2002, LB 276, § 5.

28-634 Payment cards; prohibited use of scanning device or reencoder; violation; penalty.

(1) It is unlawful for a person to use:

(a) A scanning device to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card without the permission of the authorized user of the payment card and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant; or

(b) A reencoder to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card without the permission of the authorized user of the card from which the information is being reencoded and with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

(2) A violation of this section is a Class IV felony for the first offense and a Class IIIA felony for a second or subsequent offense.

Source: Laws 2002, LB 276, § 6.

28-635 Motor vehicle; inflatable restraint system; prohibited acts; penalty.

(1) No person shall knowingly install or reinstall in a motor vehicle, as part of the motor vehicle's inflatable restraint system, any object or material other than an air bag designed for the make, model, and year of the motor vehicle.

(2) A person violating this section is guilty of a Class I misdemeanor.

Source: Laws 2003, LB 17, § 6.

ARTICLE 7

OFFENSES INVOLVING THE FAMILY RELATION

Section

Section
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28-701 Bigamy; penalty; exception.

(1) If any married person, having a husband or wife living, shall marry any other person, he shall be deemed guilty of bigamy, unless as an affirmative defense it appears that at the time of the subsequent marriage:

(a) The accused reasonably believes that the prior spouse is dead; or

(b) The prior spouse had been continually absent for a period of five years during which the accused did not know the prior spouse to be alive; or

(c) The accused reasonably believed that he was legally eligible to remarry.

(2) Any unmarried person who knowingly marries a person who is married commits bigamy.

(3) Bigamy is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 140.

28-702 Incestuous marriages; declared void.

Incestuous marriages are marriages between parents and children, grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, aunts and nephews. Incestuous marriages are declared to be absolutely void. This section shall extend to children and relations born out of wedlock.

Source: Laws 1977, LB 38, § 141.

28-703 Incest; penalty.

(1) Any person who shall knowingly intermarry or engage in sexual penetration with any person who falls within the degrees of consanguinity set forth in section 28-702 or any person who engages in sexual penetration with his or her minor stepchild commits incest.

(2) Incest is a Class III felony.

(3)(a) For purposes of this section, the definitions found in section 28-318 shall be used.

(b) The testimony of a victim shall be entitled to the same weight as the testimony of victims of other crimes under this code.

Source: Laws 1977, LB 38, § 142; Laws 1978, LB 748, § 9; Laws 1985, LB 89, § 1.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

For purposes of the incest statute, a ''minor'' is defined as a child under the age of 19. State v. Johnson, 12 Neb. App. 247, 670 N.W.2d 802 (2003).

28-704 Repealed. Laws 1995, LB 22, § 1.

28-705 Abandonment of spouse, child, or dependent stepchild; prohibited acts; penalty.

(1) Any person who abandons and neglects or refuses to maintain or provide for his or her spouse or his or her child or dependent stepchild, whether such child is born in or out of wedlock, commits abandonment of spouse, child, or dependent stepchild.

(2) For the purposes of this section, child shall mean an individual under the age of sixteen years.

(3) When any person abandons and neglects to provide for his or her spouse or his or her child or dependent stepchild for three consecutive months or more, it shall be prima facie evidence of intent to violate the provisions of subsection (1) of this section.

(4) A designation of assets for or use of income by an individual in accordance with section 68-922 shall be considered just cause for failure to use such assets or income to provide medical support of such individual's spouse.

(5) Abandonment of spouse, child, or dependent stepchild is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 144; Laws 1978, LB 748, § 11; Laws 1988, LB 419, § 10; Laws 1989, LB 362, § 1; Laws 2006, LB 1248, § 51.

28-706 Criminal nonsupport; penalty; exceptions.

(1) Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport.

(2) A parent or guardian who refuses to pay hospital costs, medical costs, or any other costs arising out of or in connection with an abortion procedure performed on a minor child or minor stepchild does not commit criminal nonsupport if:

(a) Such parent or guardian was not consulted prior to the abortion procedure; or

(b) After consultation, such parent or guardian refused to grant consent for such procedure, and the abortion procedure was not necessary to preserve the minor child or stepchild from an imminent peril that substantially endangered her life or health.

(3) Support includes, but is not limited to, food, clothing, medical care, and shelter.

(4) A designation of assets for or use of income by an individual in accordance with section 68-922 shall be considered just cause for failure to use such assets or income to provide medical support of such individual's spouse.

(5) This section does not exclude any applicable civil remedy.

(6) Except as provided in subsection (7) of this section, criminal nonsupport is a Class II misdemeanor.

(7) Criminal nonsupport is a Class IV felony if it is in violation of any order of any court.

Source: Laws 1977, LB 38, § 145; Laws 1978, LB 920, § 3; Laws 1988, LB 419, § 11; Laws 1989, LB 362, § 2; Laws 2006, LB 1248, § 52.

An assertion that defendant did not pay child support in mistaken belief that the trial court's order relieved him of such responsibility if visitation rights were terminated does not negate the intent necessary for violation of this section. State v. Beck, 238 Neb. 449, 471 N.W.2d 128 (1991).

Under subsection (1) of this section, ''intentionally'' means willfully or purposely, and not accidentally or involuntarily. State v. Bright, 238 Neb. 348, 470 N.W.2d 181 (1991).

A prison sentence imposed for failure to support one's children does not constitute an imprisonment for debt within the prohibition contained in Article 1, section 20, of the Nebraska Constitution, nor does it constitute cruel and unusual punishment. State v. Reuter, 216 Neb. 325, 343 N.W.2d 907 (1984).

Prosecution under section 28-449 of the old criminal code could be brought for failure to support wife, child, or stepchild, even though a child support judgment, either incident to a decree of divorce or separation or otherwise, has been entered against the person charged. Where a person prosecuted under such section has previously been ordered to pay child support in a divorce decree, the measure of his liability is the amount provided in the decree. State v. Easley, 207 Neb. 443, 299 N.W.2d 439 (1980).

Intent is an essential element of the crime of nonsupport. State v. Noll, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

A defendant in a State-initiated paternity action has an absolute right to be represented by counsel, and the trial court in such an action must make an initial determination regarding whether the defendant is indigent and whether the defendant should be appointed counsel. State v. Yelli, 3 Neb. App. 148, 524 N.W.2d 353 (1994).

Intent is one of the essential elements of the crime of criminal nonsupport. State v. Noll, 2 Neb. App. 73, 507 N.W.2d 44 (1993).

28-707 Child abuse; privileges not available; penalties.

(1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:

(a) Placed in a situation that endangers his or her life or physical or mental health;

(b) Cruelly confined or cruelly punished;

(c) Deprived of necessary food, clothing, shelter, or care;

(d) Placed in a situation to be sexually exploited by allowing, encouraging, or forcing such minor child to solicit for or engage in prostitution, debauchery, public indecency, or obscene or pornographic photography, films, or depictions; or

(e) Placed in a situation to be sexually abused as defined in section 28-319, 28-319.01, or 28-320.01.

(2) The statutory privilege between patient and physician, between client and professional counselor, and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for a violation of this section.

(3) Child abuse is a Class I misdemeanor if the offense is committed negligently.

(4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.

(5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.

(6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

Source: Laws 1977, LB 38, § 146; Laws 1982, LB 347, § 10; Laws 1993, LB 130, § 3; Laws 1993, LB 430, § 3; Laws 1994, LB 908, § 1; Laws 1996, LB 645, § 15; Laws 1997, LB 364, § 9; Laws 2006, LB 1199, § 9.

Cross References

Appointment of guardian ad litem, see section 43-272.01.

Evidence must be sufficient for the factfinder to conclude beyond a reasonable doubt that the unlawful conduct resulted in death. State v. Muro, 269 Neb. 703, 695 N.W.2d 425 (2005).

This section contains multiple gradations of felony child abuse, depending upon the result of the abusive conduct. State v. Muro, 269 Neb. 703, 695 N.W.2d 425 (2005).

Misdemeanor child abuse is a lesser-included offense of felony child abuse. State v. Parks, 253 Neb. 939, 573 N.W.2d 453 (1998).

''Endangers'' as used in subsection (1)(a) of this section means to expose a minor child's life or health to danger or the peril of probable harm or loss. State v. Crowdell, 234 Neb. 469, 451 N.W.2d 695 (1990).

Subsections (1)(a) and (c) of this section are not void for vagueness and are thus constitutional. State v. Crowdell, 234 Neb. 469, 451 N.W.2d 695 (1990).

The term cruelly punished as used in this statute has acquired a relatively widely accepted connotation in the law and is capable of an easily understood meaning. State v. Sinica, 220 Neb. 792, 372 N.W.2d 445 (1985).

A general finding of guilt under this section would not be a finding of felony assault because it is possible to commit the crime of child abuse by means other than by felony assault. In re Interest of Janet J., 12 Neb. App. 42, 666 N.W.2d 741 (2003).

Jury instruction given by trial court adequately distinguished the crimes of intentional child abuse and negligent child abuse. State v. Fitzgerald, 1 Neb. App. 315, 493 N.W.2d 357 (1992).

28-708 Repealed. Laws 1988, LB 463, § 50.

28-709 Contributing to the delinquency of a child; penalty; definitions.

(1) Any person who, by any act, encourages, causes, or contributes to the delinquency or need for special supervision of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent child, or a child in need of special supervision, commits contributing to the delinquency of a child.

(2) The following definitions shall be applicable to this section:

(a) Delinquent child shall mean any child under the age of eighteen years who has violated any law of the state or any city or village ordinance; and

(b) A child in need of special supervision shall mean any child under the age of eighteen years (i) who, by reason of being wayward or habitually disobedient,

is uncontrolled by his parent, guardian, or custodian; (ii) who is habitually truant from school or home; or (iii) who deports himself so as to injure or endanger seriously the morals or health of himself or others.

(3) Contributing to the delinquency of a child is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 148.

This section prohibits any person from engaging in conduct that encourages, causes, or contributes to a child's becoming or tending to become either a delinquent child under subsection (2)(a) or a child in need of special supervision under subsection (2)(b). A defendant's requests that a child under 18 years of age meet him during the evening or in the early hours of the morning for sexual encounters encourages, causes, and contributes to the child's violations of Nebraska state law and a city ordinance. A defendant who engages in conduct clearly prohibited by subsection (1) of this section lacks standing to challenge the constitutionality of this section on vagueness grounds. State v. VanAckeren, 263 Neb. 222, 639 N.W.2d 112 (2002).

The act of affording shelter to a runaway rather than immediately contacting the authorities does not necessarily constitute contributing to the delinquency of a child, especially when the person affording shelter did not induce or encourage the youth to leave home in the first place. Evidence that defendant harbored an underage runaway and withheld information regarding the youth's whereabouts from her parents and the police for several hours was insufficient as a matter of law to sustain a conviction for contributing to the delinquency of a child where the youth was not exposed to any unlawful or immoral activity and defendant's actions resulted in a reunion with the parents. State v. Hird, 239 Neb. 331, 476 N.W.2d 229 (1991).

Subsection (1) of this section is addressed to the conduct of the person accused of contributing to the delinquency of a child, not the conduct of the child. The statute does not require that the child actually become delinquent or in need of special supervision, but only that the defendant encourage the child to become delinquent or to need special supervision so that the child will ''tend to become a delinquent child or a child in need of special supervision.'' State v. Brister, 231 Neb. 263, 435 N.W.2d 679 (1989).

Constitutionality of this section will not be considered when raised for the first time on appeal. State v. Hiross, 211 Neb. 319, 318 N.W.2d 291 (1982).

28-710 Act, how cited; terms, defined.

(1) Sections 28-710 to 28-727 shall be known and may be cited as the Child Protection Act.

(2) For purposes of the Child Protection Act:

(a) Child abuse or neglect means knowingly, intentionally, or negligently causing or permitting a minor child to be:

(i) Placed in a situation that endangers his or her life or physical or mental health;

(ii) Cruelly confined or cruelly punished;

(iii) Deprived of necessary food, clothing, shelter, or care;

(iv) Left unattended in a motor vehicle if such minor child is six years of age or younger;

(v) Sexually abused; or

(vi) Sexually exploited by allowing, encouraging, or forcing such person to solicit for or engage in prostitution, debauchery, public indecency, or obscene or pornographic photography, films, or depictions;

(b) Department means the Department of Health and Human Services;

(c) Law enforcement agency means the police department or town marshal in incorporated municipalities, the office of the sheriff in unincorporated areas, and the Nebraska State Patrol;

(d) Out-of-home child abuse or neglect means child abuse or neglect occurring in day care homes, foster homes, day care centers, group homes, and other child care facilities or institutions; and

(e) Subject of the report of child abuse or neglect means the person or persons identified in the report as responsible for the child abuse or neglect.

Source: Laws 1977, LB 38, § 149; Laws 1979, LB 505, § 1; Laws 1982, LB 522, § 3; Laws 1985, LB 447, § 10; Laws 1988, LB 463,

§ 42; Laws 1992, LB 1184, § 9; Laws 1994, LB 1035, § 2; Laws 1996, LB 1044, § 71; Laws 1997, LB 119, § 1; Laws 2005, LB 116, § 1.

28-711 Child subjected to abuse or neglect; report; contents; toll-free number.

(1) When any physician, medical institution, nurse, school employee, social worker, or other person has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made to the proper law enforcement agency or to the department on the toll-free number established by subsection (2) of this section. Such report may be made orally by telephone with the caller giving his or her name and address, shall be followed by a written report, and to the extent available shall contain the address and age of the abused or neglected child, the address of the person or persons having custody of the abused or neglected child, the nature and extent of the child abuse or neglect or the conditions and circumstances which would reasonably result in such child abuse or neglect, any evidence of previous child abuse or neglect including the nature and extent, and any other information which in the opinion of the person may be helpful in establishing the cause of such child abuse or neglect and the identity of the perpetrator or perpetrators. Law enforcement agencies receiving any reports of child abuse or neglect under this subsection shall notify the department pursuant to section 28-718 on the next working day by telephone or mail.

(2) The department shall establish a statewide toll-free number to be used by any person any hour of the day or night, any day of the week, to make reports of child abuse or neglect. Reports of child abuse or neglect not previously made to or by a law enforcement agency shall be made immediately to such agency by the department.

Source: Laws 1977, LB 38, § 150; Laws 1979, LB 505, § 2; Laws 1982, LB 522, § 4; Laws 1988, LB 463, § 43; Laws 2002, LB 1105, § 432; Laws 2005, LB 116, § 2.

28-712 Repealed. Laws 1992, LB 1184, § 25.

28-713 Reports of child abuse or neglect; law enforcement agency; department; duties.

Upon the receipt of a call reporting child abuse and neglect as required by section 28-711:

(1) It is the duty of the law enforcement agency to investigate the report, to take immediate steps to protect the child, and to institute legal proceedings if appropriate. In situations of alleged out-of-home child abuse or neglect if the person or persons to be notified have not already been notified and the person to be notified is not the subject of the report of child abuse or neglect, the law enforcement agency shall immediately notify the person or persons having custody of each child who has allegedly been abused or neglected that such report of alleged child abuse or neglect has been made and shall provide such person or persons with information of the nature of the alleged child abuse or neglect. The law enforcement agency may request assistance from the depart-

ment during the investigation and shall, by the next working day, notify either the hotline or the department of receipt of the report, including whether or not an investigation is being undertaken by the law enforcement agency. A copy of all reports, whether or not an investigation is being undertaken, shall be provided to the department;

(2) In situations of alleged out-of-home child abuse or neglect if the person or persons to be notified have not already been notified and the person to be notified is not the subject of the report of child abuse or neglect, the department shall immediately notify the person or persons having custody of each child who has allegedly been abused or neglected that such report of alleged child abuse or neglect has been made and shall provide such person or persons with information of the nature of the alleged child abuse or neglect and any other information that the department deems necessary. The department shall investigate for the purpose of assessing each report of child abuse or neglect to determine the risk of harm to the child involved. The department shall also provide such social services as are necessary and appropriate under the circumstances to protect and assist the child and to preserve the family;

(3) The department may make a request for further assistance from the appropriate law enforcement agency or take such legal action as may be appropriate under the circumstances;

(4) The department shall, by the next working day after receiving a report of child abuse or neglect under subdivision (1) of this section, make a written report or a summary on forms provided by the department to the proper law enforcement agency in the county and enter in the tracking system of child protection cases maintained pursuant to section 28-715 all reports of child abuse or neglect opened for investigation and any action taken; and

(5) The department shall, upon request, make available to the appropriate investigating law enforcement agency and the county attorney a copy of all reports relative to a case of suspected child abuse or neglect.

Source: Laws 1977, LB 38, § 152; Laws 1979, LB 505, § 4; Laws 1982, LB 522, § 5; Laws 1988, LB 463, § 45; Laws 1992, LB 1184, § 10; Laws 1996, LB 1044, § 72; Laws 1997, LB 119, § 2; Laws 1997, LB 307, § 13; Laws 2005, LB 116, § 3; Laws 2007, LB296, § 37.

28-713.01 Cases of child abuse or neglect; completion of investigation; notice; when.

Upon completion of the investigation pursuant to section 28-713:

(1) In situations of alleged out-of-home child abuse or neglect, the person or persons having custody of the allegedly abused or neglected child or children shall be given written notice of the results of the investigation and any other information the law enforcement agency or department deems necessary. Such notice and information shall be sent by first-class mail; and

(2) The subject of the report of child abuse or neglect shall be given written notice of the determination of the case and whether the subject of the report of child abuse or neglect will be entered into the central register of child protection cases maintained pursuant to section 28-718 under the criteria provided in section 28-720.

Such notice to the subject shall be sent by certified mail to the last-known address of the subject of the report of child abuse or neglect and shall include:

(a) The nature of the report;

(b) The classification of the report under section 28-720; and

(c) Notification of the right of the subject of the report of child abuse or neglect to a hearing and appeal in accordance with section 28-723.

Source: Laws 1994, LB 1035, § 3; Laws 1997, LB 119, § 3; Laws 2005, LB 116, § 4.

28-714 Privileged communications; not grounds for excluding evidence.

The privileged communication between patient and physician, between client and professional counselor, and between husband and wife shall not be a ground for excluding evidence in any judicial proceeding resulting from a report of child abuse or neglect required by section 28-711.

Source: Laws 1977, LB 38, § 153; Laws 1993, LB 130, § 4; Laws 1994, LB 1035, § 4; Laws 2005, LB 116, § 5.

28-715 Tracking system; department; duties; use authorized.

The department shall retain all information from all reports of suspected child abuse or neglect required by section 28-711 and all records generated as a result of such reports in a tracking system of child protection cases. The tracking system shall be used for statistical purposes as well as a reference for future investigations if subsequent reports of child abuse or neglect are made involving the same victim or subject of a report of child abuse or neglect.

Source: Laws 1977, LB 38, § 154; Laws 1979, LB 505, § 5; Laws 1988, LB 463, § 46; Laws 2005, LB 116, § 6.

28-716 Person participating in an investigation or making report; immune from liability; civil or criminal.

Any person participating in an investigation or the making of a report of child abuse or neglect required by section 28-711 pursuant to or participating in a judicial proceeding resulting therefrom shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed, except for maliciously false statements.

Source: Laws 1977, LB 38, § 155; Laws 1994, LB 1035, § 5; Laws 2005, LB 116, § 7.

The immunity from liability under state law provided by this section does not apply to a claim advanced under federal law, even if that claim is litigated in a Nebraska court. Shearer v. Leuenberger, 256 Neb. 566, 591 N.W.2d 762 (1999).

28-717 Violation; penalty.

Any person who willfully fails to make any report of child abuse or neglect required by section 28-711 shall be guilty of a Class III misdemeanor.

Source: Laws 1977, LB 38, § 156; Laws 1994, LB 1035, § 6; Laws 2005, LB 116, § 8.

28-718 Child protection cases; central register.

There shall be a central register of child protection cases maintained in the department containing records of all reports of child abuse or neglect opened

for investigation as provided in section 28-713 and classified as either court substantiated or inconclusive as provided in section 28-720.

Source: Laws 1979, LB 505, § 6; Laws 2005, LB 116, § 9.

28-719 Child abuse and neglect records; access; when.

Upon complying with identification requirements established by regulation of the department, or when ordered by a court of competent jurisdiction, any person legally authorized by section 28-722, 28-726, or 28-727 to have access to records relating to child abuse and neglect may request and shall be immediately provided the information requested in accordance with the requirement of the Child Protection Act. Such information shall not include the name and address of the person making the report of child abuse or neglect. The names and other identifying data and the dates and the circumstances of any persons requesting or receiving information from the central register of child protection cases maintained pursuant to section 28-718 shall be entered in such register record.

Source: Laws 1979, LB 505, § 7; Laws 2005, LB 116, § 10.

28-720 Cases; central register; classification.

All cases entered into the central register of child protection cases maintained pursuant to section 28-718 shall be classified as one of the following:

(1) Court substantiated, if a court of competent jurisdiction has entered a judgment of guilty against the subject of the report of child abuse or neglect upon a criminal complaint, indictment, or information or there has been an adjudication of jurisdiction of a juvenile court over the child under subdivision (3)(a) of section 43-247 which relates or pertains to the report of child abuse or neglect;

(2) Court pending, if a criminal complaint, indictment, or information or a juvenile petition under subdivision (3)(a) of section 43-247, which relates or pertains to the subject of the report of abuse or neglect, has been filed and is pending in a court of competent jurisdiction; or

(3) Inconclusive, if the department's determination of child abuse or neglect against the subject of the report of child abuse or neglect was made, by a preponderance of the evidence, based upon an investigation pursuant to section 28-713.

Source: Laws 1979, LB 505, § 8; Laws 2005, LB 116, § 11.

28-720.01 Unfounded reports; how treated.

All reports of child abuse or neglect which are not under subdivision (1), (2), or (3) of section 28-720 shall be considered unfounded and shall be maintained only in the tracking system of child protection cases pursuant to section 28-715 and not in the central register of child protection cases maintained pursuant to section 28-718.

Source: Laws 2005, LB 116, § 12.

28-721 Central register; record; amend, expunge, or remove.

At any time, the department may amend, expunge, or remove from the central register of child protection cases maintained pursuant to section 28-718

any record upon good cause shown and upon notice to the subject of the report of child abuse or neglect.

Source: Laws 1979, LB 505, § 9; Laws 2005, LB 116, § 13; Laws 2007, LB296, § 38.

28-722 Central register; subject of report; access to information.

Upon request, a subject of the report of child abuse or neglect or, if such subject is a minor or otherwise legally incompetent, the guardian or guardian ad litem of the subject, shall be entitled to receive a copy of all information contained in the central register of child protection cases maintained pursuant to section 28-718 pertaining to his or her case. The department shall not release data that would be harmful or detrimental or that would identify or locate a person who, in good faith, made a report of child abuse or neglect or cooperated in a subsequent investigation unless ordered to do so by a court of competent jurisdiction.

Source: Laws 1979, LB 505, § 10; Laws 2005, LB 116, § 14.

28-723 Subject of report; request to amend, expunge, or remove information; denied; hearing; decision; appeal.

At any time subsequent to the completion of the department's investigation, the subject of the report of child abuse or neglect may request the department to amend, expunge identifying information from, or remove the record of the report from the central register of child protection cases maintained pursuant to section 28-718. If the department refuses to do so or does not act within thirty days, the subject of the report of child abuse or neglect shall have the right to a fair hearing within the department to determine whether the record of the report of child abuse or neglect should be amended, expunged, or removed on the grounds that it is inaccurate or that it is being maintained in a manner inconsistent with the Child Protection Act. Such fair hearing shall be held within a reasonable time after the subject's request and at a reasonable place and hour. In such hearings, the burden of proving the accuracy and consistency of the record shall be on the department. A juvenile court finding of child abuse or child neglect shall be presumptive evidence that the report was not unfounded. The hearing shall be conducted by the head of the department or his or her designated agent, who is hereby authorized and empowered to order the amendment, expunction, or removal of the record to make it accurate or consistent with the requirements of the act. The decision shall be made in writing, at the close of the hearing, or within thirty days thereof, and shall state the reasons upon which it is based. Decisions of the department may be appealed under the provisions of the Administrative Procedure Act.

Source: Laws 1979, LB 505, § 11; Laws 1982, LB 522, § 6; Laws 2005, LB 116, § 15.

Cross References

Administrative Procedure Act, see section 84-920.

The Department of Health and Human Services Regulation and Licensure must prove the accuracy and consistency of a central registry report of child abuse or neglect by a preponderance of the evidence in a hearing to expunge, amend, or remove a report under this section. Benitez v. Rasmussen, 261 Neb. 806, 626 N.W.2d 209 (2001).

28-724 Record; amendment, expunction, or removal; notice.

Written notice of any amendment, expunction, or removal of any record in the central register of child protection cases maintained pursuant to section

28-718 shall be served upon the subject of the report of child abuse or neglect. The department shall inform any other individuals or agencies which received such record of any amendment, expunction, or removal of such record.

Source: Laws 1979, LB 505, § 12; Laws 1982, LB 522, § 7; Laws 2005, LB 116, § 16.

28-725 Information, report; confidential; violation; penalty.

All information of the department concerning reports of child abuse or neglect of noninstitutional children, including information in the tracking system of child protection cases maintained pursuant to section 28-715 or records in the central register of child protection cases maintained pursuant to section 28-718, and all information of the department generated as a result of such reports or records, shall be confidential and shall not be disclosed except as specifically authorized by the Child Protection Act and section 81-3126 or other applicable law. The subject of the report of child abuse or neglect may authorize any individual or organization to receive the following information from the central register of child protection cases maintained pursuant to section 28-718 which relates or pertains to him or her: (1) The date of the alleged child abuse or neglect; and (2) the classification of the case pursuant to section 28-720. Permitting, assisting, or encouraging the unauthorized release of any information contained in such reports or records shall be a Class V misdemeanor.

Source: Laws 1979, LB 505, § 13; Laws 1982, LB 522, § 8; Laws 2002, LB 642, § 7; Laws 2005, LB 116, § 17; Laws 2008, LB782, § 2. Effective date March 11, 2008.

28-726 Information; access.

Except as provided in this section and sections 28-722 and 81-3126, no person, official, or agency shall have access to information in the tracking system of child protection cases maintained pursuant to section 28-715 or in records in the central register of child protection cases maintained pursuant to section 28-718 unless in furtherance of purposes directly connected with the administration of the Child Protection Act. Such persons, officials, and agencies having access to such information shall include, but not be limited to:

(1) A law enforcement agency investigating a report of known or suspected child abuse or neglect;

(2) A county attorney in preparation of a child abuse or neglect petition or termination of parental rights petition;

(3) A physician who has before him or her a child whom he or she reasonably suspects may be abused or neglected;

(4) An agency having the legal responsibility or authorization to care for, treat, or supervise an abused or neglected child or a parent, a guardian, or other person responsible for the abused or neglected child's welfare who is the subject of the report of child abuse or neglect;

(5) Any person engaged in bona fide research or auditing. No information identifying the subjects of the report of child abuse or neglect shall be made available to the researcher or auditor;

(6) The State Foster Care Review Board when the information relates to a child in a foster care placement as defined in section 43-1301. The information

provided to the state board shall not include the name or identity of any person making a report of suspected child abuse or neglect;

(7) The designated protection and advocacy system authorized pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001, as the act existed on January 1, 2005, and the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. 10801, as the act existed on September 1, 2001, acting upon a complaint received from or on behalf of a person with developmental disabilities or mental illness;

(8) The person or persons having custody of the abused or neglected child in situations of alleged out-of-home child abuse or neglect; and

(9) For purposes of licensing providers of child care programs, the Department of Health and Human Services.

Source: Laws 1979, LB 505, § 14; Laws 1982, LB 522, § 9; Laws 1988, LB 463, § 47; Laws 1990, LB 1222, § 1; Laws 1992, LB 643, § 2; Laws 1994, LB 1035, § 7; Laws 1997, LB 119, § 4; Laws 2001, LB 214, § 2; Laws 2002, LB 642, § 8; Laws 2005, LB 116, § 18; Laws 2007, LB296, § 39; Laws 2008, LB782, § 3.
Effective date March 11, 2008.

28-727 Report; person making; receive summary of findings and actions; when.

Upon request, a physician or the person in charge of an institution, school, facility, or agency making a legally mandated report of child abuse or neglect pursuant to section 28-711 shall receive a summary of the findings of and actions taken by the department in response to his or her report. The amount of detail such summary contains shall depend on the source of the report of child abuse or neglect and shall be established by regulations of the department.

Source: Laws 1979, LB 505, § 15; Laws 1982, LB 522, § 10; Laws 2005, LB 116, § 19.

28-728 Legislative findings and intent; child abuse and neglect investigation team; child advocacy center; child abuse and neglect treatment team; powers and duties.

(1) The Legislature finds that child abuse and neglect are community problems requiring a cooperative complementary response by law enforcement, child advocacy centers, prosecutors, the Department of Health and Human Services, and other agencies or entities designed to protect children. It is the intent of the Legislature to create a child abuse and neglect investigation team in each county or contiguous group of counties and to create a child abuse and neglect treatment team in each county or contiguous group of counties.

(2) Each county or contiguous group of counties will be assigned by the Department of Health and Human Services to a child advocacy center. The purpose of a child advocacy center is to provide a child-focused response to support the physical, emotional, and psychological needs of children who are victims of abuse or neglect. Each child advocacy center shall meet accreditation criteria set forth by the National Children's Alliance. Nothing in this section shall prevent a child from receiving treatment or other services at a child advocacy center which has received or is in the process of receiving accreditation.

(3) Each county attorney or the county attorney representing a contiguous group of counties is responsible for convening the child abuse and neglect investigation team and ensuring that protocols are established and implemented. A representative of the child advocacy center assigned to the team shall assist the county attorney in facilitating case review, developing and updating protocols, and arranging training opportunities for the team. Each team must have protocols which, at a minimum, shall include procedures for:

(a) Conducting joint investigations of child abuse and other child abuse and neglect matters which the team deems necessary;

(b) Ensuring that a law enforcement agency will participate in the investigation;

(c) Conducting joint investigations of other child abuse and neglect matters which the team deems necessary;

(d) Arranging for a videotaped forensic interview at a child advocacy center for children sixteen years of age or younger who are alleging sexual abuse or serious physical abuse or neglect or who have witnessed a violent crime, been removed from a clandestine drug lab, or been recovered from a kidnapping;

(e) Reducing the risk of harm to child abuse and neglect victims;

(f) Ensuring that the child is in safe surroundings, including removing the perpetrator when necessary;

(g) Sharing of case information;

(h) How and when the team will meet; and

(i) Responding to drug-endangered children.

(4) Each county attorney or the county attorney representing a contiguous group of counties is responsible for convening the child abuse and neglect treatment team and ensuring that protocols are established and implemented. A representative of the child advocacy center appointed to the team shall assist the county attorney in facilitating case review, developing and updating protocols, and arranging training opportunities for the team. Each team must have protocols which, at a minimum, shall include procedures for:

(a) Case coordination and assistance, including the location of services available within the area;

(b) Case staffings and the coordination, development, implementation, and monitoring of treatment plans;

(c) Reducing the risk of harm to child abuse and neglect victims;

(d) Assisting those child abuse and neglect victims who are abused and neglected by perpetrators who do not reside in their homes;

(e) How and when the team will meet; and

(f) Working with multiproblem delinquent youth.

Source: Laws 1992, LB 1184, § 1; Laws 1996, LB 1044, § 73; Laws 1999, LB 594, § 6; Laws 2006, LB 1113, § 24; Laws 2007, LB296, § 40.

28-729 Teams; members; training; county attorney; duties; meetings; annual report.

(1) A child abuse and neglect investigation team shall include a representative from the county attorney's office, a child protective services representative from

the Department of Health and Human Services, a representative from each law enforcement agency which has jurisdiction within the county or contiguous group of counties, a representative from the child advocacy center, and representatives from such other agencies as determined by the team.

(2) A child abuse and neglect treatment team shall include a child protective services representative from the Department of Health and Human Services, a juvenile probation officer, a representative from the mental health profession or medical profession actively practicing within the county or contiguous group of counties, a representative from each school district which provides services within the county or contiguous group of counties, a representative from the child advocacy center, and representatives from such other agencies as determined by the team. For purposes of this subsection, more than one school district may be represented by the same individual.

(3) The teams established pursuant to this section and section 28-728 shall be encouraged to expand their membership to include the various relevant disciplines which exist within the county or contiguous group of counties. The additional members shall have the requisite experience necessary as determined by the core members of the teams. Consistent with requirements set out by the teams, all members of both teams shall attend child abuse and neglect training on an annual basis. Such training shall be no less than eight hours annually and consist of the following components:

(a) Child abuse and neglect investigation procedures as provided by law enforcement standards;

(b) Legal requirements and procedures for successful prosecution of child abuse and neglect cases;

(c) Roles and responsibilities of child protective services, law enforcement agencies, county attorneys, the Attorney General, and judges;

(d) Characteristics of child development and family dynamics;

(e) Recognition of various types of abuse and neglect;

(f) Duty of public and private individuals and agencies, including schools, governmental agencies, physicians, and child advocates, to report suspected or known child abuse;

(g) Multidisciplinary approaches to providing services to children; and

(h) Weaknesses in the current child protection system.

(4) The representative of the county attorney shall report the name and address of each team member to the Nebraska Commission on Law Enforcement and Criminal Justice. If more than one county is part of a team, the representative of the participating county attorneys shall jointly and cooperatively report their results to the commission.

(5) Each team shall meet at a location agreed to by the team. The number of meetings of the team shall be secondary to the caseload of the team, but each team shall meet at least quarterly. The representative from the child advocacy center assigned to the team shall annually report to the commission the number of times the team met within a calendar year and any changes in team membership. Each team shall select a chairperson annually in the first quarter of each calendar year. Each team may substitute a telephone conference call among team members in lieu of meeting in person. If a team fails to convene, the commission shall notify the Child Protection Division of the office of the Attorney General and the division shall appoint the team members or convene

the team pursuant to sections 28-728 to 28-730. Nothing in this section shall relieve the county attorney from ensuring that the teams meet as required by this section.

Source: Laws 1992, LB 1184, § 2; Laws 1996, LB 1044, § 74; Laws 2006, LB 1113, § 25.

28-730 Records and information; access; disclosure; limitation; review of cases; immunity; violation; penalty.

(1) Notwithstanding any other provision of law regarding the confidentiality of records and when not prohibited by the federal Privacy Act of 1974, as amended, juvenile court records and any other pertinent information that may be in the possession of school districts, law enforcement agencies, county attorneys, the Attorney General, the Department of Health and Human Services, child advocacy centers, and other team members concerning a child whose case is being investigated or discussed by a child abuse and neglect investigation team or a child abuse and neglect treatment team shall be shared with the respective team members as part of the discussion and coordination of efforts for investigative or treatment purposes. Upon request by a team, any individual or agency with information or records concerning a particular child shall share all relevant information or records with the team as determined by the team pursuant to the appropriate team protocol. Only a team which has accepted the child's case for investigation or treatment shall be entitled to access to such information.

(2) All information acquired by a team member or other individuals pursuant to protocols developed by the team shall be confidential and shall not be disclosed except to the extent necessary to perform case consultations, to carry out a treatment plan or recommendations, or for use in a legal proceeding instituted by a county attorney or the Child Protection Division of the office of the Attorney General. Information, documents, or records otherwise available from the original sources shall not be immune from discovery or use in any civil or criminal action merely because the information, documents, or records were presented during a case consultation if the testimony sought is otherwise permissible and discoverable. Any person who presented information before the team or who is a team member shall not be prevented from testifying as to matters within the person's knowledge.

(3) Each team may review any case arising under the Nebraska Criminal Code when a child is a victim or any case arising under the Nebraska Juvenile Code. A member of a team who participates in good faith in team discussion or any person who in good faith cooperates with a team by providing information or records about a child whose case has been accepted for investigation or treatment by a team shall be immune from any civil or criminal liability. The provisions of this subsection or any other section granting or allowing the grant of immunity from liability shall not be extended to any person alleged to have committed an act of child abuse or neglect.

(4) A member of a team who publicly discloses information regarding a case consultation in a manner not consistent with sections 28-728 to 28-730 shall be guilty of a Class III misdemeanor.

Source: Laws 1992, LB 1184, § 3; Laws 1996, LB 1044, § 75; Laws 2006, LB 1113, § 26.

Cross References

Nebraska Juvenile Code, see section 43-2,129.

28-731 Teams; exempt from Open Meetings Act.

The teams established by sections 28-728 to 28-730 shall not be considered a public body for purposes of the Open Meetings Act.

Source: Laws 1992, LB 1184, § 4; Laws 2004, LB 821, § 10.

Cross References

Open Meetings Act, see section 84-1407.

28-732 Failure to establish teams; requirements.

If a county or contiguous group of counties does not establish the teams required by sections 28-728 to 28-730, it shall establish a program of child abuse and neglect investigation and treatment services to accomplish the goals of section 28-728. Such program shall be submitted to the Nebraska Commission on Law Enforcement and Criminal Justice, prior to July 15, 1993, to ensure that such program meets the goals of section 28-728. If the commission does not recognize such program as meeting the goals of such section, the commission shall make recommendations for changes to the program and establish an appropriate time period for the changes to be adopted. In the event an agreement cannot be reached between the commission and the county or contiguous group of counties proposing the alternative program, sections 28-728 to 28-730 shall be met with implementation to begin within one year.

Source: Laws 1992, LB 1184, § 5.

28-733 Sections; when operative.

Sections 28-728 to 28-732 shall become operative July 15, 1993, except that the creation and appointment of the child abuse and neglect investigation and treatment teams and the development of protocols shall be made as soon after July 15, 1992, as possible.

Source: Laws 1992, LB 1184, § 6.

28-734 Repealed. Laws 2008, LB 782, § 5.

28-735 Repealed. Laws 2008, LB 782, § 5.

28-736 Repealed. Laws 2008, LB 782, § 5.

28-737 Repealed. Laws 2008, LB 782, § 5.

28-738 Repealed. Laws 2008, LB 782, § 5.

28-739 Repealed. Laws 2008, LB 782, § 5.

ARTICLE 8

OFFENSES RELATING TO MORALS

Section

28-801 Prostitution; penalty.

(1) Any person who performs, offers, or agrees to perform any act of sexual contact or sexual penetration, as those terms are defined in section 28-318, with any person not his or her spouse, in exchange for money or other thing of value, commits prostitution.

(2) Any person convicted of violating subsection (1) of this section shall be punished as follows:

(a) If such person has had no prior convictions or has had one prior conviction, such person shall be guilty of a Class II misdemeanor. If the court places such person on probation, such order of probation shall include, as one of its conditions, that such person shall satisfactorily attend and complete an appropriate mental health and substance abuse assessment conducted by a

licensed mental health professional or substance abuse professional authorized to complete such assessment; and

(b) If such person has had two or more prior convictions, such person shall be guilty of a Class I misdemeanor. If the court places such person on probation, such order of probation shall include, as one of its conditions, that such person shall satisfactorily attend and complete an appropriate mental health and substance abuse assessment conducted by a licensed mental health professional or substance abuse professional authorized to complete such assessment.

For purposes of this subsection, prior conviction means any conviction on or after July 14, 2006, for violation of subsection (1) of this section or any conviction on or after July 14, 2006, for violation of a city or village ordinance relating to prostitution.

Source: Laws 1977, LB 38, § 157; Laws 1985, LB 19, § 1; Laws 1987, LB 176, § 1; Laws 1989, LB 116, § 1; Laws 2006, LB 1086, § 7.

28-801.01 Solicitation of prostitution; penalty.

(1) Any person who solicits another person not his or her spouse to perform any act of sexual contact or sexual penetration, as those terms are defined in section 28-318, in exchange for money or other thing of value, commits solicitation of prostitution.

(2) Any person convicted of violating subsection (1) of this section shall be punished as follows:

(a) If such person has had no prior convictions, such person shall be guilty of a Class I misdemeanor and pay a fine of not less than two hundred fifty dollars. If the court places such person on probation, such order of probation shall include, as one of its conditions, the payment of a fine of not less than two hundred fifty dollars and such person shall satisfactorily attend and complete an appropriate mental health and substance abuse assessment conducted by a licensed mental health professional or substance abuse professional authorized to complete such assessment; and

(b) If such person has had one or more prior convictions, such person shall be guilty of a Class IV felony and pay a fine of not less than five hundred dollars. If the court places such person on probation, such order of probation shall include, as one of its conditions, the payment of a fine of not less than five hundred dollars and such person shall satisfactorily attend and complete an appropriate mental health and substance abuse assessment conducted by a licensed mental health professional or substance abuse professional authorized to complete such assessment.

Source: Laws 2006, LB 1086, § 8.

28-802 Pandering; penalty.

(1) A person commits pandering if such person:

(a) Entices another person to become a prostitute; or

(b) Procures or harbors therein an inmate for a house of prostitution or for any place where prostitution is practiced or allowed; or

(c) Inveigles, entices, persuades, encourages, or procures any person to come into or leave this state for the purpose of prostitution or debauchery; or

(d) Receives or gives or agrees to receive or give any money or other thing of value for procuring or attempting to procure any person to become a prostitute or commit an act of prostitution or come into this state or leave this state for the purpose of prostitution or debauchery.

(2) Pandering is a Class IV felony.

Source: Laws 1977, LB 38, § 158.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

This section does not violate the constitutional guarantee of equal protection, nor does it violate the constitutional prohibition against cruel and unusual punishment. State v. Ruzicka, 218 Neb. 594, 357 N.W.2d 457 (1984).

Debauching a minor is not a lesser-included offense of pandering. Mingus v. Fairbanks, 211 Neb. 81, 317 N.W.2d 770 (1982).

28-803 Pandering; evidence.

(1) Any person referred to in section 28-802 shall be a competent witness in any prosecution thereunder to testify to any and all matters, including conversation with the accused, or by the accused with third persons, in his presence, notwithstanding having married the accused either before or after the violation of any of the provisions of such section; and the act and state of marriage shall not be a defense to any violation of such section.

(2) Pandering shall be an exception to the husband-wife privilege as provided in section 27-505.

Source: Laws 1977, LB 38, § 159; Laws 1978, LB 748, § 12.

28-804 Keeping a place of prostitution; penalty.

(1) Any person who has or exercises control over the use of any place which offers seclusion or shelter for the practice of prostitution and who knowingly grants or permits the use of such place for the purpose of prostitution commits the offense of keeping a place of prostitution.

(2) Keeping a place of prostitution is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 160.

28-804.01 Prostitution cases; incriminating testimony; how treated.

In all cases arising under sections 28-801 to 28-804, no person shall be excused from testifying against another person by reason of such testimony tending to incriminate the person testifying, but the testimony so given, unless voluntary, shall in no case be used against the person so testifying in any criminal prosecution or otherwise.

Source: Laws 1978, LB 618, § 1; Laws 2006, LB 1086, § 9.

28-805 Debauching a minor; penalty.

(1) Any person not a minor commits the offense of debauching a minor if he or she shall debauch or deprave the morals of any boy or girl under the age of seventeen years by:

(a) Lewdly inducing such boy or girl carnally to know any other person; or

(b) Soliciting any such boy or girl to visit a house of prostitution or other place where prostitution, debauchery, or other immoral practices are permitted or encouraged, for the purpose of prostitution or sexual penetration; or

(c) Arranging or assisting in arranging any meeting for such purpose between any such boy or girl and any female or male of dissolute character or any inmate of any place where prostitution, debauchery, or other immoral practices are permitted or encouraged; or

(d) Arranging or aiding or assisting in arranging any meeting between any such boy or girl and any other person for the purpose of sexual penetration.

(2) Debauching a minor is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 161; Laws 1979, LB 378, § 12.

Debauching a minor is not a lesser-included offense of pandering. Mingus v. Fairbanks, 211 Neb. 81, 317 N.W.2d 770 (1982).

The words ''any other person'' are construed to mean any person other than the victim. State v. Parmer, 210 Neb. 92, 313 N.W.2d 237 (1981).

28-806 Public indecency; penalty.

(1) A person, eighteen years of age or over, commits public indecency if such person performs or procures, or assists any other person to perform, in a public place and where the conduct may reasonably be expected to be viewed by members of the public:

(a) An act of sexual penetration; or

(b) An exposure of the genitals of the body done with intent to affront or alarm any person; or

(c) A lewd fondling or caressing of the body of another person of the same or opposite sex.

(2) Public indecency is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 162.

28-807 Terms, defined.

As used in sections 28-807 to 28-829, unless the context otherwise requires:

(1) Adult shall mean any married person or any unmarried person of the age of eighteen years or older;

(2) Commercial film and photographic print processor shall mean any person who for compensation develops exposed photographic film into negatives, slides, or prints or who for compensation makes prints from negatives or slides. The term shall include, but not be limited to, any employee of such a person but shall not include employees of law enforcement agencies and prosecuting attorneys involved in the investigation and prosecution of criminal offenses or to persons involved in legitimate medical, scientific, or educational activities;

(3) Distribute shall mean to transfer possession, whether with or without consideration, by any means;

(4) Disseminate shall mean to manufacture, issue, publish, sell, lend, distribute, transmit, exhibit, or present materials or to offer in person or through an agent or by placing an advertisement for the same, whether with or without consideration, or agree to do the same;

(5) Knowingly shall mean having general knowledge of, reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry of the character and content of any material, taken as a whole, described in this section, which is reasonably susceptible to examination by the defendant;

(6) Harmful to minors shall mean that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominantly appeals to the prurient, shameful, or morbid interest of minors, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (c) is lacking in serious literary, artistic, political, or scientific value for minors;

(7) Material or work shall mean any book, magazine, newspaper, comic book, pamphlet, or other printed or written material or any picture, drawing, photograph, figure, image, motion picture, whether or not positive or negative exhibited or screened, play, nightclub, live performance, television production, other pictorial representation or electric reproduction, recording transcription, mechanical or otherwise, or other articles, equipment, machines, or materials;

(8) Minor shall mean any unmarried person under the age of eighteen years;

(9) Nudity shall mean the showing of the human, post-pubertal male or female genitals, pubic area, or buttocks with less than a full opaque covering, the depiction of covered male genitals in a discernibly turgid state, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple;

(10) Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex, or excretion, (b) the work, material, conduct, or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material, or live performance taken as a whole lacks serious literary, artistic, political, or scientific value;

(11) Place shall mean any building, structure, or place or any separate part or portion thereof or the ground itself;

(12) Person shall mean any individual, partnership, limited liability company, firm, association, corporation, trustee, lessee, agent, assignee, or other legal entity;

(13) Performance, whether with or without consideration, shall mean any play, motion picture, dance, or other exhibition performed before an audience;

(14) Promote shall mean to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or place an order for advertising or to knowingly offer in person or through an agent or agree to do the same;

(15) Sexual conduct shall mean acts of masturbation, homosexuality, sodomy, sexual intercourse, or prolonged physical contact with a person's clothed or unclothed genitals, pubic area, or buttocks or, if such person is female, breast;

(16) Sexual excitement shall mean the condition of human male or female genitals when in a state of sexual stimulation or arousal; and

(17) Sadomasochistic abuse shall mean flagellation or torture by or upon a nude person or a person clad in undergarments, a mask, or a bizarre costume or the condition of being fettered, bound, or otherwise physically restrained when performed to predominantly appeal to the shameful or morbid interest.

Source: Laws 1977, LB 38, § 163; Laws 1978, LB 748, § 13; Laws 1988, LB 117, § 1; Laws 1993, LB 121, § 178.

In reviewing a determination of whether certain material is obscene pursuant to the three-part obscenity test, the appellate court should give appropriate deference to the trier of fact on the ''prurient interest'' and ''patently offensive'' prongs of the test because these issues depend on the knowledge of ''contemporary community standards'' which are uniquely within the province of the trier of fact. However, the third prong of the test, whether the material has artistic value, is subject to de novo review because it does not depend on community standards. Tipp-It, Inc. v. Conboy, 257 Neb. 219, 596 N.W.2d 304 (1999).

The definition of obscenity provided in this section is patterned upon, and coextensive with, the language of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L. Ed. 2d 419 (1973). State v. Harrold, 256 Neb. 829, 593 N.W.2d 299 (1999).

Films which have little plot and which consist of scene after scene of sexual intercourse, lesbianism, homosexuality, cunnilingus, and fellatio are obscene as that term is defined. State v. Embassy Corp., 215 Neb. 631, 340 N.W.2d 160 (1983).

Subsection (10) of this statute is not unconstitutionally vague. State v. Embassy Corp., 215 Neb. 631, 340 N.W.2d 160 (1983).

28-808 Obscene literature and material; sale to minor, unlawful; penalty.

(1) It shall be unlawful for a person knowingly to sell, deliver, distribute, display for sale, or provide to a minor or knowingly to possess with intent to sell, deliver, distribute, display for sale, or provide to a minor:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body or any replica, article, or device having the appearance of either male or female genitals which predominantly pruriently, shamefully, or morbidly depicts nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and which, taken as a whole, is harmful to minors; or

(b) Any book, pamphlet, magazine, printed matter however produced, or sound recording which contains any matter enumerated in subdivision (1)(a) of this section or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse of a predominantly prurient, shameful, or morbid nature and which, taken as a whole, is harmful to minors.

(2) Any person who violates this section shall be guilty of a Class I misdemeanor.

Source: Laws 1977, LB 38, § 164; Laws 1988, LB 117, § 2.

28-809 Obscene motion picture, show, or presentation; admit minor; unlawful; penalty.

(1) It shall be unlawful for any person knowingly to exhibit to a minor or knowingly to provide to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, predominantly pruriently, shamefully, or morbidly depicts nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

(2) Any person who violates this section shall be guilty of a Class I misdemeanor.

Source: Laws 1977, LB 38, § 165; Laws 1988, LB 117, § 3.

28-810 Prosecution; defense.

It shall be a defense to a prosecution under sections 28-808 and 28-809 that:

(1) Such person had reasonable cause to believe that the minor involved was eighteen years of age or more, and that such reasonable cause is based on but not limited to the presentation by the minor exhibited to such person of a draft card, driver's license, birth certificate, or other official or apparently official document purporting to establish that such minor was eighteen years of age or more;

(2) The minor was accompanied by his parent or guardian and such person had reasonable cause to believe that the person accompanying the minor was the parent or guardian of that minor;

(3) Such person had reasonable cause to believe that the person was the parent or guardian of the minor; and

(4) Such person's activity falls within the defenses to a prosecution contained in section 28-815.

Source: Laws 1977, LB 38, § 166.

28-811 False representation; unlawful employment of minor; exceptions; penalty.

(1) It shall be unlawful for any minor to falsely represent to any person mentioned in section 28-808 or 28-809, or to his or her agent, that such minor is eighteen years of age or older with the intent to procure any materials set forth in section 28-808 or with the intent to procure such minor's admission to any motion picture, show, or other presentation as set forth in section 28-809.

(2) It shall be unlawful for any person to knowingly make a false representation to any person mentioned in section 28-808 or 28-809, or to his or her agent, that he or she is the parent or guardian of any minor or that any minor is eighteen years of age with the intent to procure any material set forth in section 28-808 or with the intent to procure such minor's admission to any motion picture, show, or other presentation as set forth in section 28-809.

(3) It shall be unlawful for any person to hire as an employee a minor whose duties it will be to assist in any manner the sale, delivery, distribution, or exhibition of material declared obscene by sections 28-807 to 28-829, except that this section shall not apply if such minor's parents or legal guardian should consent to such employment by giving the employer a written affidavit prior to the minor's employment.

(4) Any person who violates this section shall be guilty of a Class II misdemeanor.

Source: Laws 1977, LB 38, § 167; Laws 1988, LB 117, § 4.

28-812 Repealed. Laws 1988, LB 117, § 8.

28-813 Obscene literature or material; prepares; distributes; promotes; penalty.

(1) It shall be unlawful for a person knowingly to (a) print, copy, manufacture, prepare, produce, or reproduce obscene material for the purpose of sale or distribution, (b) publish, circulate, sell, rent, lend, transport in interstate commerce, distribute, or exhibit any obscene material, (c) have in his or her possession with intent to sell, rent, lend, transport, or distribute any obscene material, or (d) promote any obscene material or performance.

(2) It shall be unlawful for a person to place an order for any advertising promoting the sale or distribution of material represented or held out to be obscene, whether or not such material exists in fact or is obscene. In all cases in which a charge for a violation of this section is brought against a person who cannot be found in this state, the executive authority of this state may demand extradition of such person from the executive authority of the state in which such person may be found.

(3) A person commits an offense of promoting obscene material if knowing its content and character he or she (a) disseminates for monetary consideration any obscene material, (b) produces, presents, or directs obscene performances for monetary consideration, or (c) participates for monetary consideration in that part of a performance which makes it obscene.

(4) Any person who violates this section shall be guilty of a Class I misdemeanor.

Source: Laws 1977, LB 38, § 169; Laws 1988, LB 117, § 5; Laws 2006, LB 1113, § 27.

Films which have little plot and which consist of scene after scene of sexual intercourse, lesbianism, homosexuality, cunnilingus, and fellatio are obscene as the term is defined. State v. Embassy Corp., 215 Neb. 631, 340 N.W.2d 160 (1983).

Subsection (1) of this statute is not unconstitutionally vague. State v. Embassy Corp., 215 Neb. 631, 340 N.W.2d 160 (1983).

28-813.01 Sexually explicit conduct; visual depiction; unlawful; penalty.

(1) It shall be unlawful for a person to knowingly possess any visual depiction of sexually explicit conduct, as defined in section 28-1463.02, which has a child, as defined in such section, as one of its participants or portrayed observers.

(2) Any person who violates this section shall be guilty of a Class IV felony.

Source: Laws 1988, LB 117, § 6; Laws 2003, LB 111, § 1.

28-813.02 Commercial film and photographic print processor; immune from liability; when.

Any commercial film and photographic print processor who has knowledge of or observes, within the scope of his or her professional capacity or employment, and who participates in an investigation or the making of any report pertaining to any film, photograph, videotape, negative, or slide depicting a child under the age of eighteen years engaged in an act of sexually explicit conduct, as defined in section 28-1463.02, or participates in a judicial proceeding resulting from such participation shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed, except for maliciously false statements.

Source: Laws 1988, LB 117, § 7.

28-814 Criminal prosecutions; trial by jury; waiver; instructions to jury; expert witness.

(1) Criminal prosecutions involving the ultimate issue of obscenity, as distinguished from the issue of probable cause, shall be tried by jury, unless the defendant shall waive a jury trial in writing or by statement in open court entered in the minutes.

(2) The judge shall instruct the jury that the guidelines in determining whether a work, material, conduct, or live exhibition is obscene are: (a) The average person applying contemporary community standards would find the work taken as a whole goes substantially beyond contemporary limits of candor in description or presentation of such matters and predominantly appeals to the prurient, shameful, or morbid interest; (b) the work depicts in a patently offensive way sexual conduct specifically referred to in sections 28-807 to 28-829; (c) the work as a whole lacks serious literary, artistic, political, or scientific value; and (d) in applying these guidelines to the determination of

whether or not the work, material, conduct or live exhibition is obscene, each element of each guideline must be established beyond a reasonable doubt.

(3) In any proceeding, civil or criminal, under sections 28-807 to 28-829, where there is an issue as to whether or not the matter is obscene, either party shall have the right to introduce, in addition to all other relevant evidence, the testimony of expert witnesses on such issue as to any artistic, literary, scientific, political or other societal value in the determination of the issue of obscenity.

Source: Laws 1977, LB 38, § 170.

28-815 Prosecution; defense.

It shall be a defense to a prosecution under section 28-813 that:

(1) Such person's activity consists of teaching in regularly established and recognized educational institutions, galleries or libraries, or the publication or use of standard textbooks, films, tapes or visual aids of any such institution, or the practice of licensed practitioners of medicine or of pharmacy in their regular business or profession, or the possession by established schools teaching art, or by public art galleries, or artists or models in the necessary line of their art, or to relevant references to, or accounts or portrayal of, nudity, sex, or excretion in religion, art, literature, history, science, medicine, public health, law, the judicial process, law enforcement, education, public libraries, or news reports and news pictures by any form of news media of general circulation;

(2) Such person has no financial interest in an activity, product, or event entitling such person to participate in the promotion, management, proceeds, or profits of the activity, product, or event, and such person's only connection with the activity, product, or event entitles such person to a reasonable salary or wages for services actually rendered; and

(3) The provisions of sections 28-807 to 28-829 with respect to the exhibition or the possession with the intent to exhibit of any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment if such projectionist, usher, or ticket taker has no financial interest in the place wherein he is so employed. Such person shall be required to give testimony regarding such employment in all judicial proceedings brought under sections 28-807 to 28-829 when granted immunity by the trial judge.

Source: Laws 1977, LB 38, § 171.

28-816 Violations; declaratory judgment.

Any city, village, or county, through its chief law enforcement officer in which a person, firm or corporation violates or is about to violate sections 28-807 to 28-829 or has in his or its possession with intent to so violate, or is about to acquire possession with intent to so violate, any work, material, conduct or live performance which is obscene or an instrument of obscene use, or purports to be for such use or purpose, may maintain an action in the district court against such person, firm or corporation for a declaratory judgment under the Uniform Declaratory Judgments Act for the purpose of obtaining a judicial determination as to whether or not such work, material, conduct or live performance is obscene.

Source: Laws 1977, LB 38, § 172.

Cross References

Uniform Declaratory Judgments Act, see section 25-21,164.

28-817 Prosecution; temporary restraining order or injunction; when.

(1) The plaintiff, after the commencement of such action may, if he deems it necessary in order to prevent the continued use of such work, material, conduct or live performance, request a temporary restraining order or injunction against such person, firm or corporation to prevent the violation or further violation except as provided in this section.

(2) No other temporary restraining order or injunction shall issue in advance of final adjudication by the trial court in actions brought under the provisions of sections 28-816 to 28-818 when the question of whether the work, material, conduct or live performance is obscene is in issue. If an injunction is requested, any party to the action shall be entitled to a trial of the issues within ten calendar days after service of the summons has been completed, and a decision shall be rendered by the court within two judicial days of the conclusion of the trial.

Source: Laws 1977, LB 38, § 173.

28-818 Order or judgment of injunction; contents.

If an order or judgment of injunction be entered, such order or judgment shall contain either a provision directing the person to surrender to the sheriff or police the work, material, conduct or live performance which has been adjudicated to be obscene for seizure and impoundment by the court or to destroy or remove the same from the state. No order or judgment directing such firm, person, corporation or other legal entity to destroy or to remove such work, material, conduct or live performance from the state under such supervision as the court may direct shall issue until after a final judgment has been made as the result of an appeal or in the absence of an appeal. The court shall require satisfactory proof of compliance with such order.

Source: Laws 1977, LB 38, § 174.

28-819 Action; service of summons; effect.

Every person who sells, distributes, or acquires possession with intent to sell, exhibit, or distribute any of the work, material, conduct or live performance described in section 28-808, after service upon him of summons in such action, shall be chargeable with knowledge of the contents thereof in any subsequent prosecution.

Source: Laws 1977, LB 38, § 175.

28-820 Declaratory judgment; use of.

Any person who exhibits, sells or distributes, or is about to exhibit, sell or distribute or has in his or its possession with intent to sell or distribute, or is about to acquire possession with intent to exhibit, sell or distribute, any work, material, conduct or live performance shall, if such person has genuine doubt as to the question of whether such work, material, conduct or live performance is in fact within the terms and provisions of sections 28-807 to 28-829, have the right to bring an action in the district court for declaratory judgment under the Uniform Declaratory Judgments Act against the appropriate chief law enforcement officer of the city, village or county in which the work, material, conduct

or live performance is located or is intended to be disseminated, distributed, or exhibited, for a judicial determination as to whether or not such work, material, conduct or live performance is obscene. Any such action may be consolidated with a pending action brought under the provisions of sections 28-816 to 28-818, and the defendant in any action brought under this section may seek a declaratory judgment or request a temporary restraining order or an injunction therein in accordance with the provisions of sections 28-816 to 28-818.

Source: Laws 1977, LB 38, § 176.

Cross References

Uniform Declaratory Judgments Act, see section 25-21,164.

The State bears the burden of proving beyond a reasonable doubt all three elements of obscenity. Main Street Movies, Inc. v. Wellman, 257 Neb. 559, 598 N.W.2d 754 (1999).

Proof beyond a reasonable doubt is the most appropriate standard in civil obscenity cases, instituted pursuant to this section. Tipp-It, Inc. v. Conboy, 257 Neb. 219, 596 N.W.2d 304 (1999).

28-821 Conviction more than twice; continue business dealing in obscene work or conduct; effect.

Any person who is convicted more than twice under sections 28-807 to 28-829 and continues to use, occupy, establish or conduct a business selling, distributing, disseminating, or exhibiting any obscene work, material, conduct or live performance shall be deemed to be maintaining a nuisance and shall be enjoined as provided for in sections 28-807 to 28-829.

Source: Laws 1977, LB 38, § 177.

28-822 Nuisance; action to abate; punished as for contempt; when.

Whenever a nuisance exists as provided for in sections 28-807 to 28-829, any city, village, or county, through its chief law enforcement officer, may bring an action in equity to abate such a nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If any person continues to use the building or place for such purpose he shall be punished as for contempt.

Source: Laws 1977, LB 38, § 178.

28-823 Temporary injunction; where brought; hearing; restraining order; issuance; inventory; rights of owner of property.

The action provided for in section 28-821 shall be brought in the district court of the county in which the act of nuisance is being conducted. After filing of the petition, application for a temporary injunction may be made to the district court or judge thereof who shall grant a hearing within ten calendar days after the filing. When such application for temporary injunction is made, the court or judge thereof may, on application of the complainant, issue a restraining order as otherwise provided for in sections 25-1062 to 25-1080, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is being conducted until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. The officers serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance and further violations of sections 28-807 to 28-829. The owner of any real or personal

property closed or restrained or to be closed or restrained may appear between the filing of the complaint and the hearing on the application for permanent injunction, and upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk of the district court in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court is rendered on the application for a permanent injunction, and the court, if satisfied with the good faith of the owner of the real property and of innocence on the part of the owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subjected. In no event shall any work, material, conduct or live performance not adjudicated to be obscene under sections 28-807 to 28-829 be enjoined.

Source: Laws 1977, LB 38, § 179.

28-824 Trial; precedence; evidence; admissible; existence of nuisance; enjoin defendant.

The action provided for in sections 28-807 to 28-829 shall be set down for trial and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws of this state against obscenity at any such place shall be admissible for the purpose of proving the existence of such nuisance and shall be prima facie evidence of such nuisance and of knowledge of and acquiescence and participation therein on the part of the person charged with maintaining such nuisance. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant or the same defendant acting directly or indirectly through other persons from further maintaining the nuisance at the place complained of or at any other location whether within or without the judicial district of the court hearing such proceedings for a period of three years.

Source: Laws 1977, LB 38, § 180.

28-825 Nuisance; existence; order of abatement; closing order.

If the existence of a nuisance is admitted or established in an action as provided for in sections 28-807 to 28-829, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 28-823, and shall direct the sale of such thereof as belonging to the defendants notified or appearing in the manner provided for the sale of personal property under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property as

provided for in sections 28-807 to 28-829 or, if not so furnished, shall continue for one year any closing order issued at the time of the granting of the temporary injunction or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any illegal purpose unless otherwise released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided for in sections 28-807 to 28-829. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized may appear and claim the same within ten days after such order of abatement is made and prove innocence to the satisfaction of the court of any knowledge of such use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section and all consideration received is recoverable as damages to the county where the nuisance was located.

Source: Laws 1977, LB 38, § 181; Laws 1978, LB 748, § 14.

28-826 Tenant or occupant of building; use to commit violations; conviction; right of possession in owner.

If a tenant or occupant of a building or tenement under lawful title used such place for the purposes of committing a violation of sections 28-807 to 28-829, and if such tenant or occupant is convicted of such violation, such conviction shall make the lease or other title which he holds void at the option of the owner, and without any act of the owner, cause the right of possession to revert and vest in such owner, who may without further process of law make immediate entry upon the premises and retake possession.

Source: Laws 1977, LB 38, § 182.

28-827 Material or work; adjudicated obscene; contraband; proceeds of sale to county; other copies; disposal.

Material or work introduced in evidence and judicially adjudicated to be obscene is contraband and there are no property rights therein. All monetary consideration received for such work, material, conduct or live performance is recoverable as damages to the county where sold or exhibited. The defendant, as part of the court order, shall be required to remove from the state all other identical copies owned or controlled by such defendant within five days after a court determination of obscenity thereof or the same shall be deemed forfeited to the state for destruction by the state.

Source: Laws 1977, LB 38, § 183; Laws 1978, LB 748, § 15.

28-828 Proceeding, civil or criminal; application to court for copy of material; order; contempt of court, when.

In any proceeding, civil or criminal under sections 28-807 to 28-829, the party charged with possession of any obscene material shall be required, upon application by petitioner and order of the court, to provide one copy of such material to petitioner to be used in the preparation and trial of such proceed-

ings. Failure to comply with this section shall be punishable as contempt of court.

Source: Laws 1977, LB 38, § 184.

28-829 Sections; uniform application; laws and regulations of political subdivisions; void.

In order to provide for the uniform application of sections 28-807 to 28-829 within this state, it is intended that the sole and only regulation of the commercial distribution of any work, material, conduct or live performance described as obscene shall be under sections 28-807 to 28-829, and no municipality, county, or other governmental unit within this state shall make any law, ordinance or regulation relating to obscenity, or licenses or taxes respecting the obscene work, material, conduct or live performance as regulated by the state under sections 28-807 to 28-829. All such laws, ordinances, regulations, special or discriminatory taxes, or licenses, whether enacted or issued before or after sections 28-807 to 28-829, shall be void, unenforceable, and of no effect.

Source: Laws 1977, LB 38, § 185.

28-830 Human trafficking; forced labor or services; terms, defined.

For purposes of sections 28-830 to 28-832, the following definitions apply:

(1) Actor means a person who solicits, procures, or supervises the services or labor of another person;

(2) Commercial sexual activity means any sex act on account of which anything of value is given, promised to, or received by any person;

(3) Financial harm means theft by extortion as described by section 28-513;

(4) Forced labor or services means labor or services that are performed or provided by another person and are obtained or maintained through:

(a) Inflicting or threatening to inflict serious personal injury as defined by section 28-318;

(b) Physically restraining or threatening to physically restrain another person;

(c) Knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document or any other actual or purported government identification document of another person; or

(d) Causing or threatening to cause financial harm to another person;

(5) Labor means work of economic or financial value;

(6) Maintain means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement by the victim to perform such type of service;

(7) Minor means a person younger than eighteen years of age;

(8) Obtain means, in relation to labor or services, to secure performance thereof;

(9) Services means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of services under this section. Nothing in this subdivision shall be construed to legalize prostitution;

(10) Sexually-explicit performance means a live or public play, dance, show, or other exhibition intended to arouse or gratify sexual desire or to appeal to prurient interests; and

(11) Trafficking victim means a person subjected to any act or acts prohibited by section 28-831.

Source: Laws 2006, LB 1086, § 10.

28-831 Human trafficking; forced labor or services; prohibited acts; penalties.

(1) No person shall knowingly subject or attempt to subject another person to forced labor or services. If an actor knowingly subjects another person to forced labor or services by:

(a) Inflicting or threatening to inflict serious personal injury as defined by section 28-318, the actor is guilty of a Class III felony;

(b) Physically restraining or threatening to physically restrain another person, the actor is guilty of a Class III felony;

(c) Knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of such other person, the actor is guilty of a Class IV felony; or

(d) Causing or threatening to cause financial harm to another person, the actor is guilty of a Class I misdemeanor.

(2) No person shall knowingly recruit, entice, harbor, transport, provide, or obtain by any means or attempt to recruit, entice, harbor, provide, or obtain by any means a minor for the purpose of having such minor engage in commercial sexual activity, sexually-explicit performance, or the production of pornography, or to cause or attempt to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography. A person who violates this subsection shall be punished as follows:

(a) In cases in which the actor uses overt force or the threat of force, the actor is guilty of a Class II felony;

(b) In cases in which the victim has not attained the age of fifteen years and the actor does not use overt force or the threat of force, the actor is guilty of a Class II felony; or

(c) In cases involving a victim between the ages of fifteen and eighteen years, and the actor does not use overt force or threat of force, the actor is guilty of a Class III felony.

(3) Any person who knowingly (a) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, a person eighteen years of age or older, intending or knowing that the person will be subjected to forced labor or services or (b) benefits, financially or by receiving anything of value, from participation in a venture which has, as part of the venture, an act that is in violation of subsection (1) of this section, is guilty of a Class IV felony.

Source: Laws 2006, LB 1086, § 11.

28-832 Human trafficking; Attorney General; Department of Health and Human Services; duties.

(1) The Attorney General, in consultation with the Department of Health and Human Services, shall, no later than one year after July 14, 2006, issue a report outlining how existing victim and witness laws and rules and regulations respond to the needs of trafficking victims and suggesting areas of improvement and modification.

(2) The Department of Health and Human Services, in consultation with the Attorney General, shall, no later than one year after July 14, 2006, issue a report outlining how existing social service programs respond or fail to respond to the needs of trafficking victims and the interplay of such existing programs with federally funded victim service programs and suggesting areas of improvement and modification.

Source: Laws 2006, LB 1086, § 12.

28-833 Enticement by electronic communication device; penalty.

(1) A person commits the offense of enticement by electronic communication device if he or she is nineteen years of age or over and knowingly and intentionally utilizes an electronic communication device to contact a child under sixteen years of age or a peace officer who is believed by such person to be a child under sixteen years of age and in so doing:

(a) Uses or transmits any indecent, lewd, lascivious, or obscene language, writing, or sound;

(b) Transmits or otherwise disseminates any visual depiction of sexually explicit conduct as defined in section 28-1463.02; or

(c) Offers or solicits any indecent, lewd, or lascivious act.

(2) Enticement by electronic communication device is a Class IV felony.

(3) Enticement by electronic communication device is deemed to have been committed either at the place where the communication was initiated or where it was received.

(4) For purposes of this section, electronic communication device means any device which, in its ordinary and intended use, transmits by electronic means writings, sounds, visual images, or data of any nature to another electronic communication device.

Source: Laws 2007, LB142, § 2.

ARTICLE 9

OFFENSES INVOLVING INTEGRITY AND EFFECTIVENESS OF GOVERNMENT OPERATION

Section

Section

28-901 Obstructing government operations; penalty.

(1) A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

(2) Obstructing government operations is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 186.

Failure to volunteer information is not a physical act that violates this section. Nor are mere words, even those words deliberately intended to frustrate law enforcement, physical acts. State v. Fahlk, 246 Neb. 834, 524 N.W.2d 39 (1994).

The offense must consist of physical interference or some unlawful act. State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (1984).

28-902 Failure to report injury of violence; physician or surgeon; emergency room or first-aid station attendant; penalty.

(1) Every person engaged in the practice of medicine and surgery, or who is in charge of any emergency room or first-aid station in this state, shall report every case, in which he is consulted for treatment or treats a wound or injury of violence which appears to have been received in connection with the commission of a criminal offense, immediately to the chief of police of the municipality or to the sheriff of the county wherein the consultation or treatment occurs. Such report shall include the name of such person, the residence, if ascertainable, and a brief description of the injury. Any provision of law or rule of

evidence relative to confidential communications is suspended insofar as the provisions of this section are concerned.

(2) Any person who fails to make the report required by subsection (1) of this section commits a Class III misdemeanor.

Source: Laws 1977, LB 38, § 187.

28-903 Refusing to aid a peace officer; penalty.

(1) A person commits the offense of refusing to aid a peace officer if, upon request by a person known to him to be a peace officer, he unreasonably refuses or fails to aid such peace officer in:

(a) Apprehending any person charged with or convicted of any offense against any of the laws of this state; or

(b) Securing such offender when apprehended; or

(c) Conveying such offender to the jail of the county.

(2) Refusing to aid a peace officer is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 188.

28-904 Resisting arrest; penalty; affirmative defense.

(1) A person commits the offense of resisting arrest if, while intentionally preventing or attempting to prevent a peace officer, acting under color of his or her official authority, from effecting an arrest of the actor or another, he or she:

(a) Uses or threatens to use physical force or violence against the peace officer or another; or

(b) Uses any other means which creates a substantial risk of causing physical injury to the peace officer or another; or

(c) Employs means requiring substantial force to overcome resistance to effecting the arrest.

(2) It is an affirmative defense to prosecution under this section if the peace officer involved was out of uniform and did not identify himself or herself as a peace officer by showing his or her credentials to the person whose arrest is attempted.

(3) Resisting arrest is (a) a Class I misdemeanor for the first such offense and (b) a Class IIIA felony for any second or subsequent such offense.

(4) Resisting arrest through the use of a deadly or dangerous weapon is a Class IIIA felony.

Source: Laws 1977, LB 38, § 189; Laws 1982, LB 465, § 2; Laws 1997, LB 364, § 10.

In prosecutions for assaulting a peace officer, obstructing a peace officer, or resisting arrest, a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim that the peace officer used unreasonable force in making the arrest. State v. Yeutter, 252 Neb. 857, 566 N.W.2d 387 (1997).

This is a serious offense for which a jury trial is constitutionally required unless knowingly and intelligently waived by the defendant. State v. Bishop, 224 Neb. 522, 399 N.W.2d 271 (1987).

It is an affirmative defense to prosecution under this section if the peace officer involved was out of uniform and did not identify himself as a peace officer by showing his credentials to the person whose arrest is attempted. State v. Daniels, 220 Neb. 480, 370 N.W.2d 179 (1985).

Where there was evidence that the arrester communicated his intention to arrest the arrestee, the arrestee understood the intention, and the arrester had the apparent ability to control the arrestee, a jury instruction on resisting arrest was not necessary. State v. White, 209 Neb. 218, 306 N.W.2d 906 (1981).

28-905 Operating a motor vehicle or a vessel to avoid arrest; penalty; revocation or impoundment of operator's license.

(1) Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest.

(2)(a) Except as otherwise provided in subsection (3) of this section, any person who violates subsection (1) of this section shall be guilty of a Class I misdemeanor.

(b) The court may, as part of the judgment of conviction under subdivision (a) of this subsection, order that the operator's license of such person be revoked or impounded for a period of not more than one year and order the person not to drive any motor vehicle for any purpose in the State of Nebraska for a like period. The revocation or impoundment shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

(3)(a) Any person who violates subsection (1) of this section shall be guilty of a Class IV felony if, in addition to the violation of subsection (1) of this section, one or more of the following also applies:

(i) The person committing the offense has previously been convicted under this section;

(ii) The flight to avoid arrest results directly and proximately in the death of or injury to any person if such death or injury is caused directly and proximately by the vehicle being driven by the person fleeing to avoid arrest; or

(iii) The flight to avoid arrest includes the willful reckless operation of the motor vehicle.

(b) The court shall, as part of the judgment of conviction under subdivision (a) of this subsection, order that the operator's license of such person be revoked or impounded for a period of two years and order the person not to drive any motor vehicle for any purpose in the State of Nebraska for a like period. The revocation or impoundment shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

(4)(a) Any person who operates a vessel as defined in section 37-1203 to flee in such vessel in an effort to avoid arrest or citation for the violation of any statute punishable as a misdemeanor or any city or village ordinance shall be guilty of misdemeanor operation of a vessel to avoid arrest.

(b) Any person violating subdivision (a) of this subsection shall be guilty of a Class I misdemeanor. Upon conviction thereof the court shall, as part of the judgment of conviction, order such person not to operate any vessel for any purpose for a period of one year.

(5)(a) Any person who operates a vessel as defined in section 37-1203 to flee in such vessel in an effort to avoid arrest for the violation of any statute punishable as a felony shall be guilty of felony operation of a vessel to avoid arrest.

(b) Any person violating subdivision (a) of this subsection shall be guilty of a Class IV felony. Upon conviction thereof the court shall, as part of the judgment of conviction, order such person not to operate any vessel for any purpose for a period of two years.

(6) An order of the court under subsection (4) or (5) of this section prohibiting operation of a vessel shall be administered upon sentencing, upon final

judgment of any appeal or review, or upon the date that any probation is revoked.

Source: Laws 1977, LB 38, § 190; Laws 1980, LB 696, § 5; Laws 1981, LB 76, § 1; Laws 1993, LB 235, § 2; Laws 2001, LB 38, § 2; Laws 2008, LB624, § 1.
Effective date July 18, 2008.

An attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required. State v. Carman, 10 Neb. App. 373, 631 N.W.2d 531 (2001).

28-906 Obstructing a peace officer; penalty.

(1) A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he or she intentionally obstructs, impairs, or hinders (a) the enforcement of the penal law or the preservation of the peace by a peace officer or judge acting under color of his or her official authority or (b) a police animal assisting a peace officer acting pursuant to the peace officer's official authority.

(2) For purposes of this section, police animal means a horse or dog owned or controlled by the State of Nebraska for the purpose of assisting a Nebraska state trooper acting pursuant to his or her official authority.

(3) Obstructing a peace officer is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 191; Laws 1995, LB 283, § 1.

In prosecutions for assaulting a peace officer, obstructing a peace officer, or resisting arrest, a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim that the peace officer used unreasonable force in making the arrest. State v. Yeutter, 252 Neb. 857, 566 N.W.2d 387 (1997).

The mere verbal refusal to provide information to an officer does not constitute an obstacle to the enforcement of the penal laws as contemplated by this section. State v. Yeutter, 252 Neb. 857, 566 N.W.2d 387 (1997).

''Preservation of the peace,'' as used in this statute, means maintaining the tranquillity enjoyed by members of a community where good order reigns. In re Interest of Richter, 226 Neb. 874, 415 N.W.2d 476 (1987).

The act of running away from an officer does obstruct, impair, or hinder the officer's efforts to preserve the peace. In re Interest of Richter, 226 Neb. 874, 415 N.W.2d 476 (1987).

Words ''violence, force, physical interference, or obstacle'' are of common usage and understandable by those of ordinary intelligence and, thus, not unconstitutionally vague. State v. Lynch, 223 Neb. 849, 394 N.W.2d 651 (1986).

There must be some sort of affirmative physical act, or threat thereof, for a violation of this section to occur. State v. Owen, 7 Neb. App. 153, 580 N.W.2d 566 (1998).

28-907 False reporting; penalty.

(1) A person commits the offense of false reporting if he or she:

(a) Furnishes material information he or she knows to be false to any peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter;

(b) Furnishes information he or she knows to be false alleging the existence of the need for the assistance of an emergency medical service or out-of-hospital emergency care provider or an emergency in which human life or property are in jeopardy to any hospital, emergency medical service, or other person or governmental agency;

(c) Furnishes any information, or causes such information to be furnished or conveyed by electric, electronic, telephonic, or mechanical means, knowing the same to be false concerning the need for assistance of a fire department or any personnel or equipment of such department;

(d) Furnishes any information he or she knows to be false concerning the location of any explosive in any building or other property to any person; or

(e) Furnishes material information he or she knows to be false to any governmental department or agency with the intent to instigate an investigation or to impede an ongoing investigation and which actually results in causing or impeding such investigation.

(2)(a) False reporting pursuant to subdivisions (1)(a) through (d) of this section is a Class I misdemeanor; and

(b) False reporting pursuant to subdivision (1)(e) of this section is an infraction.

Source: Laws 1977, LB 38, § 192; Laws 1982, LB 347, § 12; Laws 1994, LB 907, § 1; Laws 1997, LB 138, § 36.

To commit the crime of false reporting one need not actually impede a police investigation, but must furnish false information with the intent to impede the investigation of a criminal matter. State v. Gonzales, 224 Neb. 659, 399 N.W.2d 832 (1987).

''To impede the investigation of an actual criminal matter'' includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant. State v. Nissen, 224 Neb. 60, 395 N.W.2d 560 (1986).

Evidence was sufficient for juvenile court to find beyond a reasonable doubt that defendant had violated provisions of this section. In re Interest of McManaman, 222 Neb. 263, 383 N.W.2d 45 (1986).

Purpose of statute is to prevent wasted time and efforts of law enforcement personnel by discouraging public from willfully furnishing erroneous information to law enforcement officers which may interfere with performance of their duties. In re Interest of McManaman, 222 Neb. 263, 383 N.W.2d 45 (1986).

The phrase ''the investigation of an actual criminal matter'' requires that there be a legitimate and valid investigation of facts which could constitute a predicate criminal offense. State v. Ewing, 221 Neb. 462, 378 N.W.2d 158 (1985).

A person must have reliable knowledge of the principal's identity to be guilty as an accessory under section 28-204. Merely reporting false information about a crime without knowledge of the principal's identity constitutes the misdemeanor of false reporting, as defined by this section. State v. Anderson, 10 Neb. App. 163, 626 N.W.2d 627 (2001).

28-908 Interfering with a fireman on official duty; penalty; fireman, defined.

(1) A person commits the offense of interfering with a fireman if at any time and place where any fireman is discharging or attempting to discharge any official duties, he willfully:

(a) Resists or interferes with the lawful efforts of any fireman in the discharge or attempt to discharge an official duty; or

(b) Disobeys the lawful orders given by any fireman while performing his duties; or

(c) Engages in any disorderly conduct which delays or prevents a fire from being extinguished within a reasonable time; or

(d) Forbids or prevents others from assisting or extinguishing a fire or exhorts another person, as to whom he has no legal right or obligation to protect or control, not to assist in extinguishing a fire.

(2) As used in this section, fireman shall mean any person who is an officer, employee, or member of a fire department or fire-protection or firefighting agency of the federal government, the State of Nebraska, a city, county, city and county, district, or other public or municipal corporation or political subdivision of the state, whether such person is a volunteer or partly paid or fully paid, while he is actually engaged in firefighting, fire supervision, fire suppression, fire prevention, or fire investigation.

(3) Interference with a fireman on official duty is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 193.

28-909 Falsifying records of a public utility; penalty.

(1) Any person who shall knowingly falsify or direct or authorize the falsifying of any record of a public utility operating in the State of Nebraska in any

manner affecting directly or indirectly the value of its investment or the rate of return or earnings or expenditures of such public utility or who shall certify any reports of the investment, operating receipts, or expenditures of such public utilities to any regulatory body, whether state or municipal, under any statute, order, resolution, or ordinance lawfully passed, knowing such reports so certified to contain any item or element of rebate, secret charge, bonus, or gratuity paid or promised to any officer, stockholder, agent, or other person, directly or indirectly, or knowing such report to be untrue or incomplete in any particular, without disclosing this information in such report, shall be guilty of falsifying records of a public utility.

(2) Falsifying records of a public utility is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 194.

28-910 Filing false reports with regulatory bodies; penalty.

(1) Any firm or corporation operating a public utility in this state which shall file with any regulatory body, whether state or municipal, under any statute, order, resolution, or ordinance lawfully passed, any report or reports containing false statements, knowing the same to be false, affecting directly or indirectly, the value of its investment or the rate of return or earnings or expenditures of such public utility shall be guilty of filing false reports with regulatory bodies.

(2) Filing false reports with regulatory bodies is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 195.

28-911 Abuse of public records; penalty; public record, defined.

(1) A person commits abuse of public records, if:

(a) He knowingly makes a false entry in or falsely alters any public record; or

(b) Knowing he lacks the authority to do so, he intentionally destroys, mutilates, conceals, removes, or impairs the availability of any public record; or

(c) Knowing he lacks the authority to retain the record, he refuses to deliver up a public record in his possession upon proper request of any person lawfully entitled to receive such record; or

(d) He makes, presents, or uses any record, document, or thing, knowing it to be false, and with the intention that it be taken as a genuine part of the public record.

(2) As used in this section, the term public record includes all official books, papers, or records created, received, or used by or in any governmental office or agency.

(3) Abuse of public records is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 196.

28-912 Escape; official detention, defined; knowingly permitting an escape; penalty; defense to prosecution.

(1) A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons

under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.

(2) A public servant concerned in detention commits an offense if he knowingly permits an escape. Any person who knowingly causes or facilitates an escape commits a Class IV felony.

(3) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority shall not be a defense to prosecution under this section if the escape is from a prison or other custodial facility or from detention pursuant to commitment by official proceedings. In the case of other detentions, irregularity or lack of jurisdiction shall be a defense only if:

(a) The escape involved no substantial risk of harm to the person or property of anyone other than the detainee; and

(b) The detaining authority did not act in good faith under color of law.

(4) Except as provided in subsection (5) of this section, escape is a Class IV felony.

(5) Escape is a Class III felony where:

(a) The detainee was under arrest for or detained on a felony charge or following conviction for the commission of an offense; or

(b) The actor employs force, threat, deadly weapon, or other dangerous instrumentality to effect the escape; or

(c) A public servant concerned in detention of persons convicted of crime purposely facilitates or permits an escape from a detention facility or from transportation thereto.

Source: Laws 1977, LB 38, § 197.

When an incarcerated criminal defendant is charged with escape under subsection (1) of this section, no prejudice results from trying the defendant while he or she is wearing jail clothing. State v. Sorich, 226 Neb. 547, 412 N.W.2d 484 (1987).

Some degree of custody is essential before one can be considered to be in official detention. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has apparent present power to control the person even though he has not yet asserted physical control. State v. Hicks, 225 Neb. 322, 404 N.W.2d 923 (1987).

Nebraska's escape statute defines one offense and sets out factors which, if present, change the range of the penalty. State v. Heathman, 224 Neb. 19, 395 N.W.2d 538 (1986).

A person on work release is within the custody and control of the Nebraska Penal and Correctional Complex. Walking away from work release is an "escape" within the meaning of this statute. State v. Stafford, 213 Neb. 595, 330 N.W.2d 739 (1983); State v. Ford, 213 Neb. 594, 330 N.W.2d 497 (1983); State v. Coffman, 213 Neb. 560, 330 N.W.2d 727 (1983).

For purposes of this section, constructive restraint takes place when an officer has the intention to effect an arrest and that intention has been communicated to the arrestee who understands that he is under legal restraint and the officer has the apparent present power to control the arrestee even though he has not asserted physical control. State v. White, 209 Neb. 218, 306 N.W.2d 906 (1981).

A person who is serving a jail sentence pursuant to official proceedings commits the crime of escape when that person flees while in the custody of a police detective who has removed the person from the jail facility in furtherance of law enforcement purposes. State v. Farr, 209 Neb. 163, 306 N.W.2d 854 (1981).

If a prisoner escapes from jail while he is being held on a charge of violation of probation, the fact that the charge may be unfounded does not prevent him from being guilty of escape. State v. Greaser, 207 Neb. 668, 300 N.W.2d 197 (1981).

Legal custody is an essential element of the crime of escape. State v. Schlothauer, 206 Neb. 670, 294 N.W.2d 382 (1980).

28-912.01 Juvenile; escapes; prohibited acts; penalty.

Any person who entices or attempts to entice a juvenile away from a facility or program when the juvenile has been legally placed with or committed to the Office of Juvenile Services or who knowingly harbors, transports, conceals, or aids in harboring, transporting, or concealing any juvenile who has escaped from the custody of the Office of Juvenile Services is guilty of a Class IV felony.

Source: Laws 1901, c. 51, § 12, p. 408; R.S.1913, § 7380; C.S.1922, § 7039; C.S.1929, § 83-1110; R.S.1943, § 83-473; Laws 1969,

c. 817, § 81, p. 3111; Laws 1977, LB 39, § 315; Laws 1993, LB 31, § 45; Laws 1994, LB 988, § 36; R.S.1943, (1994), § 83-473; Laws 1998, LB 1073, § 9.

28-913 Implements for escape; other contraband; penalty.

(1) A person commits an offense if he unlawfully introduces within a detention facility, or unlawfully provides an inmate with, any weapon, tool, or other thing which may be useful for escape. An inmate commits an offense if he unlawfully procures, makes, or otherwise provides himself with, or has in his possession, any such implement of escape. Unlawfully means surreptitiously or contrary to law, regulation, or order of the detaining authority.

(2) Introducing escape implements is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 198.

The crime of escape may, but does not necessarily, include the use of force. State v. White, 209 Neb. 218, 306 N.W.2d 906 (1981).

28-914 Loitering about a penal institution; penalty.

(1) Any person who loiters about a penal institution in this state and engages in an unauthorized conversation with or passes any unauthorized message or messages to any inmate of such institution, or fails or refuses to leave the immediate vicinity of a penal institution when ordered to do so by a peace officer or correctional official, commits the offense of loitering about a penal institution.

(2) Loitering about a penal institution is a Class III misdemeanor.

(3) For purposes of this section, penal institution includes a jail, prison, penitentiary, house of correction, or other place of penal detention.

Source: Laws 1977, LB 38, § 199; Laws 1995, LB 352, § 1.

28-915 Perjury; subornation of perjury; penalty.

(1) A person is guilty of perjury, a Class III felony, if in any official proceeding he or she makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he or she does not believe it to be true.

(2) A person is guilty of subornation of perjury, a Class III felony, if he or she persuades, procures, or suborns any other person to commit perjury.

(3) A falsification shall be material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It shall not be a defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation shall be a question of law.

(4) It shall not be a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(5) No person shall be guilty of an offense under this section if he or she retracted the falsification in the course of the proceeding in which it was made

before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(6) When the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(7) No person shall be convicted of an offense under this section when proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.

Source: Laws 1977, LB 38, § 200; Laws 1987, LB 451, § 3.

For an oath to be ''required by law'' as a foundation for the crime of perjury in violation of subsection (1) of this section, a specific statute must explicitly require that an oath be administered. State v. Douglas, 222 Neb. 833, 388 N.W.2d 801 (1986).

To sustain a conviction for perjury outside a judicial proceeding, there must exist a valid statute which requires the making of a statement under oath. State v. Douglas, 222 Neb. 833, 388 N.W.2d 801 (1986).

In a prosecution for perjury, the falsity of the accused's sworn testimony cannot be established by the testimony of one witness alone, but may be established by testimony of one witness plus corroborative facts and circumstances sufficient to exclude all reasonable doubt of the guilt of the accused. State v. Mayhew, 216 Neb. 761, 346 N.W.2d 237 (1984).

In the absence of a statute imposing civil liability, the policy is to grant witnesses immunity from civil liability for damages resulting from false statements made by them, and to leave the matter of liability for perjury to the criminal law. Stolte v. Blackstone, 213 Neb. 113, 328 N.W.2d 462 (1982).

False sworn deposition testimony given for use in a pending criminal proceeding was considered to have been made in connection with an official proceeding where the statement was material to the accused's guilt or innocence; the statement could therefore form the basis for a charge of subornation of perjury. State v. Meehan, 7 Neb. App. 639, 585 N.W.2d 459 (1998).

28-915.01 False statement under oath or affirmation; penalty; applicability of section.

(1) A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he or she does not believe the statement to be true, is guilty of a Class I misdemeanor if the falsification:

(a) Occurs in an official proceeding; or

(b) Is intended to mislead a public servant in performing his or her official function.

(2) A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he or she does not believe the statement to be true, is guilty of a Class II misdemeanor if the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(3) Subsections (4) through (7) of section 28-915 shall apply to subsections (1) and (2) of this section.

(4) This section shall not apply to reports, statements, affidavits, or other documents made or filed pursuant to the Campaign Finance Limitation Act or the Nebraska Political Accountability and Disclosure Act.

Source: Laws 1987, LB 451, § 4; Laws 2007, LB464, § 1.

Cross References

Campaign Finance Limitation Act, see section 32-1601.
Nebraska Political Accountability and Disclosure Act, see section 49-1401.

A person can be convicted of making a false statement under oath when making a statement based on a belief that he or she knows is false. Perjury can be proved either by two witnesses or

by one witness, together with material and independently established corroborative facts sufficient to amount to the testimony of another witness. State v. McCaslin, 240 Neb. 482, 482 N.W.2d 558 (1992).

28-916 Terms, defined.

As used in sections 28-916 to 28-923, unless the context otherwise requires:

(1) Juror shall mean any person who is a member of any jury or grand jury, impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The word juror also includes any person who has been drawn or summoned to attend as a prospective juror;

(2) Testimony shall mean oral or written statements, documents, or any other evidence that may be offered by or through a witness in an official proceeding; and

(3) Official proceeding shall mean a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding.

Source: Laws 1977, LB 38, § 201.

28-916.01 Terms, defined.

As used in this section and sections 28-915, 28-915.01, and 28-919, unless the context otherwise requires:

(1) Administrative proceeding shall mean any proceeding, other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals;

(2) Benefit shall mean gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he or she is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose;

(3) Government shall include any branch, subdivision, or agency of the government of the state or any locality within it;

(4) Harm shall mean loss, disadvantage, or injury, or anything so regarded by the person affected, including loss, disadvantage, or injury to any other person or entity in whose welfare he or she is interested;

(5) Pecuniary benefit shall mean benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain;

(6) Public servant shall mean any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant, or otherwise, in performing a governmental function, but the term shall not include witnesses;

(7) Official proceeding shall mean a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with any such proceeding; and

(8) Statement shall mean any representation, but shall include a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

Source: Laws 1987, LB 451, § 2.

A proceeding is not made official by the formality with which it is conducted; instead, its officiality depends on its purpose and the authority from which it derives. Hence, a false sworn statement made for use in a pending judicial proceeding was considered to have been made in connection with an official proceeding for purposes of subornation of perjury. State v. Meehan, 7 Neb. App. 639, 585 N.W.2d 459 (1998).

28-917 Bribery; penalty.

(1) A person commits bribery if:

(a) He offers, confers, or agrees to confer any benefit upon a public servant or peace officer with the intent to influence that public servant or peace officer to violate his public duty, or oath of office, thereby influencing the public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his official capacity; or

(b) While a public servant or peace officer, he solicits, accepts, or agrees to accept any benefit upon an agreement or understanding that he will violate his public duty or oath of office by changing or amending his vote, opinion, judgment, exercise of discretion, or other action or inaction as a public servant or peace officer.

(2) It is no defense to prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not yet assumed office, lacked jurisdiction, or for any other reason.

(3) Bribery is a Class IV felony.

Source: Laws 1977, LB 38, § 202.

This section does not repeal by implication section 49-14,101. This section prohibits anyone from conferring or offering to confer ''any benefit'' upon a public servant with the intent to influence that public servant's actions in his official capacity. State v. Null, 247 Neb. 192, 526 N.W.2d 220 (1995).

The crime of felony bribery is not committed unless the acts of the defendant actually influence a public servant's or peace officer's vote, opinion, judgment, exercise of discretion, or other action or inaction in his or her official capacity. State v. Kao, 3 Neb. App. 727, 531 N.W.2d 555 (1995).

28-918 Bribery of a witness; penalty; witness receiving bribe; penalty.

(1) A person commits bribery of a witness if he offers, confers, or agrees to confer any benefit upon a witness or a person he believes is about to be called as a witness in any official proceeding with intent to:

(a) Influence him to testify falsely or unlawfully withhold any testimony; or

(b) Induce him to avoid legal process summoning him to testify; or

(c) Induce him to absent himself from an official proceeding to which he has been legally summoned.

(2) Bribery of a witness is a Class IV felony.

(3) A person who is a witness or has been called as a witness in any official proceeding commits a Class IV felony if he accepts or agrees to accept any benefit from any other person for the purposes set forth in subsection (1) of this section.

Source: Laws 1977, LB 38, § 203.

28-919 Tampering with witness or informant; jury tampering; penalty.

(1) A person commits the offense of tampering with a witness or informant if, believing that an official proceeding or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to:

(a) Testify or inform falsely;

(b) Withhold any testimony, information, document, or thing;

(c) Elude legal process summoning him or her to testify or supply evidence; or

(d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.

(2) A person commits the offense of jury tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he or she attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case.

(3) Tampering with witnesses or informants is a Class IV felony. Jury tampering is a Class IV felony.

Source: Laws 1977, LB 38, § 204; Laws 1994, LB 906, § 1.

Sufficient evidence was presented from which a jury could conclude beyond a reasonable doubt that the defendant intended to persuade the victim, who is also the witness, to withhold any further information concerning the rape she had reported. State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997).

A person who has knowledge of a relevant fact or occurrence sufficient to testify in respect to it is a witness for the purpose of this section, even if such knowledge is not firsthand. State v. Cisneros, 248 Neb. 372, 535 N.W.2d 703 (1995).

A witness, for purposes of this provision, is one who has knowledge of a relevant fact or occurrence sufficient to testify in respect to it. State v. McCoy, 227 Neb. 494, 418 N.W.2d 250 (1988).

28-920 Bribery of a juror; penalty; juror receiving bribe; penalty.

(1) A person commits bribery of a juror if he offers, confers, or agrees to confer any benefit upon a juror with intent to influence the juror's vote, opinion, decision, or other action as a juror.

(2) Bribery of a juror is a Class IV felony.

(3) A juror commits a Class IV felony if he accepts or agrees to accept any benefit from another person for the purpose of influencing his vote, opinion, decision, or other action as a juror.

Source: Laws 1977, LB 38, § 205.

28-921 Repealed. Laws 1994, LB 906, § 2.

28-922 Tampering with physical evidence; penalty; physical evidence, defined.

(1) A person commits the offense of tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with the intent to impair its verity or availability in the pending or prospective official proceeding; or

(b) Knowingly makes, presents, or offers any false physical evidence with intent that it be introduced in the pending or prospective official proceeding.

(2) Physical evidence, as used in this section, shall mean any article, object, document, record, or other thing of physical substance.

(3) Tampering with physical evidence is a Class IV felony.

Source: Laws 1977, LB 38, § 207.

28-923 Simulating legal process; penalty.

(1) A person commits the offense of simulating legal process if he sends, delivers, or mails or in any manner shall cause to be sent, delivered, or mailed, any paper or document simulating or intended to simulate a summons, complaint, writ, or other court process of any kind, to any person, firm, company, or corporation, for the purpose and intent of forcing payment of any alleged claim, debt, or legal obligation.

(2) Simulating legal process is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 208.

28-924 Official misconduct; penalty.

(1) A public servant commits official misconduct if he knowingly violates any statute or lawfully adopted rule or regulation relating to his official duties.

(2) Official misconduct is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 209.

Failure by a county attorney to reside in the county he or she holds office in is not official misconduct. Hynes v. Hogan, 251 Neb. 404, 558 N.W.2d 35 (1997).

28-925 Misuse of official information; penalty.

(1) Any public servant, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, commits misuse of official information if he:

(a) Acquires pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or

(b) Speculates or wagers on the basis of such information or official action; or

(c) Aids, advises, or encourages another to do any of the foregoing with intent to confer on any person a special pecuniary benefit.

(2) Misuse of official information is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 210.

28-926 Oppression under color of office; penalty.

(1) Any public servant or peace officer who, by color of or in the execution of his office, shall designedly, willfully, or corruptly injure, deceive, harm, or oppress any person, or shall attempt to injure, deceive, harm, or oppress any person, commits oppression under color of office, and shall be answerable to the party so injured, deceived, or harmed or oppressed in treble damages.

(2) Oppression under color of office is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 211.

This section is penal in nature and makes no provision for plaintiff to elect between actual and treble damages. An action pursuant to this section is one ''upon a statute for a penalty'' and is subject to the 1-year statute of limitations of section 25-208. LaBenz Trucking v. Snyder, 246 Neb. 468, 519 N.W.2d 259 (1994).

Because this section is a criminal statute, a prosecution and conviction of public servants for the crime of oppression under

color of office is necessary before any damages or penalties will be assessed. Cole v. Wilson, 11 Neb. App. 837, 661 N.W.2d 706 (2003).

This section is purely criminal in nature and does not provide for an independent civil remedy. Cole v. Wilson, 11 Neb. App. 837, 661 N.W.2d 706 (2003).

Treble damages under this section would not be payable to the individual who was oppressed. Cole v. Wilson, 11 Neb. App. 837, 661 N.W.2d 706 (2003).

28-927 Neglecting to serve a warrant; penalty; forfeiture of office.

(1) When any warrant legally issued by any magistrate in this state in any criminal case shall be delivered into the hands of any sheriff or other officer to be executed, whose duty it shall be to execute such warrant, it is hereby made the duty of such sheriff or other officer to serve the same immediately, and if such sheriff or other officer shall neglect or delay to serve any such warrant, delivered to him or her as aforesaid, when in his or her power to serve the same, either alone or by calling upon assistance according to law, he or she commits the offense of neglecting to serve a warrant.

(2) Neglecting to serve a warrant is a Class II misdemeanor if the offense charged for which the warrant was issued is a felony.

(3) Neglecting to serve a warrant is a Class III misdemeanor if the offense charged for which the warrant was issued is a misdemeanor.

(4) Any sheriff or other officer who is convicted under this section shall immediately forfeit his or her office.

Source: Laws 1977, LB 38, § 212; Laws 1988, LB 1030, § 20.

28-928 Mutilating a flag; penalty; flag, defined.

(1) A person commits the offense of mutilating a flag if such person intentionally casts contempt or ridicule upon a flag by mutilating, defacing, defiling, burning, or trampling upon such flag.

(2) Flag as used in this section shall mean any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States or the State of Nebraska.

(3) Mutilation of a flag is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 213.

28-929 Assault on an officer in the first degree; penalty.

(1) A person commits the offense of assault on an officer in the first degree if he or she intentionally or knowingly causes serious bodily injury to a peace officer, a probation officer, or an employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.

(2) Assault on an officer in the first degree shall be a Class II felony.

Source: Laws 1982, LB 465, § 3; Laws 2005, LB 538, § 1.

28-930 Assault on an officer in the second degree; penalty.

(1) A person commits the offense of assault on an officer in the second degree if he or she:

(a) Intentionally or knowingly causes bodily injury with a dangerous instrument to a peace officer, a probation officer, or an employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties; or

(b) Recklessly causes bodily injury with a dangerous instrument to a peace officer, a probation officer, or an employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.

(2) Assault on an officer in the second degree shall be a Class III felony.

Source: Laws 1982, LB 465, § 4; Laws 2005, LB 538, § 2.

In determining whether an off-duty officer working in a secondary employment capacity is performing official duties within the meaning of this section, one should examine the nature of the acts the officer is performing at the time of the incident as well as the circumstances surrounding those acts and the secondary employment. State v. Wilen, 4 Neb. App. 132, 539 N.W.2d 650 (1995).

There is no crime in this state for attempted reckless assault on a peace officer in the second degree. State v. Hemmer, 3 Neb. App. 769, 531 N.W.2d 559 (1995).

28-931 Assault on an officer in the third degree; penalty.

(1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer, a probation officer, or an employee of the Department of Correctional Services while such officer or employee is engaged in the performance of his or her official duties.

(2) Assault on an officer in the third degree shall be a Class IIIA felony.

Source: Laws 1982, LB 465, § 5; Laws 1997, LB 364, § 11; Laws 2005, LB 538, § 3.

The status of the victim under this section is an element of the crime and is not a subsequent offense penalty enhancement. State v. Taylor, 262 Neb. 639, 634 N.W.2d 744 (2001).

In prosecutions for assaulting a peace officer, obstructing a peace officer, or resisting arrest, a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim that the peace officer used unreasonable force in making the arrest. State v. Yeutter, 252 Neb. 857, 566 N.W.2d 387 (1997).

For purposes of this section, the State must prove that the victim assaulted was a peace officer engaged in the performance of his or her official duties, but is not required to prove that the defendant was so aware. State v. Cebuhar, 252 Neb. 796, 567 N.W.2d 129 (1997).

Evidence that defendant hit a police officer with his right forearm and poked the officer in the eye when the officer attempted to prevent defendant from leaving an interviewing room while under arrest was sufficient to sustain the jury's guilty verdicts. Proof that the officer sustained bruises or other visible injuries is not required to prove third degree assault on an officer under this section. State v. Green, 240 Neb. 639, 483 N.W.2d 748 (1992).

A deputy sheriff is a peace officer. Assault on a peace officer in the third degree is committed when an on-duty deputy sheriff is slapped, and the deputy sheriff suffers physical pain. State v. Melton, 239 Neb. 576, 477 N.W.2d 154 (1991).

A police officer is a peace officer for purposes of this section. State v. Fly, 236 Neb. 408, 461 N.W.2d 421 (1990).

Jury properly advised that only reasonably necessary force may be used when making an arrest and that a person attacked so as to cause fear of bodily injury may use reasonable necessary force in defense. State v. Wallace, 223 Neb. 465, 390 N.W.2d 530 (1986).

An employee of the Douglas County Board of Corrections is considered a jailer and, therefore, a peace officer for the purposes of this section. State v. Parks, 8 Neb. App. 491, 596 N.W.2d 712 (1999).

28-931.01 Assault on an officer using a motor vehicle; penalty.

(1) A person commits the offense of assault on an officer using a motor vehicle if he or she intentionally and knowingly causes bodily injury to a peace officer, a probation officer, or an employee of the Department of Correctional Services (a) by using a motor vehicle to run over or to strike such officer or employee or (b) by using a motor vehicle to collide with such officer's or employee's motor vehicle, while such officer or employee is engaged in the performance of his or her duties.

(2) Assault on an officer using a motor vehicle shall be a Class IIIA felony.

Source: Laws 1995, LB 371, § 31; Laws 1997, LB 364, § 12; Laws 2005, LB 538, § 4.

28-932 Confined person; assault; penalty; sentence.

(1) Any person who is legally confined in a jail or correctional or penal institution and intentionally, knowingly, or recklessly causes bodily injury to another person shall be guilty of a Class IIIA felony, except that if a deadly or dangerous weapon is used to commit such assault he or she shall be guilty of a Class III felony.

(2) Sentences imposed under subsection (1) of this section shall be consecutive to any sentence or sentences imposed for violations committed prior to the violation of subsection (1) of this section and shall not include any credit for time spent in custody prior to sentencing unless the time in custody is solely related to the offense for which the sentence is being imposed under this section.

Source: Laws 1982, LB 465, § 6; Laws 1997, LB 364, § 13.

Before there can be a violation of this section, a bodily injury must occur to another person that is proximately caused by an intentional, knowing, or reckless overt act of a legally confined person or the legally confined person's accomplice. State v. Auman, 232 Neb. 341, 440 N.W.2d 254 (1989).

This section primarily prohibits a lawfully confined person from injuring another person by intentionally, knowingly, or recklessly committing a battery upon the other person. State v. Auman, 232 Neb. 341, 440 N.W.2d 254 (1989).

28-933 Confined person; offenses against another person; penalty; sentence.

(1) Any person who is legally confined in a jail or correctional or penal institution and who commits (a) assault in the first, second, or third degree as defined in sections 28-308 to 28-310, (b) terroristic threats as defined in section 28-311.01, (c) kidnapping as defined in section 28-313, or (d) false imprisonment in the first or second degree as defined in sections 28-314 and 28-315, against any person for the purpose of compelling or inducing the performance of any act by such person or any other person shall be guilty of a Class II felony.

(2) Sentences imposed under subsection (1) of this section shall be served consecutive to any sentence or sentences imposed for violations committed prior to the violation of subsection (1) of this section and shall not include any credit for time spent in custody prior to sentencing unless the time in custody is solely related to the offense for which the sentence is being imposed under this section.

Source: Laws 1982, LB 465, § 7; Laws 1986, LB 956, § 13.

ARTICLE 10

OFFENSES AGAINST ANIMALS

Section
28-1001. Repealed. Laws 1990, LB 50, § 13.
28-1002. Repealed. Laws 1990, LB 50, § 13.
28-1003. Transferred to section 28-1010.
28-1004. Terms, defined.
28-1005. Dogfighting, cockfighting, bearbaiting, or pitting an animal against another; prohibited acts; penalty.
28-1006. Investigation; arrest; seizure of property; reimbursement of expenses.
28-1007. Sections, how construed.
28-1008. Terms, defined.
28-1009. Abandonment; cruel neglect; harassment of a police animal; penalty.
28-1009.01. Violence on a service animal; interference with a service animal; penalty.
28-1009.02. Equine; prohibited acts; penalty.
28-1009.03. Bovine; prohibited acts; penalty.
28-1010. Indecency with an animal; penalty.

28-1001 Repealed. Laws 1990, LB 50, § 13.

28-1002 Repealed. Laws 1990, LB 50, § 13.

28-1003 Transferred to section 28-1010.

28-1004 Terms, defined.

As used in this section and section 28-1005, unless the context otherwise requires:

(1) Bearbaiting shall mean the pitting of any animal against a bear;

(2) Cockfighting shall mean the pitting of a fowl against another fowl;

(3) Dogfighting shall mean the pitting of a dog against another dog; and

(4) Pitting shall mean bringing animals together in combat.

Source: Laws 1988, LB 170, § 2.

28-1005 Dogfighting, cockfighting, bearbaiting, or pitting an animal against another; prohibited acts; penalty.

(1) No person shall knowingly:

(a) Promote, engage in, or be employed at dogfighting, cockfighting, bearbaiting, or pitting an animal against another;

(b) Receive money for the admission of another person to a place kept for such purpose;

(c) Own, use, train, sell, or possess an animal for such purpose; or

(d) Permit any act as described in this subsection to occur on any premises owned or controlled by him or her.

(2) Any person violating subsection (1) of this section shall be guilty of a Class IV felony.

(3) No person shall knowingly and willingly be present at and witness as a spectator dogfighting, cockfighting, bearbaiting, or the pitting of an animal against another as prohibited in subsection (1) of this section. Any person who violates any provision of this subsection shall be guilty of a Class IV felony.

Source: Laws 1988, LB 170, § 3; Laws 2003, LB 273, § 3.

28-1006 Investigation; arrest; seizure of property; reimbursement of expenses.

(1) It shall be the duty of the sheriff, a police officer, or the Nebraska State Patrol to make prompt investigation of and arrest for any violation of section 28-1005.

(2) Any animal, equipment, device, or other property or things involved in any violation of section 28-1005 shall be subject to seizure, and disposition may be made in accordance with the method of disposition directed for contraband in section 29-820.

(3) Any animal involved in any violation of section 28-1005 shall be subject to seizure. Distribution or disposition may be made in such manner as the court may direct. The court may give preference to adoption alternatives through humane societies or comparable institutions and to the protection of such animal's welfare. For a humane society or comparable institution to be considered as an adoption alternative under this subsection, it must first be licensed by the Department of Agriculture as having passed the inspection requirements in the Commercial Dog and Cat Operator Inspection Act and paid the fee for inspection under the act. The court may prohibit an adopting or purchasing party from selling such animal for a period not to exceed one year.

(4) In addition to any other sentence given for a violation of section 28-1005, the sentencing court may order the defendant to reimburse a public or private agency for expenses incurred in conjunction with the care, impoundment, or disposal, including adoption, of an animal involved in the violation of such section. Whenever the court believes that such reimbursement may be a proper sentence or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the expenses incurred. The court may order that reimbursement be made immediately, in specified installments, or within a specified period of time, not to exceed five years after the date of judgment.

Source: Laws 1988, LB 170, § 4; Laws 1997, LB 551, § 1; Laws 2002, LB 82, § 5.

Cross References

Commercial Dog and Cat Operator Inspection Act, see section 54-625.

28-1007 Sections, how construed.

Sections 28-1004 to 28-1006 shall not be construed to amend or in any manner change the authority of the Game and Parks Commission under the Game Law, to prohibit any conduct authorized or permitted in the Game Law, or to prohibit the training of dogs for any purpose not prohibited by law.

Source: Laws 1988, LB 170, § 5; Laws 1998, LB 922, § 393.

28-1008 Terms, defined.

For purposes of sections 28-1008 to 28-1017 and 28-1019:

(1) Abandon means to leave any animal in one's care, whether as owner or custodian, for any length of time without making effective provision for its food, water, or other care as is reasonably necessary for the animal's health;

(2) Animal means any vertebrate member of the animal kingdom. The term does not include an uncaptured wild creature;

(3) Bovine means a cow, an ox, or a bison;

(4) Cruelly mistreat means to knowingly and intentionally kill, maim, disfigure, torture, beat, mutilate, burn, scald, or otherwise inflict harm upon any animal;

(5) Cruelly neglect means to fail to provide any animal in one's care, whether as owner or custodian, with food, water, or other care as is reasonably necessary for the animal's health;

(6) Equine means a horse, pony, donkey, mule, hinny, or llama;

(7) Humane killing means the destruction of an animal by a method which causes the animal a minimum of pain and suffering;

(8) Law enforcement officer means any member of the Nebraska State Patrol, any county or deputy sheriff, any member of the police force of any city or village, or any other public official authorized by a city or village to enforce state or local animal control laws, rules, regulations, or ordinances. Law enforcement officer also includes any inspector under the Commercial Dog and Cat Operator Inspection Act to the extent that such inspector may exercise the authority of a law enforcement officer under section 28-1012 while in the course of performing inspection activities under the Commercial Dog and Cat Operator Inspection Act;

(9) Mutilation means intentionally causing permanent injury, disfigurement, degradation of function, incapacitation, or imperfection to an animal. Mutilation does not include conduct performed by a veterinarian licensed to practice veterinary medicine and surgery in this state or conduct that conforms to accepted veterinary practices;

(10) Police animal means a horse or dog owned or controlled by the State of Nebraska for the purpose of assisting a Nebraska state trooper in the performance of his or her official enforcement duties;

(11) Repeated beating means intentional successive strikes to an animal by a person resulting in serious bodily injury or death to the animal;

(12) Serious injury or illness includes any injury or illness to any animal which creates a substantial risk of death or which causes broken bones, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ; and

(13) Torture means intentionally subjecting an animal to extreme pain, suffering, or agony. Torture does not include conduct performed by a veterinarian licensed to practice veterinary medicine and surgery in this state or conduct that conforms to accepted veterinary practices.

Source: Laws 1990, LB 50, § 1; Laws 1995, LB 283, § 2; Laws 2003, LB 273, § 4; Laws 2006, LB 856, § 11; Laws 2007, LB227, § 1; Laws 2008, LB764, § 2; Laws 2008, LB1055, § 2.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB764, section 2, with LB1055, section 2, to reflect all amendments.

Note: Changes made by LB1055 became effective April 22, 2008. Changes made by LB764 became effective July 18, 2008.

Cross References

Commercial Dog and Cat Operator Inspection Act, see section 54-625.

28-1009 Abandonment; cruel neglect; harassment of a police animal; penalty.

(1) A person who intentionally, knowingly, or recklessly abandons or cruelly neglects an animal is guilty of a Class I misdemeanor unless the abandonment

or cruel neglect results in serious injury or illness or death of the animal, in which case it is a Class IV felony.

(2)(a) Except as provided in subdivision (b) of this subsection, a person who cruelly mistreats an animal is guilty of a Class I misdemeanor for the first offense and a Class IV felony for any subsequent offense.

(b) A person who cruelly mistreats an animal is guilty of a Class IV felony if such cruel mistreatment involves the knowing and intentional torture, repeated beating, or mutilation of the animal.

(3) A person commits harassment of a police animal if he or she knowingly and intentionally teases or harasses a police animal in order to distract, agitate, or harm the police animal for the purpose of preventing such animal from performing its legitimate official duties. Harassment of a police animal is a Class IV misdemeanor unless the harassment is the proximate cause of the death of the police animal, in which case it is a Class IV felony.

Source: Laws 1990, LB 50, § 2; Laws 1995, LB 283, § 3; Laws 2002, LB 82, § 6; Laws 2003, LB 273, § 5; Laws 2007, LB227, § 2.

28-1009.01 Violence on a service animal; interference with a service animal; penalty.

(1) A person commits the offense of violence on a service animal when he or she (a) intentionally injures, harasses, or threatens to injure or harass or (b) attempts to intentionally injure, harass, or threaten an animal that he or she knows or has reason to believe is a service animal for a blind or visually impaired person, a deaf or hearing-impaired person, or a physically limited person.

(2) A person commits the offense of interference with a service animal when he or she (a) intentionally impedes, interferes, or threatens to impede or interfere or (b) attempts to intentionally impede, interfere, or threaten to impede or interfere with an animal that he or she knows or has reason to believe is a service animal for a blind or visually impaired person, a deaf or hearing-impaired person, or a physically limited person.

(3) Evidence that the defendant initiated or continued conduct toward an animal as described in subsection (1) or (2) of this section after being requested to avoid or discontinue such conduct by the blind, visually impaired, deaf, hearing-impaired, or physically limited person being served or assisted by the animal shall create a rebuttable presumption that the conduct of the defendant was initiated or continued intentionally.

(4) For purposes of this section:

(a) Blind person means a person with totally impaired vision or with vision, with or without correction, which is so severely impaired that the primary means of receiving information is through other sensory input, including, but not limited to, braille, mechanical reproduction, synthesized speech, or readers;

(b) Deaf person means a person with totally impaired hearing or with hearing, with or without amplification, which is so severely impaired that the primary means of receiving spoken language is through other sensory input, including, but not limited to, lip reading, sign language, finger spelling, or reading;

(c) Hearing-impaired person means a person who is unable to hear air conduction thresholds at an average of forty decibels or greater in the person's better ear;

(d) Physically limited person means a person having limited ambulatory abilities, including, but not limited to, having a permanent impairment or condition that requires the person to use a wheelchair or to walk with difficulty or insecurity to the extent that the person is insecure or exposed to danger; and

(e) Visually impaired person means a person having a visual acuity of 20/200 or less in the person's better eye with correction or having a limitation to the person's field of vision so that the widest diameter of the visual field subtends an angular distance not greater than twenty degrees.

(5) Violence on a service animal or interference with a service animal is a Class III misdemeanor.

Source: Laws 1997, LB 814, § 1; Laws 2008, LB806, § 11.
Effective date July 18, 2008.

28-1009.02 Equine; prohibited acts; penalty.

(1) No person shall intentionally trip or cause to fall, or lasso or rope the legs of, any equine by any means for the purpose of entertainment, sport, practice, or contest.

(2) Violation of this section is a Class I misdemeanor.

Source: Laws 2008, LB764, § 3.
Effective date July 18, 2008.

28-1009.03 Bovine; prohibited acts; penalty.

(1) No person shall intentionally trip, cause to fall, or drag any bovine by its tail by any means for the purpose of entertainment, sport, practice, or contest.

(2) Violation of this section is a Class I misdemeanor.

Source: Laws 2008, LB764, § 4.
Effective date July 18, 2008.

28-1010 Indecency with an animal; penalty.

A person commits indecency with an animal when such person subjects an animal to sexual penetration as defined in subdivision (6) of section 28-318. Indecency with an animal is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 216; Laws 1978, LB 748, § 16; R.S.1943, (1989), § 28-1003; Laws 1990, LB 50, § 3.

28-1011 Violations; liability for expenses.

(1) In addition to any other sentence given for a violation of section 28-1009 or 28-1010, the sentencing court may order the defendant to reimburse a public or private agency for expenses incurred in conjunction with the care, impoundment, or disposal of an animal involved in the violation of such section. Whenever the court believes that such reimbursement may be a proper sentence or the prosecuting attorney requests, the court shall order that the presentence investigation report include documentation regarding the nature and amount of the expenses incurred. The court may order that reimbursement

be made immediately, in specified installments, or within a specified period of time, not to exceed five years after the date of judgment.

(2) Even if reimbursement for expenses is not ordered under subsection (1) of this section, the defendant shall be liable for all expenses incurred by a public or private agency in conjunction with the care, impoundment, or disposal of an animal. The expenses shall be a lien upon the animal.

Source: Laws 1990, LB 50, § 5; Laws 1997, LB 551, § 2.

28-1012 Law enforcement officer; powers; immunity; seizure; court powers.

(1) Any law enforcement officer who has reason to believe that an animal has been abandoned or is being cruelly neglected or cruelly mistreated may seek a warrant authorizing entry upon private property to inspect, care for, or impound the animal.

(2) Any law enforcement officer who has reason to believe that an animal has been abandoned or is being cruelly neglected or cruelly mistreated may issue a citation to the owner as prescribed in sections 29-422 to 29-429.

(3) Any animal, equipment, device, or other property or things involved in a violation of section 28-1009 or 28-1010 shall be subject to seizure and distribution or disposition may be made in such manner as the court may direct.

(4) Any animal involved in a violation of section 28-1009 or 28-1010 shall be subject to seizure. Distribution or disposition may be made in such manner as the court may direct. The court may consider adoption alternatives through humane societies or comparable institutions and the protection of such animal's welfare. For a humane society or comparable institution to be considered as an adoption alternative under this subsection, it must first be licensed by the Department of Agriculture as having passed the inspection requirements in the Commercial Dog and Cat Operator Inspection Act and paid the fee for inspection under the act. The court may prohibit an adopting or purchasing party from selling such animal for a period not to exceed one year.

(5) Any law enforcement officer acting under this section shall not be liable for damage to property if such damage is not the result of the officer's negligence.

Source: Laws 1990, LB 50, § 4; Laws 1997, LB 551, § 3; Laws 2002, LB 82, § 7.

Cross References

Commercial Dog and Cat Operator Inspection Act, see section 54-625.

28-1013 Sections; exemptions.

Sections 28-1008 to 28-1017 and 28-1019 shall not apply to:

(1) Care or treatment of an animal by a veterinarian licensed under the Nebraska Veterinary Practice Act until December 1, 2008, and the Veterinary Medicine and Surgery Practice Act on and after December 1, 2008;

(2) Commonly accepted care or treatment of a police animal by a law enforcement officer in the normal course of his or her duties;

(3) Research activity carried on by any research facility currently meeting the standards of the federal Animal Welfare Act, 7 U.S.C. 2131 et seq., as such act existed on January 1, 2003;

(4) Commonly accepted practices of hunting, fishing, or trapping;

(5) Commonly accepted practices occurring in conjunction with sanctioned rodeos, animal racing, or pulling contests;

(6) Humane killing of an animal by the owner or by his or her agent or a veterinarian upon the owner's request;

(7) Commonly accepted practices of animal husbandry with respect to farm animals and commercial livestock operations, including their transport from one location to another and nonnegligent actions taken by personnel or agents of the Nebraska Department of Agriculture or the United States Department of Agriculture in the performance of duties prescribed by law;

(8) Use of reasonable force against an animal, other than a police animal, which is working, including killing, capture, or restraint, if the animal is outside the owned or rented property of its owner or custodian and is injuring or posing an immediate threat to any person or other animal;

(9) Killing of house or garden pests;

(10) Commonly followed practices occurring in conjunction with the slaughter of animals for food or byproducts; and

(11) Commonly accepted animal training practices.

Source: Laws 1990, LB 50, § 6; Laws 1995, LB 283, § 4; Laws 2003, LB 273, § 6; Laws 2007, LB463, § 1127; Laws 2008, LB764, § 5; Laws 2008, LB1055, § 4.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB764, section 5, with LB1055, section 4, to reflect all amendments.

Note: Changes made by LB1055 became effective April 22, 2008. Changes made by LB764 became effective July 18, 2008.

Cross References

Veterinary Medicine and Surgery Practice Act, see section 38-3301.

28-1013.01 Equine; sanctioned rodeos, animal racing, or pulling contests; activities; how construed.

The intentional tripping or causing to fall, or lassoing or roping the legs of, any equine by any means for the purpose of entertainment, sport, practice, or contest shall not be considered a commonly accepted practice occurring in conjunction with sanctioned rodeos, animal racing, or pulling contests.

Source: Laws 2008, LB764, § 6.
Effective date July 18, 2008.

28-1013.02 Bovine; sanctioned rodeos, animal racing, or pulling contests; activities; how construed.

The intentional tripping, causing to fall, or dragging of any bovine by its tail by any means for the purpose of entertainment, sport, practice, or contest shall not be considered a commonly accepted practice occurring in conjunction with sanctioned rodeos, animal racing, or pulling contests.

Source: Laws 2008, LB764, § 7.
Effective date July 18, 2008.

28-1014 Local regulation; authorized.

Any city, village, or county may adopt and promulgate rules, regulations, and ordinances which are not inconsistent with the provisions of sections 28-1008

to 28-1017 and 28-1019 for the protection of the public, public health, and animals within its jurisdiction.

Source: Laws 1990, LB 50, § 7; Laws 2003, LB 273, § 7; Laws 2008, LB764, § 8; Laws 2008, LB1055, § 5.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB764, section 8, with LB1055, section 5, to reflect all amendments.

Note: Changes made by LB1055 became effective April 22, 2008. Changes made by LB764 became effective July 18, 2008.

28-1015 Ownership by child; applicability of penalties.

When an animal is owned by a minor child, the parent of such minor child with whom the child resides or legal guardian with whom the child resides shall be subject to the penalties provided under sections 28-1008 to 28-1017 and 28-1019 if the animal is abandoned or cruelly neglected.

Source: Laws 1990, LB 50, § 8; Laws 2003, LB 273, § 8; Laws 2008, LB764, § 9; Laws 2008, LB1055, § 6.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB764, section 9, with LB1055, section 6, to reflect all amendments.

Note: Changes made by LB1055 became effective April 22, 2008. Changes made by LB764 became effective July 18, 2008.

28-1016 Game and Parks Commission; Game Law; sections, how construed.

Nothing in sections 28-1008 to 28-1017 and 28-1019 shall be construed as amending or changing the authority of the Game and Parks Commission as established in the Game Law or to prohibit any conduct authorized or permitted by such law.

Source: Laws 1990, LB 50, § 9; Laws 2003, LB 273, § 9; Laws 2008, LB764, § 10; Laws 2008, LB1055, § 7.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB764, section 10, with LB1055, section 7, to reflect all amendments.

Note: Changes made by LB1055 became effective April 22, 2008. Changes made by LB764 became effective July 18, 2008.

Cross References

Game Law, see section 37-201.

28-1017 Animal abandonment, cruel neglect, or cruel mistreatment; report required by certain employees; violation; penalty.

(1) For purposes of this section:

(a) Reasonably suspects means a basis for reporting knowledge or a set of facts that would lead a person of ordinary care and prudence to believe and conscientiously entertain a strong suspicion that criminal activity is at hand or that a crime has been committed; and

(b) Employee means any employee of an agency relating to a governmental child or adult protective services, animal control, or animal abuse.

(2) Any employee, while acting in his or her professional capacity or within the scope of his or her employment, who observes or is involved in an incident which leads the employee to reasonably suspect that an animal has been abandoned, cruelly neglected, or cruelly mistreated shall report such to the entity or entities that investigate such reports in that jurisdiction.

(3) The report shall be made within two working days of acquiring the information concerning the animal by facsimile transmission of a written report presented in the form described in subsection (6) of this section or by telephone. When an immediate response is necessary to protect the health and

safety of the animal or others, the report shall be made by telephone as soon as possible.

(4) Nothing in this section shall be construed to impose a duty to investigate observed or reasonably suspected animal abandonment, cruel neglect, or cruel mistreatment. Any person making a report under this section is immune from liability except for false statements of fact made with malicious intent.

(5) Reports made pursuant to this section shall include:

(a) The reporter's name and title, business address, and telephone number;

(b) The name, if known, of the animal owner or custodian, whether a business or individual;

(c) A description of the animal or animals involved, person or persons involved, and location of the animal or animals and the premises; and

(d) The date, time, and a description of the observation or incident which led the reporter to reasonably suspect animal abandonment, cruel neglect, or cruel mistreatment and any other information the reporter believes may be relevant.

(6) Reports made pursuant to this section may be made on preprinted forms prepared by the entity or entities that investigate reports of animal abandonment, cruel neglect, or cruel mistreatment in that jurisdiction. The form shall include space for the information required under subsection (5) of this section.

(7) When two or more employees jointly have observed or reasonably suspected animal abandonment, cruel neglect, or cruel mistreatment and there is agreement between or among them, a report may be made by one person by mutual agreement. Any reporter who has knowledge that the person designated to report has failed to do so shall thereafter make the report.

(8) Any employee failing to report under this section shall be guilty of an infraction.

Source: Laws 2003, LB 273, § 1.

28-1018 Sale of puppy or kitten; prohibited acts; penalty.

(1) A person, other than an animal control facility or animal shelter, who sells a puppy or kitten under eight weeks of age without its mother is guilty of a Class V misdemeanor.

(2) For purposes of this section:

(a) Animal control facility means a facility operated by the state or any political subdivision of the state for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted animals; and

(b) Animal shelter means a facility used to house or contain dogs or cats and owned, operated, or maintained by an incorporated humane society, animal welfare society, society for the prevention of cruelty to animals, or other nonprofit organization devoted to the welfare, protection, and humane treatment of such animals.

Source: Laws 2003, LB 17, § 5; Laws 2006, LB 856, § 12.

28-1019 Conviction; order prohibiting ownership, possession, or residing with animal; duration; violation; penalty; seizure of animal.

(1)(a) If a person is convicted of a Class IV felony under section 28-1005 or 28-1009, the sentencing court shall order such person not to own, possess, or

reside with any animal for at least five years after the date of conviction, but such time restriction shall not exceed fifteen years. Any person violating such court order shall be guilty of a Class I misdemeanor.

(b) If a person is convicted of a Class I misdemeanor under subdivision (2)(a) of section 28-1009 or a Class III misdemeanor under section 28-1010, the sentencing court may order such person not to own, possess, or reside with any animal after the date of conviction, but such time restriction, if any, shall not exceed five years. Any person violating such court order shall be guilty of a Class IV misdemeanor.

(c) Any animal involved in a violation of a court order under subdivision (a) or (b) of this subsection shall be subject to seizure by law enforcement.

(2) This section shall not apply to any person convicted under section 28-1005 or 28-1009 if a licensed physician confirms in writing that ownership or possession of or residence with an animal is essential to the health of such person.

Source: Laws 2008, LB1055, § 3.
Effective date April 22, 2008.

ARTICLE 11
GAMBLING

Section

28-1101 Terms, defined.

As used in this article, unless the context otherwise requires:

(1) A person advances gambling activity if, acting other than as a player, he or she engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes, but shall not be limited to, conduct directed toward (a) the creation or establishment of the particular game, contest, scheme, device, or activity involved, (b) the acquisition or maintenance of premises, paraphernalia, equipment, or apparatus therefor, or (c) engaging in the procurement, sale, or offering for sale within this state of any chance, share,

or interest in a lottery of another state or government whether or not such chance, share, or interest is an actual lottery ticket, receipt, contingent promise to pay, order to purchase, or other record of such interest except as provided in the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701;

(2) Bookmaking shall mean advancing gambling activity by unlawfully accepting bets from members of the public as a business upon the outcome of future contingent events;

(3) A person profits from gambling activity if, other than as a player, he or she accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of gambling activity;

(4) A person engages in gambling if he or she bets something of value upon the outcome of a future event, which outcome is determined by an element of chance, or upon the outcome of a game, contest, or election, or conducts or participates in any bingo, lottery by the sale of pickle cards, lottery, raffle, gift enterprise, or other scheme not authorized or conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701, but a person does not engage in gambling by:

(a) Entering into a lawful business transaction;

(b) Playing an amusement device or a coin-operated mechanical game which confers as a prize an immediate, unrecorded right of replay not exchangeable for something of value;

(c) Conducting or participating in a prize contest; or

(d) Conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701;

(5) Gambling device shall mean any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value, free games redeemable for something of value, instant-win tickets which also provide the possibility of participating in a subsequent drawing or event, or tickets or stubs redeemable for something of value, except as authorized in the furtherance of parimutuel wagering. Supplies, equipment, cards, tickets, stubs, and other items used in any bingo, lottery by the sale of pickle cards, other lottery, raffle, or gift enterprise conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701 are not gambling devices within this definition;

(6) Something of value shall mean any money or property, any token, object, or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service or entertainment; and

(7) Prize contest shall mean any competition in which one or more competitors are awarded something of value as a consequence of winning or achieving a certain result in the competition and (a) the value of such awards made to competitors participating in the contest does not depend upon the number of participants in the contest or upon the amount of consideration, if any, paid for the opportunity to participate in the contest or upon chance and (b) the value or identity of such awards to be made to competitors is published before the competition begins.

Source: Laws 1977, LB 38, § 217; Laws 1978, LB 900, § 1; Laws 1979, LB 152, § 1; Laws 1983, LB 259, § 36; Laws 1983, LB 374, § 1; Laws 1984, LB 744, § 1; Laws 1984, LB 949, § 72; Laws 1986, LB 1027, § 192; Laws 1991, LB 849, § 64; Laws 1993, LB 138, § 66; Laws 1995, LB 343, § 6.

Cross References

Constitutional provisions, see Article III, section 24, Constitution of Nebraska.
Nebraska Bingo Act, see section 9-201.
Nebraska County and City Lottery Act, see section 9-601.
Nebraska Lottery and Raffle Act, see section 9-401.
Nebraska Pickle Card Lottery Act, see section 9-301.
Nebraska Small Lottery and Raffle Act, see section 9-501.
State Lottery Act, see section 9-801.

A gambling device is one which is used or usable to bet something of value on the outcome of a future event, which outcome is determined by an element of chance, unless the device falls within one of the exceptions contained in subsection (4) of this section. State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

Free replay credits are a credit or promise involving extension of a service or entertainment and are thus something of value. State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

The definition of ''gambling device'' contained in subsection (5) of this section, when taken in the context of section 28-1107, is not unconstitutionally overbroad. State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

A lottery is a game of chance in which the winner is determined by mere luck, not by skill, and contains the elements of consideration, a prize, and chance. Video Consultants v. Douglas, 219 Neb. 868, 367 N.W.2d 697 (1985).

The sale of pickle cards constitutes a lottery under this section as it has the requisite elements of consideration, prize, and chance. CONtact, Inc. v. State, 212 Neb. 584, 324 N.W.2d 804 (1982).

28-1102 Promoting gambling, first degree; penalty.

(1) A person commits the offense of promoting gambling in the first degree if he or she knowingly advances or profits from unlawful gambling activity by:

(a) Engaging in bookmaking to the extent that he or she receives or accepts in any one day one or more bets totaling one thousand dollars or more; or

(b) Receiving, in connection with any unlawful gambling scheme or enterprise, more than one thousand dollars of money played in the scheme or enterprise in any one day.

(2) Promoting gambling in the first degree is, for the first offense, a Class I misdemeanor, for the second offense, a Class IV felony, and for the third and all subsequent offenses, a Class III felony. No person shall be charged with a second or subsequent offense under this section unless the prior offense or offenses occurred after August 24, 1979.

Source: Laws 1977, LB 38, § 218; Laws 1979, LB 152, § 2.

28-1103 Promoting gambling, second degree; penalty.

(1) A person commits the offense of promoting gambling in the second degree if he or she knowingly advances or profits from any unlawful gambling activity by:

(a) Engaging in bookmaking to the extent that he or she receives or accepts in any one day one or more bets totaling less than one thousand dollars;

(b) Receiving, in connection with any unlawful gambling scheme or enterprise, less than one thousand dollars of money played in the scheme or enterprise in any one day; or

(c) Betting something of value in an amount of three hundred dollars or more with one or more persons in one day.

(2) Promoting gambling in the second degree is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 219; Laws 1979, LB 152, § 3.

28-1104 Promoting gambling, third degree; penalty.

(1) A person commits the offense of promoting gambling in the third degree if he or she knowingly participates in unlawful gambling as a player by betting less than three hundred dollars in any one day.

(2) Promoting gambling in the third degree is a Class IV misdemeanor.

Source: Laws 1977, LB 38, § 220; Laws 1979, LB 152, § 4.

28-1105 Possession of gambling records; penalty.

(1) A person commits the offense of possession of gambling records if, other than as a player, he or she knowingly possesses any writing, paper, instrument, or article which is:

(a) Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise and such writing, paper, instrument, or article has been used for the purpose of recording, memorializing, or registering any bet, wager, or other gambling information; or

(b) Of a kind commonly used in the operation, promotion, or playing of a lottery or mutuel scheme or enterprise or other scheme not conducted pursuant to the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701 and such writing, paper, instrument, or article has been used for the purpose of recording, memorializing, or registering any bet, wager, or other gambling information not permitted by such acts or section.

(2) Possession of gambling records in the first degree is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 221; Laws 1979, LB 152, § 5; Laws 1983, LB 259, § 37; Laws 1985, LB 408, § 39; Laws 1986, LB 1027, § 193; Laws 1991, LB 849, § 65; Laws 1993, LB 138, § 67.

Cross References

Nebraska Bingo Act, see section 9-201.
Nebraska County and City Lottery Act, see section 9-601.
Nebraska Lottery and Raffle Act, see section 9-401.
Nebraska Pickle Card Lottery Act, see section 9-301.
Nebraska Small Lottery and Raffle Act, see section 9-501.
State Lottery Act, see section 9-801.

28-1105.01 Gambling debt collection; penalty.

(1) A person commits the offense of gambling debt collection if he or she employs any force or intimidation or threatens force or intimidation in order to collect any debt which results from gambling as defined by sections 9-510, 28-1101 to 28-1109, and 28-1117.

(2) Gambling debt collection is a Class III felony.

Source: Laws 1979, LB 152, § 6.

28-1106 Repealed. Laws 1979, LB 152, § 12.

28-1107 Possession of a gambling device; penalty; exemption.

(1) A person commits the offense of possession of a gambling device if he or she manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

(2) This section shall not apply to any coin-operated mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding free games, which is intended to be played and is in fact played for amusement only, and which may allow the player the right to replay such gaming device at no additional cost, which right to replay shall not be considered money or property, except that such mechanical game (a) can be discharged of accumulated free replays only by reactivating the game for one additional play for each accumulated free replay and (b) makes no permanent record directly or indirectly of free replays so awarded. Notwithstanding any other provisions of this section, any mechanical game or device classified by the federal government as an illegal gambling device and requiring a federal Gambling Device Tax Stamp as required by the Internal Revenue Service in its administration of 26 U.S.C. 4461 and 4462, amended July 1, 1965, by Public Law 89-44, are hereby declared to be illegal and excluded from the exemption granted in this section.

(3) Possession of a gambling device is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 223; Laws 1978, LB 900, § 2; Laws 1979, LB 152, § 7; Laws 1987, LB 523, § 4.

Subsection (1) of this section is severable from the remaining invalid portion of the statute. Evidence that devices were seen in bars being played by patrons shows knowledge that defendant tavern owners knew the machines, with no purpose except as ''gambling devices,'' were used in gambling activity and was sufficient to prove defendants violated subsection (1) of this section. Subsection (2) of this section is unconstitutional for being in contravention of the express provisions of Neb. Const. art. III, section 24, which defines ''games of chance'' and ''prize.'' State ex rel. Spire v. Strawberries, Inc., 239 Neb. 1, 473 N.W.2d 428 (1991).

Coin-operated electronic and video machines equipped with reset switches and meters permanently recording replays awarded are gambling devices within the meaning of this section. State v. Dodge City, 238 Neb. 439, 470 N.W.2d 795 (1991).

A gambling device is one which is used or usable to bet something of value on the outcome of a future event, which outcome is determined by an element of chance, unless the device falls within one of the exceptions contained in section 28-1101(4). State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

Free replay credits are a credit or promise involving extension of a service or entertainment and are thus something of value. State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

Statutes prohibiting possession or use of gambling devices and providing their forfeiture are a valid exercise of the State's power. State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

The definition of ''gambling device'' contained in section 28-1101(5), when taken in the context of this section, is not unconstitutionally overbroad. State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

28-1108 Prosecution; affirmative defense.

In any prosecution under this article, it shall be an affirmative defense that the writing, paper, instrument, or article possessed by the defendant was

neither used nor intended to be used in the advancement of an unlawful gambling activity.

Source: Laws 1977, LB 38, § 224; Laws 1979, LB 152, § 8.

28-1109 Proof of possession of gambling device; prima facie evidence.

Proof of possession of any gambling device shall be prima facie evidence of possession thereof with knowledge of its contents and character.

Source: Laws 1977, LB 38, § 225; Laws 1979, LB 152, § 9.

28-1110 Gambling; prosecution; not in violation of jurisdiction where conducted; no defense.

It shall be no defense to a prosecution under any provision of this article relating to gambling that the gambling is conducted outside this state and is not in violation of the laws of the jurisdiction in which it is conducted.

Source: Laws 1977, LB 38, § 226; Laws 1986, LB 1027, § 194.

28-1111 Gambling device or record; money used as a bet or stake; forfeited to state.

Any gambling device or gambling record possessed in violation of any provision of this article, or any money used as a bet or stake in gambling activity in violation of any provision of this article, shall be forfeited to the state.

Source: Laws 1977, LB 38, § 227.

Statutes prohibiting possession or use of gambling devices and providing their forfeiture are a valid exercise of the State's power. State v. Two IGT Video Poker Games, 237 Neb. 145, 465 N.W.2d 453 (1991).

28-1112 Defendant, status as a player; affirmative defense, when.

In any prosecution for an offense defined in this article, when the defendant's status as a player constitutes an excusing condition, the fact that the defendant was a player shall constitute an affirmative defense.

Source: Laws 1977, LB 38, § 228.

28-1113 Article, how construed.

Nothing in this article shall be construed to:

(1) Apply to or prohibit wagering on the results of horseraces by the parimutuel or certificate method when conducted by licensees within the racetrack enclosure at licensed horserace meetings; or

(2) Prohibit or punish the conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise when conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701.

Source: Laws 1977, LB 38, § 229; Laws 1979, LB 164, § 19; Laws 1983, LB 259, § 38; Laws 1984, LB 949, § 73; Laws 1986, LB 1027, § 195; Laws 1991, LB 849, § 66; Laws 1993, LB 138, § 68.

Cross References

Nebraska Bingo Act, see section 9-201.
Nebraska County and City Lottery Act, see section 9-601.
Nebraska Lottery and Raffle Act, see section 9-401.
Nebraska Pickle Card Lottery Act, see section 9-301.
Nebraska Small Lottery and Raffle Act, see section 9-501.
State Lottery Act, see section 9-801.

28-1114 Transferred to section 9-701.

28-1115 Transferred to section 9-510.

28-1116 Transferred to section 9-608.

28-1116.01 Transferred to section 9-609.

28-1116.02 Repealed. Laws 1986, LB 1027, § 225.

28-1117 Proof of occurrence of sporting event; prima facie evidence.

In any prosecution under this article in which it is necessary to prove the occurrence of a sporting event, a published report of its occurrence in any daily newspaper, magazine, or other periodically printed publication of general circulation shall be admissible in evidence and shall constitute prima facie evidence of the occurrence of the event.

Source: Laws 1979, LB 152, § 11.

ARTICLE 12

OFFENSES AGAINST PUBLIC HEALTH AND SAFETY

Section

Section

28-1201 Terms, defined.

For purposes of sections 28-1201 to 28-1212, unless the context otherwise requires:

(1) Firearm shall mean any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or frame or receiver of any such weapon;

(2) Fugitive from justice shall mean any person who has fled or is fleeing from any peace officer to avoid prosecution or incarceration for a felony;

(3) Juvenile shall mean any person under the age of eighteen years;

(4) Knife shall mean any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds;

(5) Knuckles and brass or iron knuckles shall mean any instrument that consists of finger rings or guards made of a hard substance and that is designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles;

(6) Machine gun shall mean any firearm, whatever its size and usual designation, that shoots automatically more than one shot, without manual reloading, by a single function of the trigger;

(7) Short rifle shall mean a rifle having a barrel less than sixteen inches long or an overall length of less than twenty-six inches; and

(8) Short shotgun shall mean a shotgun having a barrel or barrels less than eighteen inches long or an overall length of less than twenty-six inches.

Source: Laws 1977, LB 38, § 233; Laws 1994, LB 988, § 2.

The Legislature intended the words ''with a blade over three and one-half inches'' to apply to daggers, dirks, knives, and stilettos, such that any of these items having blades over 3½ inches are ''knives'' under subsection (4) of this section. Daggers, dirks, knives, or stilettos with blades over 3½ inches are knives per se. When a case involves an instrument not specifically named in subsection (4) of this section, the State bears the burden of proving that the instrument is a dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds, and thus is a ''knife'' for purposes of section 28-1205(1). State v. Bottolfson, 259 Neb. 470, 610 N.W.2d 378 (2000).

A firearm does not have to be operable in order for the defendant to be guilty of use of a deadly weapon to commit a felony. State v. Clark, 10 Neb. App. 758, 637 N.W.2d 671 (2002).

The evidence was sufficient to support a conviction for use of a deadly weapon to commit a felony, even though a crime laboratory report indicated that the defendant's handgun was inoperable. The evidence indicated that the defendant used a weapon designed to expel a projectile, as the report stated that the handgun was a semiautomatic pistol with a matching magazine. State v. Clark, 10 Neb. App. 758, 637 N.W.2d 671 (2002).

28-1202 Carrying concealed weapon; penalty; affirmative defense.

(1) (a) Except as otherwise provided in this section, any person who carries a weapon or weapons concealed on or about his or her person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon commits the offense of carrying a concealed weapon.

(b) It is an affirmative defense that the defendant was engaged in any lawful business, calling, or employment at the time he or she was carrying any weapon or weapons and the circumstances in which such person was placed at the time were such as to justify a prudent person in carrying the weapon or weapons for the defense of his or her person, property, or family.

(2) This section does not apply to a person who is the holder of a valid permit issued under the Concealed Handgun Permit Act if the concealed weapon the defendant is carrying is a handgun as defined in section 69-2429.

(3) Carrying a concealed weapon is a Class I misdemeanor.

(4) In the case of a second or subsequent conviction under this section, carrying a concealed weapon is a Class IV felony.

Source: Laws 1977, LB 38, § 234; Laws 1984, LB 1095, § 1; Laws 2006, LB 454, § 22.

Cross References

Concealed Handgun Permit Act, see section 69-2427.

In order to be a deadly weapon per se under subsection (1) of this section, the weapon must be one specifically enumerated in the statute. Whether an object or weapon not specifically named in the statute is a deadly weapon is a question of fact to be determined by the trier of fact, and the resolution of that fact question will depend on the evidence adduced as to the use or intended use of the object or weapon. State v. Williams, 218 Neb. 57, 352 N.W.2d 576 (1984).

Whether an object or weapon not specifically enumerated in subsection (1) of this section was a deadly weapon is a question of fact to be decided by the trier of fact. State v. Kanger, 215 Neb. 128, 337 N.W.2d 422 (1983).

Section 28-1202(1), R.S.Supp.,1978, combined with the definition of ''deadly weapon'' found in section 28-109, R.S.Supp.,1978, is sufficiently definite to meet the requirements of the first and fifth amendments to the U.S. Constitution and Art. I, section 3, of the Nebraska Constitution. State v. Valencia, 205 Neb. 719, 290 N.W.2d 181 (1980).

When a person is charged with violation of this section, the State need not prove that a revolver or gun is operable in order to establish that it is a ''firearm''. The test is whether evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the trier of fact in a prosecution for carrying a concealed weapon. In re Interest of Cory P., 7 Neb. App. 397, 584 N.W.2d 820 (1998).

Any instrument that consists of finger rings or guards made of a hard substance and that is designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles is per se a deadly weapon under this section. State v. Lewis, 6 Neb. App. 867, 577 N.W.2d 774 (1998).

28-1203 Transportation or possession of machine guns, short rifles, or short shotguns; penalty; exception.

(1) Any person or persons who shall transport or possess any machine gun, short rifle, or short shotgun commits a Class IV felony.

(2) The provisions of this section shall not be held to prohibit any act by peace officers, members of the United States armed services, or members of the National Guard of this state, in the lawful discharge of their duties, or persons qualified under the provisions of federal law relating to the short rifle, short shotgun, or machine gun.

Source: Laws 1977, LB 38, § 235; Laws 1978, LB 748, § 17.

Under subsection (1) of this section, the possessory standard for controlled substances (i.e., a defendant possesses a controlled substance when the defendant knows of the nature or character of the substance and its presence and has dominion or control over the substance) is equally applicable to possession of a firearm. State v. Jasper, 237 Neb. 754, 467 N.W.2d 855 (1991).

Subsection (1) of this section is not vitiated by the ''Right to Bear Arms'' amendment of 1988, is a valid exercise of the State's police power in reasonable regulation of certain firearms, and does not contravene Neb. Const. art. I, sec. 1. State v. LaChapelle, 234 Neb. 458, 451 N.W.2d 689 (1990).

The requirement of ''possession'' for purposes of subsection (1) of this section may be satisfied by actual or constructive possession of any of the items named in subsection (1). State v. Frieze, 3 Neb. App. 263, 525 N.W.2d 646 (1994).

28-1204 Unlawful possession of a revolver; exceptions; penalty.

(1) Any person under the age of eighteen years who possesses a pistol, revolver, or any other form of short-barreled hand firearm commits the offense of unlawful possession of a revolver.

(2) The provisions of this section shall not apply to the issuance of such firearms to members of the armed forces of the United States, active or reserve, National Guard of this state, or Reserve Officers Training Corps, when on duty or training, or to the temporary loan of pistols, revolvers, or any other form of short-barreled firearms for instruction under the immediate supervision of a parent or guardian or adult instructor.

(3) Unlawful possession of a revolver is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 236; Laws 1978, LB 748, § 18.

When a person is charged with violation of this section, the State need not prove that a revolver or gun is operable in order to establish that it is a ''firearm''. The test is whether evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the trier of fact in a prosecution for being a person under the age of 18 in possession of a pistol, revolver, or any other form of short-barreled hand firearm. In re Interest of Cory P., 7 Neb. App. 397, 584 N.W.2d 820 (1998).

28-1204.01 Unlawful transfer of a firearm to a juvenile; exceptions; penalty; county attorney; duty.

(1) Any person who knowingly and intentionally does or attempts to sell, provide, loan, deliver, or in any other way transfer the possession of a firearm

to a juvenile commits the offense of unlawful transfer of a firearm to a juvenile. The county attorney shall have a copy of the petition served upon the owner of the firearm, if known, in person or by registered or certified mail at his or her last-known address.

(2) This section shall not apply to the transfer of a firearm other than the types specified in section 28-1204 to a juvenile:

(a) From a person related to such juvenile within the second degree of consanguinity or affinity if the transfer of physical possession of such firearm does not occur until such time as express permission has been obtained from the juvenile's parent or guardian;

(b) For a legitimate and lawful sporting purpose; or

(c) Who is under direct adult supervision in an appropriate educational program.

(3) This section shall apply to the transfer of any firearm described in section 28-1204, except as specifically provided in subsection (2) of section 28-1204.

(4) Unlawful transfer of a firearm to a juvenile is a Class IV felony.

Source: Laws 1994, LB 988, § 4.

28-1204.02 Confiscation of firearm; disposition.

Any firearm in the possession of a person in violation of section 28-1204 or 28-1204.01 shall be confiscated by a peace officer or other authorized law enforcement officer. Such firearm shall be held by the agency employing such officer until it no longer is required as evidence.

Source: Laws 1994, LB 988, § 3.

Cross References

Disposition of confiscated firearm, see section 28-1204.04.

28-1204.03 Firearms and violence; legislative findings.

The Legislature finds that:

(1) Increased violence in schools has become a national, state, and local problem;

(2) Increased violence and the threat of violence has a grave and detrimental impact on the educational process in Nebraska schools;

(3) Increased violence has caused fear and concern among not only the schools and students but the public at large;

(4) Firearms have contributed greatly to the increase of fear and concern among our citizens;

(5) Schools have a duty to protect their students and provide an environment which promotes and provides an education in a nonthreatening manner;

(6) An additional danger of firearms in schools is the risk of accidental discharge and harm to students and staff;

(7) Firearms are an immediate and inherently dangerous threat to the safety and well-being of an educational setting; and

(8) The ability to confiscate and remove firearms quickly from school grounds is a legitimate and necessary tool to protect students and the educational process.

Source: Laws 1994, LB 988, § 5.

28-1204.04 Unlawful possession of a firearm on school grounds; penalty; exceptions; confiscation of certain firearms; disposition.

(1) Any person who possesses a firearm in a school, on school grounds, in a school-owned vehicle, or at a school-sponsored activity or athletic event shall be guilty of the offense of unlawful possession of a firearm on school grounds. Unlawful possession of a firearm on school grounds is a Class II misdemeanor. This subsection shall not apply to (a) the issuance of firearms to or possession by members of the armed forces of the United States, active or reserve, National Guard of this state, or Reserve Officers Training Corps or peace officers or other duly authorized law enforcement officers when on duty or training, (b) firearms which may lawfully be possessed by the person receiving instruction, for instruction under the immediate supervision of an adult instructor, or (c) firearms contained within a private vehicle operated by a nonstudent adult which are not loaded and (i) are encased or (ii) are in a locked firearm rack that is on a motor vehicle. For purposes of this subsection, encased shall mean enclosed in a case that is expressly made for the purpose of containing a firearm and that is completely zipped, snapped, buckled, tied, or otherwise fastened with no part of the firearm exposed.

(2) Any firearm possessed in violation of subsection (1) of this section in a school, on school grounds, in a school-owned vehicle, or at a school-sponsored activity or athletic event shall be confiscated without warrant by a peace officer or may be confiscated without warrant by school administrative or teaching personnel. Any firearm confiscated by school administrative or teaching personnel shall be delivered to a peace officer as soon as practicable.

(3) Any firearm confiscated by or given to a peace officer pursuant to subsection (2) of this section shall be declared a common nuisance and shall be held by the peace officer prior to his or her delivery of the firearm to the property division of the law enforcement agency which employs the peace officer. The property division of such law enforcement agency shall hold such firearm for as long as the firearm is needed as evidence. After the firearm is no longer needed as evidence it shall be destroyed in such manner as the court may direct.

(4) Whenever a firearm is confiscated and held pursuant to this section or section 28-1204.02, the peace officer who received such firearm shall cause to be filed within ten days after the confiscation a petition for destruction of such firearm. The petition shall be filed in the district court of the county in which the confiscation is made. The petition shall describe the firearm held, state the name of the owner, if known, allege the essential elements of the violation which caused the confiscation, and conclude with a prayer for disposition and destruction in such manner as the court may direct. At any time after the confiscation of the firearm and prior to court disposition, the owner of the firearm seized may petition the district court of the county in which the confiscation was made for possession of the firearm. The court shall release the firearm to such owner only if the claim of ownership can reasonably be shown to be true and either (a) the owner of the firearm can show that the firearm was

taken from his or her property or place of business unlawfully or without the knowledge and consent of the owner and that such property or place of business is different from that of the person from whom the firearm was confiscated or (b) the owner of the firearm is acquitted of the charge of unlawful possession of a revolver in violation of section 28-1204, unlawful transfer of a firearm to a juvenile, or unlawful possession of a firearm on school grounds. No firearm having significant antique value or historical significance as determined by the Nebraska State Historical Society shall be destroyed. If a firearm has significant antique value or historical significance, it shall be sold at auction and the proceeds deposited in the permanent school fund.

Source: Laws 1994, LB 988, § 6; Laws 2002, LB 82, § 8.

28-1205 Using a deadly weapon to commit a felony; penalty; separate and distinct offense.

(1) Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony.

(2)(a) Use of a deadly weapon other than a firearm to commit a felony is a Class III felony.

(b) Use of a deadly weapon which is a firearm to commit a felony is a Class II felony.

(3) The crimes defined in this section shall be treated as separate and distinct offenses from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed.

Source: Laws 1977, LB 38, § 237; Laws 1995, LB 371, § 8.

1. Constitutionality
2. Deadly weapon
3. Evidence
4. Generally
5. Lesser-included offense
6. Sentencing
7. To commit any felony

1. Constitutionality

The consecutive sentence requirement of this statute is constitutional. State v. Stratton, 220 Neb. 854, 374 N.W.2d 31 (1985).

2. Deadly weapon

Pursuant to subsection (1) of this section, a defendant can be convicted of a use of a deadly weapon to commit a felony charge under an aiding and abetting theory. State v. Leonor, 263 Neb. 86, 638 N.W.2d 798 (2002).

To sustain a conviction under the use prong of this section, the State must show that the defendant actively employed a deadly weapon for the purpose of committing a felony. Mere storage of a weapon at a residence where drugs are dealt is insufficient to support a conviction for the use of a deadly weapon under this section. The term possession, as used in this section, includes only actual possession; actual possession is defined as including only those weapons on one's person or within one's immediate control, which is the area within which one might immediately gain possession of a weapon. State v. Garza, 256 Neb. 752, 592 N.W.2d 485 (1999).

A defendant who aids and abets the use of a deadly weapon in the commission of a first degree murder by having a conversation with another individual regarding who is going to kill the particular victim, supplying the other individual with the murder weapon, unlawfully breaking and entering the victim's residence for the purpose of killing the victim, and hitting someone in the victim's residence with a piece of wood can be prosecuted and punished as if he or she was the principal offender. State v. Larsen, 255 Neb. 532, 586 N.W.2d 641 (1998).

Pursuant to subsection (1) of this section, a ''deadly weapon'' is any instrument which, in the manner it is used or intended to be used, is capable of producing a bodily injury involving a substantial risk of (1) death, (2) serious permanent disfigurement, or (3) protracted loss or impairment of the function of any organ or body part. The weapon need not actually produce such injuries, but need only be used in a manner which makes it capable of producing them. Under the facts of this case, a 14- by 3- by 3/4-inch wooden ''spanking board'' could be found to be a deadly weapon. State v. Ayres, 236 Neb. 824, 464 N.W.2d 316 (1991).

A firearm does not have to be operable in order for the defendant to be guilty of use of a deadly weapon to commit a felony. State v. Clark, 10 Neb. App. 758, 637 N.W.2d 671 (2002).

3. Evidence

Evidence of a defendant's fingerprints has probative value; and it is for the jury to determine, in light of all other evidence,

whether such evidence permits an inference to be drawn that beyond a reasonable doubt defendant was the person who committed the offense in question. State v. Pena, 208 Neb. 250, 302 N.W.2d 735 (1981).

The evidence was sufficient to support a conviction for use of a deadly weapon to commit a felony, even though a crime laboratory report indicated that the defendant's handgun was inoperable. The evidence indicated that the defendant used a weapon designed to expel a projectile, as the report stated that the handgun was a semiautomatic pistol with a matching magazine. State v. Clark, 10 Neb. App. 758, 637 N.W.2d 671 (2002).

4. Generally

When the felony which serves as a basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a weapon to commit a felony. State v. Pruett, 263 Neb. 99, 638 N.W.2d 809 (2002).

Where the record reflects the use of multiple weapons in the commission of a single felony, the use of each weapon may constitute a separate violation of this section. State v. Decker, 261 Neb. 382, 622 N.W.2d 903 (2001).

Prosecution for both unlawful discharge of a firearm under section 28-1212.02 and use of a deadly weapon to commit a felony under this section in a single proceeding does not violate the Double Jeopardy Clause. State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997).

It is an open question as to whether a defendant has a right to be told of the mandatory consecutive nature of a sentence imposed for using a firearm to commit a felony. State v. Suffredini, 224 Neb. 220, 397 N.W.2d 51 (1986).

This section defines a separate and distinct crime, and conviction of violation of this section is not enhancement with respect to conviction of felony in which firearm was used. State v. Dandridge, 209 Neb. 885, 312 N.W.2d 286 (1981).

When instructing the jury on multiple counts under this section, the trial court need not repeat the ''use'' instruction for each separate count charged. State v. Charles, 4 Neb. App. 211, 541 N.W.2d 69 (1995).

A defendant acquitted on the underlying felony charge cannot be convicted of an offense under this section involving that felony; but a defendant convicted of the underlying felony might still be acquitted on a charge under this section. State v. Smith, 3 Neb. App. 564, 529 N.W.2d 116 (1995).

A defendant cannot be convicted under this section when defendant has been acquitted of the underlying felony. State v. George, 3 Neb. App. 354, 527 N.W.2d 638 (1995).

5. Lesser-included offense

Use of a firearm or other deadly weapon in the commission of a felony is not a lesser-included offense of assault in the second degree. State v. Jackson, 217 Neb. 332, 348 N.W.2d 866 (1984).

6. Sentencing

Pursuant to subsection (3) of this section, two separate sentences of 15 to 20 years' imprisonment for the use of a deadly weapon in the commission of two separate first degree murders can be served consecutively to the respective murder convictions, even when one of the murder convictions is based on accomplice liability. State v. Larsen, 255 Neb. 532, 586 N.W.2d 641 (1998).

Pursuant to subsection (3) of this section, the trial court's failure to impose defendant's sentence for use of a firearm consecutively to his life imprisonment sentence is plain error. State v. Russell, 248 Neb. 723, 539 N.W.2d 8 (1995).

Although it is within the trial court's discretion to direct that sentences imposed for separate crimes be served consecutively, this section does not permit such discretion in sentencing. State v. Sorenson, 247 Neb. 567, 529 N.W.2d 42 (1995).

Where defendant was convicted of two separate and distinct felonies, the sentences were within statutory limits and appropriately imposed consecutively. State v. Reynolds, 242 Neb. 874, 496 N.W.2d 872 (1993).

The language of subsection (3) of this section, to the effect that sentences under its provisions must be imposed consecutively to any sentence imposed for the predicate felony, is mandatory and not within the discretion of the sentencing court. State v. Trevino, 230 Neb. 494, 432 N.W.2d 503 (1988).

Although subsection (3) of this section mandates that a sentence imposed hereunder must be served consecutive to any other sentence, whether or not a defendant needs to be specifically apprised of such matter is factually dependent. State v. Lyman, 230 Neb. 457, 432 N.W.2d 43 (1988).

Failure to advise the defendant that sentence for use of a weapon to commit a felony was required to run consecutively with any other sentence imposed was not prejudicial when defendant was advised of the combined minimum sentence which he could serve. State v. Lyman, 230 Neb. 457, 432 N.W.2d 43 (1988).

Where a defendant is not informed that consecutive sentences are mandated by subsection (3) of this statute, he has been misinformed by the court, and his plea is not voluntary. State v. Golden, 226 Neb. 863, 415 N.W.2d 469 (1987).

It is an open question as to whether a defendant has a right to be told of the mandatory consecutive nature of a sentence imposed for using a firearm to commit a felony. State v. Suffredini, 224 Neb. 220, 397 N.W.2d 51 (1986).

When a person found guilty of a substantive crime as well as being a habitual criminal is improperly sentenced, both sentences must be set aside and the case remanded for proper sentencing. State v. Rolling, 209 Neb. 243, 307 N.W.2d 123 (1981).

7. To commit any felony

The language ''to commit any felony,'' as it is used in this section, is synonymous with ''for the purpose of committing any felony.'' State v. Ring, 233 Neb. 720, 447 N.W.2d 908 (1989).

28-1206 Possession of a deadly weapon by a felon or a fugitive from justice; penalty.

(1) Any person who possesses any firearm or brass or iron knuckles and who has previously been convicted of a felony or who is a fugitive from justice commits the offense of possession of a deadly weapon by a felon or a fugitive from justice.

(2) Such felony conviction may have been had in any court in the United States, the several states, territories, or possessions, or the District of Columbia.

(3)(a) Possession of a deadly weapon other than a firearm by a felon or a fugitive from justice is a Class IV felony.

(b) Possession of a deadly weapon which is a firearm by a felon or a fugitive from justice is a Class III felony.

Source: Laws 1977, LB 38, § 238; Laws 1978, LB 748, § 19; Laws 1995, LB 371, § 9.

1. Felon in possession
2. Miscellaneous

1. Felon in possession

Nebraska law explicitly and unequivocally prohibits a felon from being in possession of a firearm. State v. Mowell, 267 Neb. 83, 672 N.W.2d 389 (2003).

This section punishes the specific conduct of possession of a firearm by a person previously convicted of a felony, not the underlying felony. State v. Peters, 261 Neb. 416, 622 N.W.2d 918 (2001).

In order to use a prior conviction as proof that a defendant has been convicted of a felony for purposes of the felon in possession statute, the State must establish that at the time of the prior conviction, the defendant had or waived counsel. State v. Portsche, 258 Neb. 926, 606 N.W.2d 794 (2000).

The release of a convicted felon from probation and the restoration of his or her civil rights does not nullify the conviction under the terms of subsection (1) of this section. State v. Illig, 237 Neb. 598, 467 N.W.2d 375 (1991).

Pursuant to subsection (1) of this section, a convicted felon may not possess a firearm for purposes of self-defense. State v. Harrington, 236 Neb. 500, 461 N.W.2d 752 (1990).

Possession of a firearm by a felon on two separate days, absent any evidence of an interruption in that possession, is a single continuing offense where the statute does not specify any means for dividing an uninterrupted possession into separate offenses, and the former instance of possession is included in the offense for the latter. State v. Williams, 211 Neb. 650, 319 N.W.2d 748 (1982).

To have ''previously been convicted of a felony'', as the phrase is used in subsection (1) of this section, a defendant need not have commenced serving his or her sentence for the previous conviction. State v. Moore, 3 Neb. App. 417, 527 N.W.2d 223 (1995).

2. Miscellaneous

Prosecution for both unlawful discharge of a firearm under section 28-1212.02 and possession of a deadly weapon by a felon under this section does not violate the Double Jeopardy Clause. State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997).

A pistol is a firearm. State v. Melton, 239 Neb. 790, 478 N.W.2d 341 (1992).

This section is held not to be invalid as in conflict with Neb. Const. art. I, section 1. State v. Comeau, 233 Neb. 907, 448 N.W.2d 595 (1989).

Evidence which was seized during a search based solely on an illegal wiretap must be suppressed and a conviction based on that evidence reversed, where it was agreed that the defendant had waived his rights under the fourth amendment to the U.S. Constitution, but had not waived his rights under section 86-701 et seq. (recodified in 2002 as section 86-271 et seq.). State v. Aulrich, 209 Neb. 546, 308 N.W.2d 739 (1981).

Pursuant to subsection (1) of this section, the doctrine of constructive possession applies to the possession of a firearm by a felon or a fugitive from justice, and the fact of possession may be proved by circumstantial evidence. State v. Long, 8 Neb. App. 353, 594 N.W.2d 310 (1999).

28-1207 Possession of a defaced firearm; penalty.

(1) Any person who knowingly possesses, receives, sells, or leases, other than by delivery to law enforcement officials, any firearm from which the manufacturer's identification mark or serial number has been removed, defaced, altered, or destroyed, commits the offense of possession of a defaced firearm.

(2) Possession of a defaced firearm is a Class IV felony.

Source: Laws 1977, LB 38, § 239.

This section is held not to be invalid as in conflict with Neb. Const. art. I, section 1. State v. Comeau, 233 Neb. 907, 448 N.W.2d 595 (1989).

28-1208 Defacing a firearm; penalty.

(1) Any person who intentionally removes, defaces, covers, alters, or destroys the manufacturer's identification mark or serial number or other distinguishing numbers on any firearm commits the offense of defacing a firearm.

(2) Defacing a firearm is a Class IV felony.

Source: Laws 1977, LB 38, § 240.

28-1209 Failure to register tranquilizer guns; penalty.

(1) Any person who fails or neglects to register any gun or other device designed, adapted or used for projecting darts or other missiles containing tranquilizers or other chemicals or compounds which will produce unconsciousness or temporary disability in live animals, with the county sheriff of the county in which the owner of the gun or device resides, commits the offense of failure to register tranquilizer guns.

(2) Failure to register tranquilizer guns is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 241.

28-1210 Failure to notify the sheriff of the sale of tranquilizer guns; penalty; record.

(1) Any person, partnership, limited liability company, or corporation selling any gun or other device as described in section 28-1209 which fails to immediately notify the sheriff of the county of the sale and giving the name and address of the purchaser thereof and the make and number of the gun or device commits the offense of failure to notify the sheriff of the sale of tranquilizer guns.

(2) The sheriff shall keep a record of such sale with the information furnished pursuant to this section.

(3) Failure to notify the sheriff of the sale of tranquilizer guns is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 242; Laws 1993, LB 121, § 179.

28-1211 Firearms; purchase, sell, trade, or convey; conditions.

The State of Nebraska herewith permits its residents, not otherwise precluded by any applicable laws, to purchase, sell, trade, convey, deliver, or transport rifles, shotguns, ammunition, reloading components or firearm accessories in Nebraska and in states contiguous to Nebraska. This authorization is enacted to implement for this state the permissive firearms sales and delivery provisions in section 922(b), (3)(A) of Public Law 90-618 of the 90th Congress, Second Session. In the event that presently enacted federal restrictions on the purchase of rifles, shotguns, ammunition, reloading components, or firearm accessories are repealed by the United States Congress or set aside by courts of competent jurisdiction, this section shall in no way be interpreted to prohibit or restrict the purchase of shotguns, rifles, ammunition, reloading components, or firearm accessories by residents of Nebraska otherwise competent to purchase same in contiguous or other states.

Source: Laws 1977, LB 38, § 243.

28-1212 Presence of firearm in motor vehicle; prima facie evidence.

The presence in a motor vehicle other than a public vehicle of any firearm or instrument referred to in section 28-1203, 28-1206, 28-1207, or 28-1212.03 shall be prima facie evidence that it is in the possession of and is carried by all persons occupying such motor vehicle at the time such firearm or instrument is found, except that this section shall not be applicable if such firearm or instrument is found upon the person of one of the occupants therein.

Source: Laws 1977, LB 38, § 244; Laws 1991, LB 477, § 3.

Although ''prima facie evidence'' is found in this section, the content of a statute within the criminal code is not necessarily and always proper information for a jury. State v. Jasper, 237 Neb. 754, 467 N.W.2d 855 (1991).

28-1212.01 Unlawful discharge of firearm; terms, defined.

For purposes of section 28-1212.02:

(1) Aircraft shall mean any contrivance intended for and capable of transporting persons through the airspace;

(2) Inhabited shall mean currently being used for dwelling purposes; and

(3) Occupied shall mean that a person is physically present in a building, motor vehicle, or aircraft.

Source: Laws 1990, LB 1018, § 3; Laws 1995, LB 371, § 10.

28-1212.02 Unlawful discharge of firearm; penalty.

Any person who intentionally discharges a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited motor home as defined in section 71-4603, or inhabited camper unit as defined in section 60-1801 shall be guilty of a Class III felony.

Source: Laws 1990, LB 1018, § 2; Laws 1995, LB 371, § 11.

Attempted first degree assault is not a lesser-included offense of unlawful discharge of a firearm, and unlawful discharge of a firearm is not a lesser-included offense of attempted first degree assault. State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997).

Prosecution for both unlawful discharge of a firearm under this section and possession of a deadly weapon by a felon under section 28-1206 does not violate the Double Jeopardy Clause. State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997).

Prosecution for both unlawful discharge of a firearm under this section and use of a deadly weapon to commit a felony under section 28-1205 in a single proceeding does not violate the Double Jeopardy Clause. State v. McBride, 252 Neb. 866, 567 N.W.2d 136 (1997).

28-1212.03 Stolen firearm; prohibited acts; violation; penalty.

Any person who possesses, receives, retains, or disposes of a stolen firearm knowing that it has been or believing that it has been stolen shall be guilty of a Class IV felony unless the firearm is possessed, received, retained, or disposed of with intent to restore it to the owner.

Source: Laws 1991, LB 477, § 1.

28-1213 Explosives, destructive devices, other terms; defined.

For purposes of sections 28-1213 to 28-1239, unless the context otherwise requires:

(1) Person means any individual, corporation, company, association, firm, partnership, limited liability company, society, or joint-stock company;

(2) Business enterprise means any corporation, partnership, limited liability company, company, or joint-stock company;

(3) Explosive materials means explosives, blasting agents, and detonators;

(4) Explosives means any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion, including, but not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, ignited cord, igniters, display fireworks as defined in section 28-1241, and firecrackers or devices containing more than one hundred thirty milligrams of explosive composition, but does not include common fireworks as defined in such section, gasoline, kerosene, naphtha, turpentine, benzine, acetone, ethyl ether, benzol, fixed ammunition and primers for small arms, safety fuses, or matches;

(5) Blasting agent means any material or mixture, intended for blasting which meets the requirements of 49 C.F.R. part 173, subpart C, as such subpart existed on March 7, 2006;

(6) Detonator means any device containing an initiating or primary explosive that is used for initiating detonation. Excluding ignition or delay charges, a detonator shall not contain more than ten grams of explosive material per unit. Detonator includes an electric detonator of instantaneous or delay type, a detonator for use with safety fuses, a detonating cord delay connector, and a nonelectric detonator of instantaneous or delay type which consists of detonating cord, shock tube, or any other replacement for electric leg wires;

(7)(a) Destructive devices means:

(i) Any explosive, incendiary, chemical or biological poison, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, (F) booby trap, (G) Molotov cocktail, (H) bottle bomb, (I) vessel or container intentionally caused to rupture or mechanically explode by expanding pressure from any gas, acid, dry ice, or other chemical mixture, or (J) any similar device, the primary or common purpose of which is to explode and to be used as a weapon against any person or property; or

(ii) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (7)(a)(i) of this section from which a destructive device may be readily assembled.

(b) The term destructive device does not include (i) any device which is neither designed nor redesigned for use as a weapon to be used against person or property, (ii) any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device, (iii) surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to 10 U.S.C. 4684(2), 4685, or 4686, as such sections existed on March 7, 2006, (iv) any other device which the Nebraska State Patrol finds is not likely to be used as a weapon or is an antique, or (v) any other device possessed under circumstances negating an intent that the device be used as a weapon against any person or property;

(8) Federal permittee means any lawful user of explosive materials who has obtained a federal user permit under 18 U.S.C. chapter 40, as such chapter existed on March 7, 2006;

(9) Federal licensee means any importer, manufacturer, or dealer in explosive materials who has obtained a federal importers', manufacturers', or dealers' license under 18 U.S.C. chapter 40, as such chapter existed on March 7, 2006; and

(10) Smokeless propellants means solid propellants commonly called smokeless powders in the trade and used in small arms ammunition.

Source: Laws 1977, LB 38, § 245; Laws 1988, LB 893, § 1; Laws 1989, LB 215, § 1; Laws 1993, LB 121, § 180; Laws 1993, LB 163, § 1; Laws 1999, LB 131, § 1; Laws 2002, LB 82, § 9; Laws 2006, LB 1007, § 1.

28-1214 Explosives control; applicability of sections.

(1) Sections 28-1213 to 28-1239 shall apply to persons engaged in the manufacture, ownership, possession, storage, use, transportation, purchase, sale, or gift of explosive materials, except as may be otherwise indicated herein.

(2) Sections 28-1213 to 28-1239 shall not apply to explosive materials while being transported in conformity with federal law or regulations, nor, except as may be otherwise provided in such sections, to the ownership, possession, storage, use, transportation, purchase, or sale of explosive materials by the armed forces of the United States, the National Guard, other reserve components of the armed forces of the United States, and the duly constituted police and firefighting forces of the United States and of the state and its political subdivisions in the lawful discharge of their official duties.

Source: Laws 1977, LB 38, § 246.

28-1215 Unlawful possession of explosive materials, first degree; exception; penalty.

(1) Except as provided in subsection (2) of this section, any person who is ineligible to obtain a permit from the Nebraska State Patrol and who possesses or stores explosive materials commits the offense of unlawful possession of explosive materials in the first degree.

(2) Subsection (1) of this section shall not be applicable to any person transporting explosive materials in accordance with section 28-1235 or to any person who has obtained a permit from the Nebraska State Patrol to store or use such explosive materials or, in the case of a business enterprise, a permit to purchase such explosive materials.

(3) Unlawful possession of explosive materials in the first degree is a Class IV felony.

Source: Laws 1977, LB 38, § 247; Laws 1986, LB 975, § 1; Laws 1989, LB 215, § 2.

28-1216 Unlawful possession of explosive materials, second degree; penalty.

(1) Except as provided in subsection (2) of this section, any person who is eligible to obtain a permit from the Nebraska State Patrol or has valid educational, industrial, commercial, agricultural, or other legitimate need for a permit and who possesses or stores explosive materials without such a permit commits the offense of unlawful possession of explosive materials in the second degree.

(2) The exclusions provided in subsection (2) of section 28-1215 shall be applicable to this section.

(3) Unlawful possession of explosive materials in the second degree is a Class I misdemeanor.

Source: Laws 1977, LB 38, § 248; Laws 1989, LB 215, § 3.

28-1217 Unlawful sale of explosives; penalty.

(1) Any person who knowingly and intentionally sells, transfers, issues, or gives any explosive materials to any person who does not display a valid permit issued by the Nebraska State Patrol authorizing the storage or use of such explosive materials or, in the case of a business enterprise, a permit to purchase such explosive materials commits the offense of unlawful sale of explosives.

(2) Unlawful sale of explosives is a Class IV felony.

Source: Laws 1977, LB 38, § 249; Laws 1986, LB 975, § 2; Laws 1989, LB 215, § 4.

28-1218 Use of explosives without a permit; penalty.

(1) Any person who uses any explosive materials for any purpose whatsoever, unless such person has obtained a permit from the Nebraska State Patrol to use such explosive materials or uses such explosive materials under the supervision of a permitholder, commits the offense of use of explosives without a permit.

(2) Except as provided in subsection (3) of this section, use of explosives without a permit is a Class I misdemeanor.

(3) Upon a showing that the accused was eligible under existing rules and regulations to receive a permit or had a valid educational, industrial, commer-

cial, agricultural, or other legitimate need for a permit, use of explosives without a permit is a Class II misdemeanor.

(4) Any person under the direct and proximate supervision of a person possessing a permit to use explosive materials may also use explosive materials under such safety provisions as the Nebraska State Patrol may adopt and promulgate. Federal licensees and permittees shall obtain permits from the Nebraska State Patrol to use explosive materials.

Source: Laws 1977, LB 38, § 250; Laws 1989, LB 215, § 5.

28-1219 Obtaining a permit through false representation; penalty.

(1) Any person who knowingly withholds information or makes any false, fictitious, or misrepresented statement or furnishes or exhibits any false, fictitious, or misrepresented identification for the purpose of obtaining a permit or relief from disability under the provisions of sections 28-1213 to 28-1239 or knowingly makes any false entry in a record which such person is required to keep pursuant to such sections or the regulations promulgated pursuant to such sections, commits the offense of obtaining a permit through false representations.

(2) Obtaining a permit through false representations is a Class IV felony.

Source: Laws 1977, LB 38, § 251.

28-1220 Possession of a destructive device; penalty; permit or license for explosive materials; no defense.

(1) Any person who has in his possession a destructive device, as defined in subdivision (7) of section 28-1213, commits the offense of possession of a destructive device.

(2) A permit or license issued under any state or federal law to possess, own, use, distribute, sell, manufacture, store, or handle in any manner explosive materials shall not be a defense to the crime of possession of a destructive device as defined in this section.

(3) Possession of a destructive device is a Class IV felony.

Source: Laws 1977, LB 38, § 252.

Possession of each destructive device constitutes a separate offense. State v. Spurgin, 261 Neb. 427, 623 N.W.2d 644 (2001).

28-1221 Threatening the use of explosives; placing a false bomb; penalty.

(1) A person who conveys any threat or maliciously conveys to any other person false information knowing the same to be false, concerning an attempt or alleged attempt being made or to be made to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of any explosive material or destructive device commits the offense of threatening the use of explosives.

(2) A person who places or causes to be placed any device or object that by its design, construction, content, or character appears to be or appears to contain a bomb, destructive device, or explosive, but is in fact an inoperative facsimile or imitation of a bomb, destructive device, or explosive, and that such person knows, intends, or reasonably believes is likely to cause public alarm or inconvenience, commits the offense of placing a false bomb.

(3) Threatening the use of explosives or placing a false bomb is a Class IV felony.

Source: Laws 1977, LB 38, § 253; Laws 2002, LB 82, § 10.

28-1222 Using explosives to commit a felony; penalty.

(1) Any person who uses an explosive material or destructive device to commit any felony which may be prosecuted in this state or who possesses an explosive during the commission of any felony which may be prosecuted in this state commits the offense of using explosives to commit a felony.

(2) Using explosives to commit a felony is a Class III felony.

(3) In the case of a second or subsequent conviction under this section, using explosives to commit a felony is a Class II felony.

Source: Laws 1977, LB 38, § 254.

28-1223 Using explosives to damage or destroy property; penalty.

(1) Any person who, by means of an explosive material or destructive device, maliciously attempts to damage or destroy or does damage or destroy any building, structure, vehicle, or other real or personal property commits the offense of using explosives to damage or destroy property.

(2) Except as provided under subsection (3) or (4) of this section, using explosives to damage or destroy property is a Class III felony.

(3) If a personal injury results, using explosives to damage or destroy property is a Class II felony.

(4) If death results, using explosives to damage or destroy property shall be punished as for conviction of murder in the first degree.

Source: Laws 1977, LB 38, § 255.

28-1224 Using explosives to kill or injure any person; penalty.

(1) Any person who uses explosive materials or destructive devices to intentionally kill, injure or intimidate any individual commits the offense of using explosives to kill or injure any person.

(2) Except as provided in subsection (3) or (4) of this section, using explosives to kill or injure any person is a Class III felony.

(3) If personal injury results, using explosives to kill or injure any person is a Class II felony.

(4) If death results, using explosives to kill or injure any person shall be punished as for conviction of murder in the first degree.

Source: Laws 1977, LB 38, § 256.

28-1225 Storing explosives in violation of safety regulations; penalty.

(1) Any person who stores any explosive materials or uses in legitimate blasting operations any explosive materials in a manner not in conformity with safety regulations adopted and promulgated by the Nebraska State Patrol or the Secretary of the Treasury of the United States or who stores any explosive materials at a place not designated in a permit to store such explosive materials issued to such person by the Nebraska State Patrol commits the offense of storing explosives in violation of safety regulations.

(2) Storing explosives in violation of safety regulations is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 257; Laws 1989, LB 215, § 6.

28-1226 Failure to report theft of explosives; penalty.

(1) Any person who has knowledge of the theft or loss of explosive materials from his or her stock who fails to report such theft or loss within twenty-four hours of discovery to the Nebraska State Patrol commits the offense of failure to report theft of explosives.

(2) Failure to report theft of explosives is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 258; Laws 1989, LB 215, § 7.

28-1227 Other violations; penalty.

With the exception of sections 28-1213 to 28-1226, any person who violates any other provision of sections 28-1213 to 28-1239 or rules promulgated pursuant to such sections commits a Class III misdemeanor.

Source: Laws 1977, LB 38, § 259.

28-1228 Presence of explosive material or destructive device in vehicle; prima facie evidence; exception.

The presence in a vehicle other than a public conveyance of any explosive material or destructive device shall be prima facie evidence that it is in the possession of all persons occupying such vehicle at the time such explosive material or destructive device is found, except that: (1) If such explosive material or destructive device is found upon the person of one of the occupants therein; or (2) if such explosive material or destructive device is found in a vehicle operated for hire by a driver in the due, lawful, and proper pursuit of his trade, then such presumption shall not apply to the driver. The presumption shall not apply to the occupants of a vehicle being operated in compliance with the requirements of section 28-1225, if explosive material but no destructive device is found therein.

Source: Laws 1977, LB 38, § 260.

28-1229 Explosives control; Nebraska State Patrol; permits; issuance; conditions.

(1) The Nebraska State Patrol shall have the authority to issue permits for:

(a) The storage of explosive materials;

(b) The use of explosive materials; and

(c) The purchase of explosive materials by business enterprises.

(2) The Nebraska State Patrol shall not issue a permit to store or use explosive materials to any person who:

(a) Is under twenty-one years of age;

(b) Has been convicted in any court of a felony;

(c) Is charged with a felony;

(d) Is a fugitive from justice;

(e) Is an unlawful user of any depressant, stimulant, or narcotic drug;

(f) Has been admitted as a patient or inmate in a public or private institution for the treatment of a mental or emotional disease or disorder within five years preceding the date of application;

(g) Has no reasonable educational, industrial, commercial, agricultural, recreational, or other legitimate need for a permit to store or use explosive materials;

(h) Has been convicted in any court of a misdemeanor crime of domestic violence. This includes any misdemeanor conviction involving the use or attempted use of physical force committed by a current or former spouse, parent, or guardian of the victim or by a person with a similar relationship with the victim;

(i) Is subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child of such partner; or

(j) Is an alien illegally in the United States.

(3) Upon filing of a proper application and payment of the prescribed fee, and subject to the provisions of sections 28-1213 to 28-1239 and other applicable laws, the Nebraska State Patrol shall issue to such applicant a permit to store explosive materials if:

(a) The applicant, including, in the case of a corporation, partnership, limited liability company, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, limited liability company, or association, is not a person to whom the Nebraska State Patrol is prohibited to issue a permit under subsection (2) of this section;

(b) The applicant has not willfully violated any of the provisions of sections 28-1213 to 28-1239 or of 18 U.S.C. chapter 40; and

(c) The applicant has a place of storage for explosive materials which meets such standards of public safety, based on the class, type, and quantity of explosive materials to be stored, and security against theft as prescribed in rules and regulations adopted and promulgated by the Nebraska State Patrol pursuant to sections 28-1213 to 28-1239 and by the Secretary of the Treasury of the United States pursuant to 18 U.S.C. chapter 40.

(4) A permit for the storage of explosive materials shall specify the class, type, and quantity of explosive materials which are authorized to be stored. It shall also specify the type of security required. A permit for the storage of explosive materials shall be valid for a period of two years unless a shorter period is specified in the permit.

(5) Upon filing of a proper application and payment of the prescribed fee, and subject to the provisions of sections 28-1213 to 28-1239 and other applicable laws, the Nebraska State Patrol shall issue to such applicant a permit to use explosive materials if:

(a) The applicant is an individual to whom the Nebraska State Patrol is not prohibited to issue a permit under subsection (2) of this section;

(b) The applicant has not willfully violated any of the provisions of sections 28-1213 to 28-1239 or of 18 U.S.C. chapter 40;

(c) The applicant has demonstrated and certified in writing that he or she is familiar with all published laws of this state and published local ordinances

relating to the use of explosive materials applicable at the place or places he or she intends to use such explosive materials;

(d) The applicant has demonstrated that he or she has adequate knowledge, training, and experience in the use of explosive materials of the class and type for which he or she seeks a users permit and has passed a qualifying examination, as prescribed by the Nebraska State Patrol, concerning the use of such explosive materials; and

(e) The applicant has been fingerprinted and the fingerprints submitted to the Nebraska State Patrol for a criminal history record check. If no disqualifying record is located at the state level, the fingerprints shall be forwarded by the patrol to the Identification Division of the Federal Bureau of Investigation for a national criminal history record check.

(6) A permit for the use of explosive materials shall specify the class and type of explosive materials the permitholder is qualified to use. It shall be applicable to the permitholder and to any individual acting under his or her direct personal supervision. A permit may be issued for a single use of explosive materials or, when the applicant is engaged or employed in a business requiring the frequent use of explosive materials, for a period of not more than two years.

(7) Upon filing of a proper application and payment of the prescribed fees and subject to sections 28-1213 to 28-1239 and other applicable laws, the Nebraska State Patrol shall issue to a business enterprise a permit to purchase explosive materials if:

(a) The business enterprise has a place of business in this state;

(b) No individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the business enterprise is a person to whom the Nebraska State Patrol is prohibited to issue a permit under subsection (2) of this section;

(c) An authorized officer of the business enterprise certifies that all explosive materials will be used on the date of purchase of such materials unless such business enterprise is in possession of a valid storage permit; and

(d) The business enterprise employs at least one employee having a valid use permit issued under this section.

(8) A permit for a business enterprise to purchase explosive materials shall specify the class and type of explosive materials which are authorized to be purchased. The class and type of explosive materials covered by such permit shall be the same as those specified in the use permit or permits issued to an employee or employees of the business enterprise. The permit may be issued for a period of up to two years but shall become void if the business enterprise ceases to employ an individual having a valid use permit issued under this section for the class and type of explosive materials covered by the purchase permit of the business enterprise.

(9) If the applicant is an individual, an application for a permit issued under this section shall include the applicant's social security number.

Source: Laws 1977, LB 38, § 261; Laws 1989, LB 215, § 8; Laws 1993, LB 163, § 2; Laws 1993, LB 121, § 181; Laws 1997, LB 752, § 81; Laws 1999, LB 131, § 2.

28-1230 Explosives control; permit; denial; notice; appeal.

Whenever the Nebraska State Patrol denies an application for a permit or the renewal thereof, the Nebraska State Patrol shall, within twenty days of such denial, give notice thereof and the reasons therefor in writing to the applicant, personally or by mail, to the address given in the application. The notice of denial shall also advise the applicant of his or her right to appeal and set forth the steps necessary to undertake an appeal and the time limits pertaining thereto. Such denial may be appealed to the Nebraska State Patrol which shall follow the procedures for contested cases required by the Administrative Procedure Act.

Source: Laws 1977, LB 38, § 262; Laws 1989, LB 215, § 9.

Cross References

Administrative Procedure Act, see section 84-920.

28-1231 Explosives control; permit; revocation; grounds.

(1) The Nebraska State Patrol may revoke any permit on any ground authorized in subsection (2) of section 28-1229 for the denial of a permit or for any violation of the terms of such permit, for a violation of any provision of this article or of the rules and regulations of the Nebraska State Patrol, or for noncompliance with any order issued by the Nebraska State Patrol within the time specified in such order.

(2) Revocation of a permit for any ground authorized may be ordered only after giving written notice and an opportunity to be heard to the holder thereof. Revocation proceedings shall be in accordance with the procedure required for contested cases set forth in the Administrative Procedure Act. Such notice may be given to the holder personally or by mail and shall specify the ground or grounds on which it is proposed to revoke the permit. When a permit is revoked, the Nebraska State Patrol may direct the disposition of the explosives held by such permittee. Upon revocation of a permit by the Nebraska State Patrol, the holder thereof shall surrender his or her permit to the Nebraska State Patrol at once or be subject to penalties as provided for elsewhere in sections 28-1213 to 28-1239.

Source: Laws 1977, LB 38, § 263; Laws 1989, LB 215, § 10.

Cross References

Administrative Procedure Act, see section 84-920.

28-1232 Explosive materials; permit; application; form; fees.

An application for a storage, use, or business enterprise purchase permit for explosive materials shall be in such form and contain such information as the Nebraska State Patrol shall by rule and regulation prescribe. Each applicant for a permit shall pay a fee of fifty dollars in the case of a storage permit, ten dollars in the case of a use permit, and ten dollars in the case of a business enterprise purchase permit.

Source: Laws 1977, LB 38, § 264; Laws 1982, LB 928, § 21; Laws 1989, LB 215, § 11.

28-1233 Explosive material; permitholder; records; notice; requirements; penalty.

(1) Every holder of any permit required under sections 28-1213 to 28-1239 shall maintain an accurate inventory of all explosives in his or her possession

and maintain records of transfers to other persons of explosive materials. Such records shall include a statement of intended use by the transferee and the name, date of birth, place of birth, social security number or taxpayer identification number, and place of residence of any natural person to whom the explosives are transferred. If the explosive materials are transferred to a corporation or other business entity, such records shall include the identity and principal and local places of business and the name, date of birth, place of birth, and place of residence of the natural person acting as the agent of the corporation or other business entity in arranging the transfer. In the case of a federal licensee or permittee who is also a permitholder under the terms of sections 28-1213 to 28-1239, the maintenance of one set of records for the fulfilling of the record-keeping requirements of 18 U.S.C. chapter 40 shall be deemed compliance with the record-keeping requirements of sections 28-1213 to 28-1239.

(2) Every holder of any storage or business enterprise permit required under sections 28-1213 to 28-1239 shall maintain a log describing the time, place, amount, and type of explosive used in any blasting operations performed by him or her or at his or her direction.

(3) Every holder of any storage, purchase, or use permit required under sections 28-1213 to 28-1239 shall notify the fire protection district in which any explosive over one pound in weight is to be used or stored twenty-four hours prior to such use or storage, and the holder shall keep a written record in the log describing the time the notice was given, office in the district to which the notice was given, and name of the person in the district notified. The fire protection district may waive the twenty-four-hour notice when the public safety requires such waiver to prevent loss of life or property if such notice is given prior to use or storage. The fire protection district may accept a single notification of ongoing use within a set timeframe not to exceed sixty days. Any holder of a storage, purchase, or use permit who fails to notify the fire protection district pursuant to this subsection is guilty of a Class II misdemeanor.

Source: Laws 1977, LB 38, § 265; Laws 1993, LB 163, § 3; Laws 1999, LB 284, § 1.

28-1234 Permitholders; inspection of records and permits.

(1) Permitholders shall make available for inspection at all reasonable times their records kept pursuant to sections 28-1213 to 28-1239 and the rules and regulations adopted and promulgated pursuant to such sections. The Nebraska State Patrol may enter during business hours the premises, including places of storage, of any permitholder for the purpose of inspecting and examining (a) any records or documents required to be kept by such permitholder under sections 28-1213 to 28-1239 or the rules and regulations adopted and promulgated pursuant to such sections and (b) any explosive materials kept or stored by such permitholder at such premises.

(2) Holders of use permits and business enterprise purchase permits shall retain such permits and make them available to the Nebraska State Patrol on request. Storage permits shall be posted and kept available for inspection at all places of storage of explosive materials.

Source: Laws 1977, LB 38, § 266; Laws 1989, LB 215, § 12.

28-1235 Transportation of explosive materials; permit required.

No person shall transport any explosive materials into this state or within the boundaries of this state unless such person holds a permit as required by sections 28-1213 to 28-1239 or a permit or license issued pursuant to 18 U.S.C. chapter 40. Common carriers by air, highway, railway, or water transporting explosive materials into this state or within the boundaries of this state and contract or private carriers by motor vehicle transporting explosive materials into this state or within the boundaries of this state in the lawful, ordinary course of business and engaged in such business pursuant to certificate or permit by whatever name issued to them by any federal or state officer, agency, bureau, commission, or department shall be excepted from this section except as the Nebraska State Patrol by rule and regulation may otherwise provide. All transportation of explosive materials subject to this section shall be in conformity with such safety rules and regulations as the Nebraska State Patrol may adopt and promulgate.

Source: Laws 1977, LB 38, § 267; Laws 1989, LB 215, § 13.

28-1235.01 Resident; bring explosive material into state; when allowed.

Any resident of the State of Nebraska who holds a valid explosive permit issued by the Nebraska State Patrol and who uses explosive material in the conduct of a business or occupation may lawfully purchase explosive materials from a licensed seller located or residing in a state contiguous to the State of Nebraska and bring such explosive material into Nebraska.

Source: Laws 1979, LB 477, § 1; Laws 1989, LB 215, § 14.

28-1236 Nebraska State Patrol; rules and regulations.

The Nebraska State Patrol may adopt and promulgate rules and regulations supplemental to sections 28-1213 to 28-1239 necessary or desirable to assure the public safety as well as to provide reasonable and adequate protection of the lives, health, and safety of persons employed in the manufacture, storage, transportation, handling, and use of explosives. The Nebraska State Patrol may adopt and promulgate such rules and regulations necessary and proper for the administration of sections 28-1213 to 28-1239 and, together with all other peace officers of the state and its political subdivisions, shall be charged with the enforcement of such sections.

Source: Laws 1977, LB 38, § 268; Laws 1988, LB 893, § 2; Laws 1989, LB 215, § 15.

28-1237 Special law or local ordinance; minimum required standard.

The provisions of sections 28-1213 to 28-1239 and the rules adopted pursuant thereto shall be the minimum standard required and shall supersede any special law or local ordinance inconsistent therewith, and no local ordinance inconsistent therewith shall be adopted, but nothing herein contained shall prevent the enactment by local law or ordinance of additional requirements and restrictions.

Source: Laws 1977, LB 38, § 269.

28-1238 Violations; seizure and disposition of explosives.

Any explosive materials or destructive devices involved in any violation of sections 28-1213 to 28-1239 or any rule or regulation adopted and promulgated pursuant to such sections or in any violation of any other criminal law of this state shall be subject to seizure, and disposition may be made in accordance with the method of disposition directed for contraband in section 29-820, whenever the seized matter results in a judicial civil or criminal action by or against any person or as the Nebraska State Patrol directs in the absence of such judicial action.

Source: Laws 1977, LB 38, § 270; Laws 1989, LB 215, § 16.

28-1239 Explosives control; exceptions to sections; enumerated.

In addition to the exceptions provided in sections 28-1213 to 28-1239, such sections shall not apply to:

(1) The use of explosive materials in medicines and medicinal agents in forms prescribed by the official United States Pharmacopoeia or the National Formulary;

(2) The sale, transportation, shipment, receipt, or importation of explosive materials for delivery to any agency of the United States or to any state or political subdivision thereof;

(3) Small arms ammunition and components thereof;

(4) The storage or possession of or dealing in black powder used for recreation purposes by a sportsperson;

(5) The storage or possession of or dealing in smokeless propellants, percussion caps, primers, and other components used by a sportsperson in the reloading of small arms ammunition;

(6) Bona fide war trophies capable of exploding and innocently found explosive materials possessed under circumstances negating an intent to use the same unlawfully, but the owner thereof shall surrender such items forthwith to any nationally certified hazardous device technician or military explosive ordnance expert upon demand by a law enforcement officer or agency or fire department; and

(7) The storage in minimum amounts necessary for lawful educational purposes of explosive materials to be used in the natural science laboratories of any state-accredited school system.

Source: Laws 1977, LB 38, § 271; Laws 1993, LB 163, § 4.

28-1239.01 Fireworks display; permit required; fee; sale of display fireworks; regulation.

(1) No person shall conduct a public exhibition or display of fireworks without first procuring a display permit from the State Fire Marshal. If the applicant is an individual, the application for a display permit shall include the applicant's social security number. Such application for a display permit shall be accompanied by a fee of ten dollars to be deposited in the State Fire Marshal Cash Fund.

(2) No display fireworks shall be sold or delivered by a licensed distributor to any person who is not in possession of an approved display permit. Sales of

display fireworks to persons without an approved display permit shall be subject to sections 28-1213 to 28-1239.

Source: Laws 1986, LB 969, § 4; Laws 1993, LB 251, § 1; Laws 1997, LB 752, § 82.

28-1240 Unlawful transportation of anhydrous ammonia; penalty; unlawful use of certain containers; penalty.

(1) Any person, partnership, limited liability company, firm, or corporation (a) who loads, unloads, transports, or causes to be transported over the public highways of this state anhydrous ammonia in a tank or container with a water gallon capacity of three thousand gallons or less which will not withstand two-hundred-fifty-pounds-per-square-inch gauge pressure or in a tank or container with a water gallon capacity of more than three thousand gallons which will not withstand two-hundred-sixty-five-pounds-per-square-inch gauge pressure and does not meet all the other requirements of the United States Department of Transportation Specifications MC 330 or MC 331, as amended and effective September 1, 1965, or (b) who operates any anhydrous ammonia railroad tank cars over the railroads of this state which fail to comply with all of the applicable requirements of the United States Department of Transportation in effect on December 25, 1969, commits the offense of unlawful transportation of anhydrous ammonia.

(2) Compliance with this section must be shown by an identification plate permanently affixed to a conspicuous place on each tank or container. After July 17, 1986, whenever any tank or container is altered subsequent to its original manufacture, the identification plate of such tank or container shall be changed to indicate proof that the tank or container is able to meet standards prescribed in subsection (1) of this section after the tank or container has been altered. Any tank or container which is so altered without making the appropriate changes on its identification plate shall be considered not in compliance with this section.

(3) Unlawful transportation of anhydrous ammonia is a Class II misdemeanor.

(4) Each day of a violation of this section shall constitute a separate offense, and any person, partnership, limited liability company, firm, or corporation operating, loading, or unloading a tank or container not in compliance with this section shall be considered as a separate violator of this section.

(5) It shall be unlawful for any person to use or cause to be used any tank or container with a water gallon capacity of under three thousand gallons which is or has been used to contain anhydrous ammonia for containing propane or liquefied natural gas. Such unlawful use of a tank or container shall be a Class III misdemeanor.

(6) Subsection (5) of this section shall not be applicable when the owner of the tank or container can show that the tank or container has been properly prepared for alternative use. Standards for such preparation shall be adopted and promulgated by the State Fire Marshal pursuant to this section.

Source: Laws 1977, LB 38, § 272; Laws 1979, LB 476, § 1; Laws 1986, LB 881, § 1; Laws 1993, LB 121, § 182.

28-1241 Fireworks; definitions.

As used in sections 28-1239.01 and 28-1241 to 28-1252, unless the context otherwise requires:

(1) Distributor means any person engaged in the business of making sales of fireworks at wholesale in this state to any person engaged in the business of making sales of fireworks either as a jobber or as a retailer or both;

(2) Jobber means any person engaged in the business of making sales of fireworks at wholesale to any other person engaged in the business of making sales at retail;

(3) Retailer means any person engaged in the business of making sales of fireworks at retail to consumers or to persons other than distributors or jobbers;

(4) Sale includes barter, exchange, or gift or offer therefor and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee;

(5) Fireworks means any composition or device designed for the purpose of producing a visible or audible effect by combustion, deflagration, or detonation and which meets the definition of common or special fireworks set forth by the United States Department of Transportation in Title 49 of the Code of Federal Regulations;

(6) Common fireworks means any small firework device designed to produce visible effects by combustion and which is required to comply with the construction, chemical composition, and labeling regulations of the United States Consumer Product Safety Commission set forth in 16 C.F.R., small devices designed to produce audible effects such as whistling devices, ground devices containing fifty milligrams or less of explosive composition, and aerial devices and firecrackers containing one hundred thirty milligrams or less of explosive composition. Class C explosives as classified by the United States Department of Transportation shall be considered common fireworks;

(7) Permissible fireworks means only sparklers, vesuvius fountains, spray fountains, torches, color fire cones, star and comet type color aerial shells without explosive charge for the purpose of making a noise, lady fingers, not to exceed seven-eighths of an inch in length or one-eighth inch in diameter, total explosive composition not to exceed fifty milligrams in weight, color wheels, and any other fireworks approved under section 28-1247; and

(8) Display fireworks means those materials manufactured exclusively for use in public exhibitions or displays of fireworks designed to produce visible or audible effects by combustion, deflagration, or detonation. Display fireworks includes, but is not limited to, firecrackers containing more than one hundred thirty milligrams of explosive composition, aerial shells containing more than forty grams of explosive composition, and other display pieces which exceed the limits for classification as common fireworks. Class B explosives as classified by the United States Department of Transportation shall be considered display fireworks. Display fireworks shall be considered an explosive as defined in section 28-1213 and shall be subject to sections 28-1213 to 28-1239, except that display fireworks may be purchased, received, and discharged by the holder of an approved display permit issued pursuant to section 28-1239.01.

Source: Laws 1977, LB 38, § 273; Laws 1986, LB 969, § 2; Laws 1988, LB 893, § 3; Laws 2006, LB 1007, § 2.

28-1242 Unlawful throwing of fireworks; penalty.

(1) A person commits the offense of unlawful throwing of fireworks if he or she throws any firework, or any object which explodes upon contact with another object: (a) From or into a motor vehicle; (b) onto any street, highway, or sidewalk; (c) at or near any person; (d) into any building; or (e) into or at any group of persons.

(2) Unlawful throwing of fireworks is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 274; Laws 1986, LB 969, § 3.

28-1243 Repealed. Laws 1988, LB 893, § 18.

28-1244 Fireworks; unlawful acts.

Except as provided in section 28-1245, it shall be unlawful for any person to possess, sell, offer for sale, bring into this state, or discharge any fireworks other than permissible fireworks.

Source: Laws 1977, LB 38, § 276.

28-1245 Fireworks; when prohibitions not applicable.

Section 28-1244 shall not apply to:

(1) Any display fireworks purchased from a licensed distributor; or

(2) Any display fireworks purchased by the holder of a display permit issued pursuant to section 28-1239.01; or

(3) Any fireworks brought into this state for storage by a licensed distributor and held for sale outside of this state; or

(4) Any fireworks furnished for agricultural purposes pursuant to written authorization from the State Fire Marshal to any holder of a distributor's license; or

(5) Toy cap pistols or toy caps, each of which does not contain more than twenty-five hundredths of a grain of explosive material.

Source: Laws 1977, LB 38, § 277; Laws 1986, LB 969, § 5; Laws 1993, LB 251, § 2.

28-1246 Fireworks; sale; license required; fees.

(1) It shall be unlawful for any person to sell, hold for sale, or offer for sale as a distributor, jobber, or retailer any fireworks in this state unless such person has first obtained a license as a distributor, jobber, or retailer. Application for each such license shall be made to the State Fire Marshal on forms prescribed by him or her. If the applicant is an individual, each application shall include the applicant's social security number. Each application shall be accompanied by the required fee, which shall be five hundred dollars for a distributor's license, two hundred dollars for a jobber's license, and twenty-five dollars for a retailer's license. Each application for a license as a retailer postmarked after June 10 shall be accompanied by an additional fee of fifty dollars. All licenses shall be good only for the calendar year in which issued and shall at all times be displayed at the place of business of the holder thereof.

(2) The funds received pursuant to this section shall be remitted to the State Treasurer for credit to the State Fire Marshal Cash Fund.

Source: Laws 1977, LB 38, § 278; Laws 1982, LB 928, § 22; Laws 1986, LB 853, § 1; Laws 1993, LB 251, § 3; Laws 1997, LB 752, § 83.

28-1247 Fireworks; submission of samples to determine safety; duties of State Fire Marshal.

Before any permissible fireworks may be sold, held for sale, or offered for sale in this state, they shall first be submitted to the State Fire Marshal for examination to determine their compliance with subdivision (7) of section 28-1241 and their safety for general use. Fireworks not specifically listed in subdivision (7) of section 28-1241 may be added to the list of permissible fireworks by the State Fire Marshal, by rule or regulation, after having been submitted to him or her and tested to determine their safety for general use.

Source: Laws 1977, LB 38, § 279; Laws 1988, LB 893, § 4.

28-1248 Fireworks; importation into state; duties of licensees; retention of invoices for inspection.

(1) It shall be unlawful for any person not licensed as a distributor or as a jobber under the provisions of sections 28-1241 to 28-1252 to bring any fireworks into this state.

(2) It shall be unlawful for any retailer or jobber in this state to sell any fireworks in this state which have not been purchased from a distributor licensed under the provisions of sections 28-1241 to 28-1252.

(3) Any person licensed under the provisions of sections 28-1241 to 28-1252 shall keep, available for inspection by the State Fire Marshal or his agents, a copy of each invoice for fireworks purchased as long as any fireworks included on such invoice are held in his possession which invoice shall show the license number of the distributor or jobber from which the purchase was made.

Source: Laws 1977, LB 38, § 280.

28-1249 Sale of permissible fireworks; limitations.

It shall be unlawful to sell any permissible fireworks at retail within this state, outside the limits of any incorporated city or village. Permissible fireworks may be sold at retail only between June 24 and July 5 of each year.

Source: Laws 1977, LB 38, § 281; Laws 1999, LB 621, § 1; Laws 2004, LB 1091, § 2.

28-1250 Fireworks; prohibited acts; violations; penalties.

(1) Any person who violates any of the provisions of sections 28-1244 to 28-1249 commits a Class III misdemeanor. If such person is a licensed distributor or jobber he or she shall be subject to the revocation of his or her license for a period of one year.

(2) It shall be unlawful for any person, association, partnership, limited liability company, or corporation to have in his, her, or its possession any fireworks in violation of any of the provisions of such sections. If any person shall have in his, her, or its possession any fireworks in violation of such sections, a warrant may be issued for the seizure of such fireworks and when

the warrant is executed by the seizure of such fireworks, such fireworks shall be safely kept by the magistrate to be used as evidence. Upon conviction of the offender, the fireworks shall be destroyed, but if the offender is discharged, the fireworks shall be returned to the person in whose possession they were found. Nothing in such sections shall apply to the transportation of fireworks by regulated carriers.

Source: Laws 1977, LB 38, § 282; Laws 1993, LB 121, § 183.

28-1251 Unlawful testing or inspection of fire alarms; penalty; certification of applicants; examination; fee.

(1) It shall be unlawful for any person, association, partnership, limited liability company, or corporation to conduct fire alarm tests and fire alarm inspections without prior written certification by the State Fire Marshal as to the qualifications of such persons conducting such tests and inspections.

(2) The State Fire Marshal shall formulate reasonable guidelines to determine qualifications for fire alarm inspectors and shall administer an examination pursuant to such guidelines prior to certification of applicants.

(3) The State Fire Marshal may charge a fee of one hundred dollars to cover costs of administering such examinations.

(4) Unlawful testing or inspection of fire alarms is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 283; Laws 1982, LB 928, § 23; Laws 1993, LB 121, § 184.

28-1252 Fireworks; State Fire Marshal; rules and regulations; enforcement of sections.

The State Fire Marshal shall adopt and promulgate reasonable rules and regulations for the enforcement of sections 28-1239.01 and 28-1241 to 28-1252 and, together with all peace officers of the state and its political subdivisions, shall be charged with the enforcement of sections 28-1239.01 and 28-1244 to 28-1249.

Source: Laws 1977, LB 38, § 284; Laws 1989, LB 215, § 17.

28-1253 Liquefied petroleum gas; prohibited acts; violation; penalty; enforcement.

(1) The distribution, sale, or use of refrigerants containing liquefied petroleum gas for use in mobile air conditioning systems is prohibited.

(2) For purposes of this section:

(a) Liquefied petroleum gas means material composed predominantly of any of the following hydrocarbons or mixtures of such hydrocarbons: Propane, propylene, butanes (normal butane or isobutane), and butylenes;

(b) Mobile air conditioning system means mechanical vapor compression equipment which is used to cool the driver or passenger compartment of any motor vehicle; and

(c) Motor vehicle has the same meaning as in section 60-638.

(3) Any person violating this section is guilty of a Class IV misdemeanor.

(4) The State Fire Marshal shall adopt and promulgate rules and regulations for enforcement of this section and, together with peace officers of the state and its political subdivisions, is charged with enforcement of this section.

Source: Laws 1999, LB 163, § 2.

ARTICLE 13

MISCELLANEOUS OFFENSES

(a) DEAD HUMAN BODIES

(b) SPREAD OF DISEASE

(c) TELEPHONE COMMUNICATIONS

(d) INTERFERENCE WITH PUBLIC SERVICE COMPANY

(e) POLICE RADIO SYSTEM

(f) OBSERVANCE OF BLIND PERSONS

(g) LOCKS AND KEYS

(h) PICKETING

(i) NUISANCES

(j) DISTURBING THE PEACE

(k) TRANSFER OF SOUNDS RECORDED

(a) DEAD HUMAN BODIES

28-1301 Human skeletal remains or burial goods; prohibited acts; penalty.

(1) The definitions found in section 12-1204 shall apply to this section.

(2) Except as provided in subsection (3) of this section, a person commits the offense of removing, abandoning, or concealing human skeletal remains or burial goods if he or she:

(a) Knowingly digs up, disinters, removes, or carries away from its place of deposit or burial any such remains or goods, attempts to do the same, or aids, incites, assists, encourages, or procures the same to be done;

(b) Knowingly throws away or abandons any such remains or goods in any place other than a regular place for burial and under a proper death certificate issued under section 38-811 or 71-605; or

(c) Receives, conceals, purchases, sells, transports, trades, or disposes of any such remains or goods if the person knows or has reason to know that such remains or goods have been dug up, disinterred, or removed from their place of deposit or burial or have not been reported in a proper death certificate issued under section 38-811 or 71-605, attempts to do the same, or aids, incites, assists, encourages, or procures the same to be done.

(3) This section shall not apply to: (a) A body authorized to be surrendered for purposes of dissection as provided by law; (b) the body of any person directed to be delivered by competent authority for purposes of dissection; (c) the officers of any lawfully constituted cemetery acting under the direction of the board of trustees in removing any human skeletal remains or burial goods from one place of burial in the cemetery to another place in the same cemetery when disinterment and reinterment permits are secured and return made pursuant to section 71-605; (d) any person removing the human skeletal remains or burial goods of a relative or intimate friend from one place of burial in any lawfully constituted cemetery to another when consent for such removal has been obtained from the lawfully constituted authority thereof and permits for disinterment and reinterment secured and return made pursuant to section 71-605; (e) any professional archaeologist engaged in an otherwise lawful and scholarly excavation of a nonburial site who unintentionally encounters human skeletal remains or associated burial goods if the archaeologist complies with the notification requirements of the Unmarked Human Burial Sites and Skeletal Remains Protection Act; or (f) any archaeological excavation by the Nebraska State Historical Society or its designee in the course of execution of the duties of the society if any human skeletal remains or associated burial goods discovered during such excavation are disposed of pursuant to section 12-1208.

(4) Violation of this section shall be a Class IV felony.

Source: Laws 1977, LB 38, § 285; Laws 1989, LB 340, § 13; Laws 2003, LB 95, § 32; Laws 2007, LB463, § 1128.

Cross References

Unmarked Human Burial Sites and Skeletal Remains Protection Act, see section 12-1201.

28-1302 Concealing the death of another person; penalty.

Any person who conceals the death of another person and thereby prevents a determination of the cause or circumstances of death commits a Class I misdemeanor.

Source: Laws 1977, LB 38, § 286.

(b) SPREAD OF DISEASE

28-1303 Stagnant water; raising or producing, unlawful; penalty; abatement.

Whoever shall build, erect, continue or keep up any dam or other obstruction in any river or stream of water in this state and thereby raise an artificial pond, or produce stagnant waters, which shall be manifestly injurious to the public health and safety, shall be guilty of a Class III misdemeanor and the court shall, moreover, order every such nuisance to be abated or removed.

Source: Laws 1977, LB 38, § 287.

28-1304 Putting carcass or filthy substance into well, spring, brook, or stream; penalty.

Whoever shall put any dead animal, carcass or part thereof, or other filthy substance, into any well, or into any spring, brook or branch of running water, of which use is made for domestic purposes, shall be guilty of a Class IV misdemeanor.

Source: Laws 1977, LB 38, § 288.

28-1304.01 Dead animals; liquefied remains; prohibited acts; violation; penalty.

The liquefied remains of any dead animal shall not be injected below the surface of the ground nor be spread above the surface of the ground in any manner. Any person violating the provisions of this section shall be guilty of a Class II misdemeanor.

Source: Laws 1998, LB 1209, § 15; R.S.1943, (1998), § 54-725; Laws 1999, LB 6, § 2; Laws 1999, LB 870, § 3.

28-1305 Exposing offensive matter; penalty.

Whoever shall put the carcass of any dead animal, the offals from any slaughter house, butcher's establishment, packing house, or fish house, any spoiled meats, spoiled fish, or putrid animal substance, or the contents of any privy vault upon or into any river, bay, creek, pond, canal, road, street, alley, lot, field, meadow, public ground, market space, or common, or whoever, being the owner or owners or occupant or occupants thereof, shall knowingly permit the same to remain in any of the aforesaid situations, to the annoyance of the citizens of this state, or any of them, or shall neglect or refuse to remove or abate the nuisance occasioned thereby within twenty-four hours after knowledge of the existence of such nuisance upon any of the above-described premises owned or occupied by him, her, or them, or after notice thereof in writing from the street commissioner, supervisor, or any trustee or health officer of any city or precinct in which such nuisance shall exist, shall be guilty of a Class V misdemeanor. If the nuisance is not abated within twenty-four hours thereafter, it shall be deemed a second offense against the provisions of this section, and every like neglect of each twenty-four hours thereafter shall be considered an additional offense.

Source: Laws 1977, LB 38, § 289; Laws 1988, LB 1030, § 21.

28-1306 Unclean stock cars, railroads bringing into state; penalty.

It shall be unlawful for any railroad company operating its road in this state to bring or cause to be brought into this state from an adjoining state any empty car used for transporting hogs or sheep, or any empty combination car used for carrying grain and stock that has any filth of any kind whatever in the same; but such railroad company shall, before it allows such car or cars to pass into the state, cause the same to be thoroughly cleaned. Any person or persons or corporation violating any provision of this section shall be guilty of a Class V misdemeanor.

Source: Laws 1977, LB 38, § 290.

28-1307 Diseased meat; sale; penalty.

It shall be unlawful for any person to sell or offer for sale the flesh of a diseased animal, whether such animal shall have died of disease or shall have

been butchered when in a diseased condition. Any person violating the provisions of this section shall be guilty of a Class IV felony.

Source: Laws 1977, LB 38, § 291.

28-1308 Watering stock at private tank; unlawful; penalty; exceptions.

(1) It is hereby declared unlawful for any person to water livestock at any watering trough or tanks belonging to any private owner without the consent of such owner, but this section shall not apply to livestock in transportation on railroads nor to livestock delivered into any stockyards nor to livestock in holding pens awaiting slaughter.

(2) Violation of this section is a Class V misdemeanor.

Source: Laws 1977, LB 38, § 292.

(c) TELEPHONE COMMUNICATIONS

28-1309 Refusing to yield a party line; penalty.

(1) A person commits the offense of refusing to yield a party line if he willfully refuses to relinquish a telephone party line, consisting of a subscriber line telephone circuit with two or more main telephone stations connected therewith, each having a distinctive ring or telephone number, after he has been requested to do so to permit another to place a call, in an emergency in which property or human life is in jeopardy and the prompt summoning of aid is essential, unless such party line is already being used for another such emergency call, or willfully interferes with such an emergency message, or requests the use of such a party line by falsely stating that the same is needed for any such purpose, knowing the statement to be false.

(2) Refusal to yield a party line is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 293.

28-1310 Intimidation by telephone call; penalty; prima facie evidence.

(1) A person commits the offense of intimidation by telephone call if, with intent to terrify, intimidate, threaten, harass, annoy, or offend, the person:

(a) Telephones another anonymously, whether or not conversation ensues, and disturbs the peace, quiet, and right of privacy of any person at the place where the calls are received; or

(b) Telephones another and uses indecent, lewd, lascivious, or obscene language or suggests any indecent, lewd, or lascivious act; or

(c) Telephones another and threatens to inflict injury to any person or to the property of any person; or

(d) Intentionally fails to disengage the connection; or

(e) Telephones another and attempts to extort money or other thing of value from any person.

(2) The use of indecent, lewd, or obscene language or the making of a threat or lewd suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy, or offend.

(3) The offense shall be deemed to have been committed either at the place where the call was made or where it was received.

(4) Intimidation by telephone call is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 294; Laws 2002, LB 1105, § 433.

A jury instruction founded on the presumption created by subsection (2) of this section is constitutionally impermissible because such an instruction deprives a defendant of the due process right that the State must prove beyond a reasonable doubt each element of the crime charged, and shifts the burden to the defendant to disprove the element of intent in the offense charged. State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990).

As interpreted, subsection (1)(b) of this section proscribes only telephone calls made with the intention of causing mental discomfort by the use of language which conjures up repugnant sexual images or which suggests the performance of repugnant sexual acts. State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990).

Because subsection (1)(b) of this section concerns itself with sexual speech which intrudes upon the privacy of innocent citizens, not for the purpose of communicating any thought, but for the purpose of causing mental discomfort by conjuring up repugnant sexual images, it regulates in an area in which the State has a compelling interest and therefore cannot be said to be substantially overbroad. State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990).

Subsection (1)(b) of this section is not impermissibly vague; it gives fair notice of exactly what is forbidden in terms which are understandable to persons of ordinary intelligence. State v. Kipf, 234 Neb. 227, 450 N.W.2d 397 (1990).

The statement ''What should I do to retaliate'' is sufficient to constitute a threat for purposes of subsection (1)(c) of this section. State v. Methe, 228 Neb. 468, 422 N.W.2d 803 (1988).

(d) INTERFERENCE WITH PUBLIC SERVICE COMPANY

28-1311 Interfering with a public service company; penalty.

(1) A person commits the offense of interfering with a public service company if he willfully and purposely interrupts or interferes with the transmission of telegraph or telephone messages or the transmission of light, heat and power in this state.

(2) Interference with public service companies is a Class II misdemeanor.

Source: Laws 1977, LB 38, § 295.

(e) POLICE RADIO SYSTEM

28-1312 Interfering with the police radio system; police radio set, defined; penalty; exceptions; equipment used in violation of sections; disposition.

(1) Police radio set shall mean any radio set or apparatus capable of either receiving or transmitting radio frequency signals within the wavelength or channel now or which may hereafter be allocated by the Federal Communications Commission for the police radio service.

(2) A person commits the offense of interfering with the police radio system if he has in his possession or in any motor vehicle or equips or installs in or on any motor vehicle, any police radio set which:

(a) In any way intentionally interferes with the transmission or reception of radio messages by any law enforcement agency and hinders any such agency in fulfillment of its duties; or

(b) Intercepts such radio signals to evade or assist others in evading arrest; or

(c) Results in the use of such communication for monetary or personal gain.

(3) The provisions of subsection (2) of this section shall not apply to:

(a) Peace officers and members of a law enforcement agency which regularly maintains a police radio system authorized and licensed by the Federal Communications Commission;

(b) Any person who has permission in writing from the head of a law enforcement agency to possess and use any radio set or apparatus capable of receiving messages or signals within the wavelength or channel assigned to the agency granting the permission; or

(c) Legal newspapers as defined in section 25-523, or radio, television or cable antenna television stations licensed pursuant to law, monitoring messages of signals for news purposes only without rebroadcasting or republishing verbatim.

(4) Interfering with the police radio system is a Class I misdemeanor.

(5) It shall be the duty of any and all peace officers to seize and hold for evidence any and all equipment possessed or used in violation of this section, and upon conviction of the person possessing or using such equipment, the court shall order such equipment destroyed or forfeited to the State of Nebraska.

Source: Laws 1977, LB 38, § 296.

(f) OBSERVANCE OF BLIND PERSONS

28-1313 Unlawful use of a white cane or guide dog; penalty.

(1) A person commits unlawfully using a white cane or guide dog if he is not blind as defined by law and carries, displays, or otherwise makes use of a white cane or guide dog.

(2) Such use of a white cane or the use of a guide dog by a person shall be officially recognized as an indication that the bearer is blind.

(3) Unlawful use of a white cane or guide dog is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 297.

28-1314 Failing to observe a blind person; penalty.

(1) A person commits the offense of failing to observe a blind person if as an operator of any vehicle or other conveyance, he fails to:

(a) Give special consideration to the bearer of a white cane or user of a guide dog; and

(b) Stop and remain when approaching such bearer until such time as the bearer has safely reached a position well outside the course normally used by the operator of the vehicle or other conveyance.

(2) Failure to observe a blind person is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 298.

(g) LOCKS AND KEYS

28-1315 Locks and keys; terms, defined.

As used in section 28-1316, unless the context otherwise requires:

(1) Change key shall mean a key planned and cut to operate a specific lock;

(2) Try-out key shall mean a key which may or may not be one of a set of similar keys, each key made to operate a series or group of a total series of locks, the key or keys being constructed to take advantage of unplanned construction similarities in the series or group of locks;

(3) Wiggle key or manipulation key shall mean a material device which may be variably positioned or manipulated in a lock's keyway until such action develops a condition within the lock which enables the lock to be operated.

Wiggle keys or manipulation keys may or may not resemble normally used keys;

(4) Master key shall mean a key planned and cut to operate all locks in a series or group of locks, each lock having its own key other than the master key for that individual lock only, and each lock constructed as a part of the series or group for operation with the master key. For the purpose of section 28-1316, submaster keys, grand master keys, great grand master keys, emergency keys, and overriding keys are to be considered as master keys;

(5) Keyed-alike locks shall mean a series or group of locks designed and constructed to be operated with the same change key;

(6) Locksmith shall mean a person dealing in the mechanical action and the correct operation of all types of locks and cylinder devices, whose trade or occupation is primarily repairing, opening or closing such locks or devices by mechanical means other than the key designed for that particular mechanism without altering, marring, or destroying the original condition or effectiveness of such mechanism; and

(7) Key master or key cutter shall mean a person other than a locksmith, whose primary and only function is the cutting and duplicating of keys.

Source: Laws 1977, LB 38, § 299.

28-1316 Unlawful use of locks and keys; penalty; exceptions.

(1) A person commits the offense of unlawful use of locks and keys if he:

(a) Sells, offers to sell, or gives to any person other than a law enforcement agency, dealer licensed under the provisions of Chapter 60, article 14, motor vehicle manufacturer, or person regularly carrying on the profession of a locksmith any try-out key, manipulation key, wiggle key, or any other device designed to be used in place of the normal change key of any motor vehicle; or

(b) Has in his possession any try-out key, wiggle key, manipulation key, or any other device designed to be used in place of the normal change key of any motor vehicle unless he is a locksmith, locksmith manufacturer, dealer licensed under the provisions of Chapter 60, article 14, motor vehicle manufacturer, or law enforcement agency; or

(c) Duplicates a master key for anyone unless written permission has been granted by the person who has legal control of the master key. All master keys shall be stamped with the words DO NOT DUPLICATE. All duplications of master keys shall also be stamped with the words DO NOT DUPLICATE.

(2) Nothing in subsection (1) of this section shall be construed to make it unlawful if:

(a) The owner of two or more vehicles possesses a change key that can be used on two or more vehicles that he owns; or

(b) Such owner changes the locks on such vehicle so that they are keyed alike; or

(c) Any person makes or duplicates the original change keys for such an owner; or

(d) Anyone stamps any other type of key with the words DO NOT DUPLICATE.

(3) Unlawful use of locks and keys is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 300.

(h) PICKETING

28-1317 Unlawful picketing; penalty.

(1) A person commits the offense of unlawful picketing if, either singly or by conspiring with others, he or she interferes, or attempts to interfere, with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by:

(a) Using threatening language toward such person or any member of his or her immediate family, or in his, her, or their presence or hearing, for the purpose of inducing or influencing, or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment; or

(b) Following or intercepting such person from or to his or her work, from or to his or her home or lodging, or about the city, against the will of such person, for such purpose; or

(c) Menacing, threatening, coercing, intimidating, or frightening in any manner such person for such purpose; or

(d) Committing an assault upon such person for such purpose; or

(e) Picketing or patrolling the place of residence of such person, or any street, alley, road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

(2) Unlawful picketing is a Class III misdemeanor. Each violation shall constitute a separate offense.

Source: Laws 1977, LB 38, § 301; Laws 2007, LB1, § 1.

28-1318 Mass picketing, defined; penalty; display of sign required.

(1) Mass picketing shall mean any form of picketing in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

(2) A person commits the offense of mass picketing if singly or in concert with others, he or she engages in or aids and abets any form of picketing activity that constitutes mass picketing as defined in subsection (1) of this section.

(3) Mass picketing is a Class III misdemeanor. Each violation shall constitute a separate offense.

(4) Any person who shall legally picket by any means or methods other than those forbidden in this section or in section 28-1317 shall visibly display on his or her person a sign showing the name of the protesting organization he or she represents. The composition of the sign shall be uppercase lettering of not less than two and one-half inches in height.

Source: Laws 1977, LB 38, § 302; Laws 2007, LB1, § 2.

28-1319 Interfering with picketing; penalty.

(1) A person commits the offense of interfering with picketing if, acting separately or with others, he interferes with any picketing not described as mass picketing in section 28-1318, except that this provision shall not apply to duly qualified peace officers or to court action.

(2) Interfering with picketing is a Class III misdemeanor. Each violation shall constitute a separate offense.

Source: Laws 1977, LB 38, § 303.

28-1320 Intimidating pickets; penalty.

(1) A person commits the offense of intimidating pickets if he intimidates or attempts to intimidate any striker by threat of the loss of any right or condition of employment, that directly or indirectly would affect the lawful conduct of said striker in any way.

(2) Intimidation of pickets is a Class III misdemeanor. Each violation shall constitute a separate offense.

Source: Laws 1977, LB 38, § 304.

28-1320.01 Unlawful picketing of a funeral; legislative findings.

(1) The Legislature finds that families have a legitimate and legally cognizable interest in organizing and attending funerals for deceased relatives and that the rights of families to peacefully and privately mourn the death of relatives are violated when funerals are targeted for picketing or protest activities.

(2) The Legislature also recognizes that individuals have a constitutional right to free speech and that in the context of funeral ceremonies, the competing interests of picketers and funeral participants must be balanced. Therefor, the Legislature declares that the purposes of sections 28-1320.01 to 28-1320.03 are to protect the privacy of grieving families and to preserve the peaceful character of cemeteries, mortuaries, churches, and other places of worship during a funeral while still providing picketers and protestors the opportunity to communicate their message at a time and place that minimizes the interference with the rights of funeral participants.

Source: Laws 2006, LB 287, § 1.

28-1320.02 Unlawful picketing of a funeral; terms, defined.

For purposes of sections 28-1320.01 to 28-1320.03, the following definitions apply:

(1) Funeral means the ceremonies and memorial services held in connection with the burial or cremation of the dead but does not include funeral processions on public streets or highways; and

(2) Picketing of a funeral means protest activities engaged in by a person or persons located within three hundred feet of a cemetery, mortuary, church, or other place of worship during a funeral.

Source: Laws 2006, LB 287, § 2.

28-1320.03 Unlawful picketing of a funeral; penalty.

(1) A person commits the offense of unlawful picketing of a funeral if he or she engages in picketing from one hour prior to through two hours following the commencement of a funeral.

(2) Unlawful picketing of a funeral is a Class III misdemeanor.

Source: Laws 2006, LB 287, § 3.

(i) NUISANCES

28-1321 Maintaining a nuisance; penalty; abatement or removal.

(1) A person commits the offense of maintaining a nuisance if he erects, keeps up or continues and maintains any nuisance to the injury of any part of the citizens of this state.

(2) The erecting, continuing, using, or maintaining of any building, structure, or other place for the exercise of any trade, employment, manufacture, or other business which, by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort, or property of individuals or the public; the obstructing or impeding, without legal authority, of the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome or impure of any watercourse, stream, or water; or unlawfully diverting any such watercourse from its natural course or state to the injury or prejudice of others; and the obstructing or encumbering by fences, building, structures or otherwise of any of the public highways or streets or alleys of any city or village, shall be deemed nuisances.

(3) A person guilty of erecting, continuing, using, maintaining or causing any such nuisance shall be guilty of a violation of this section, and in every such case the offense shall be construed and held to have been committed in any county whose inhabitants are or have been injured or aggrieved thereby.

(4) Maintenance of nuisances is a Class III misdemeanor.

(5) The court, in case of conviction of such offense, shall order every such nuisance to be abated or removed.

Source: Laws 1977, LB 38, § 305.

Cross References

Nebraska Right to Farm Act, see sections 2-4401 to 2-4404.

(j) DISTURBING THE PEACE

28-1322 Disturbing the peace; penalty.

(1) Any person who shall intentionally disturb the peace and quiet of any person, family, or neighborhood commits the offense of disturbing the peace.

(2) Disturbing the peace is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 306.

Under subsection (1) of this section, the definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by citizens of a community. The term ''breach of the peace'' is generic and includes all violations of public peace, order, or decorum, or acts tending to the disturbance thereof. Provocative language consisting of profane, indecent, or abusive remarks directed to the person of the hearer may amount to a breach of the peace, and such language constitutes ''fighting'' words, which are not constitutionally protected forms of speech. State v. Broadstone, 233 Neb. 595, 447 N.W.2d 30 (1989).

(k) TRANSFER OF SOUNDS RECORDED

28-1323 Transfer or cause to be transferred any sounds recorded on a phonograph record, disc, wire, tape, or film; unlawful; exemption.

Unless exempt under section 28-1325, it is unlawful for any person, firm, partnership, limited liability company, corporation, or association knowingly to (1) transfer or cause to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film, or other article on which sounds are recorded onto any other phonograph record, disc, wire, tape, film, or other article or (2) sell, distribute, circulate, offer for sale, distribution or circulation, possess for the purpose of sale, distribution, or circulation, or cause to be sold, distributed, or circulated, offered for sale, distribution, or circulation, or possessed for sale, distribution, or circulation any article or device on which sounds have been transferred without the consent of the person who owns the master phonograph record, master disc, master tape, master wire, master film, or other article from which the sounds are derived.

Source: Laws 1977, LB 38, § 307; Laws 1993, LB 121, § 185.

28-1324 Sell, distribute, circulate, offer for sale, or possess phonograph record, disc, wire, tape, film, or sounds transferred; unlawful; exception.

It is unlawful for any person, firm, partnership, limited liability company, corporation, or association to sell, distribute, circulate, offer for sale, distribution, or circulation, or possess for the purpose of sale, distribution, or circulation any phonograph record, disc, wire, tape, film, or other article on which sounds have been transferred unless such phonograph record, disc, wire, tape, film, or other article bears the actual name and address of the transferor of the sounds in a prominent place on its outside face or package.

Source: Laws 1977, LB 38, § 308; Laws 1993, LB 121, § 186.

28-1325 Transfer of sounds; sections; when not applicable.

Sections 28-1323 to 28-1326 do not apply to any person who transfers or causes to be transferred any sounds (1) intended for or in connection with radio or television broadcast transmission or related uses, (2) for archival purposes, (3) solely for the personal use of the person transferring or causing the transfer and without any compensation being derived by the person from the transfer, or (4) intended for use by an educational institution, school, or other person for instructional or educational uses.

Source: Laws 1977, LB 38, § 309.

28-1326 Transfer of sounds; violations; penalty.

Any person violating the provisions of section 28-1323 or 28-1324 shall be guilty of a Class II misdemeanor.

Source: Laws 1977, LB 38, § 310.

(l) SMOKING

28-1327 Repealed. Laws 1979, LB 344, § 16.

28-1328 Repealed. Laws 1979, LB 344, § 16.

(m) FALSE BRANDS AND MARKS

28-1329 Receptacle, other term, defined.

As used in sections 28-1329 to 28-1334, unless the context otherwise requires:

(1) Receptacle shall mean not only bottles, siphons, tins, kegs, one-eighth barrels, quarter barrels, half barrels, barrels, boxes, ice cream cabinets, cans and tubs, but all other receptacles used for holding any of the commodities in the sections mentioned; and

(2) Requirement for a written transfer, bill of sale, authority, or consent shall mean that it shall be signed by the person named in the certificate issued by the Secretary of State as provided in such sections, or by a transferee claiming under a written transfer signed by such person, or by an agent whose authority is in writing signed by such person or such transferee.

Source: Laws 1977, LB 38, § 313.

28-1330 Nonintoxicating beverages, milk, and milk products; brand or mark on container; filing with Secretary of State; publication; certificate; fee.

Any person engaged in manufacturing, bottling or selling soda waters, mineral or aerated waters, cider, ginger ale and other unintoxicating beverages, milk, buttermilk, cream, ice cream or butter in any kind of receptacle having the name of such person or other mark or device printed, stamped, engraved, etched, blown, impressed, riveted or otherwise produced or permanently fixed upon the same, may file in the office of the Secretary of State for record a description of the name, mark, or device so used and cause such description to be printed once each week for three successive weeks in a newspaper published in the county in which the principal place of business of such person is located, or if the principal place of business of such person is located in another state, then in the county wherein the principal office or depot within the State of Nebraska is located. It shall be the duty of the Secretary of State to issue to the person so filing for record a description of such name, mark, or device in his office, a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar. Such certificate in all prosecutions under sections 28-1329 to 28-1334 shall be prima facie evidence of the adoption of such name, mark, or device, and of the right of the person named therein to adopt and use the same.

Source: Laws 1977, LB 38, § 314.

28-1331 Unauthorized use of receptacle; penalty; separate offense.

(1) A person commits unauthorized use of receptacle if he fills any receptacle bearing a name, mark, or device recorded as provided in section 28-1330 with soda water, mineral or aerated waters, cider, ginger ale and other unintoxicating beverages, milk, buttermilk, cream, ice cream or butter, or to deface, erase, obliterate, cover up or otherwise remove or conceal any such name, mark, or device on any such receptacle, or to buy, sell, give, take, dispose of in any way, traffic in or destroy any receptacle bearing any such name, mark, or device unless it is the person named in the certificate issued by the Secretary of State, as provided in section 28-1330, or has the written consent of the person named in such certificate.

(2) Unauthorized use of receptacles is a Class III misdemeanor. Each such receptacle so unlawfully dealt with, as herein set out, shall be deemed to be a separate offense.

Source: Laws 1977, LB 38, § 315.

28-1332 Unauthorized possession of receptacle; penalty.

(1) A person commits unauthorized possession of receptacle if having in possession or under control any receptacle bearing any name, mark, or device recorded as provided in section 28-1330, and holding a written transfer or bill of sale therefor from the person named in the certificate issued by the Secretary of State as provided in such section, or other authority in writing from such person, he fails or refuses to deliver such receptacle to the person named in such certificate or to the authorized agent of such person when demanded.

(2) Unauthorized possession of receptacle is a Class III misdemeanor.

Source: Laws 1977, LB 38, § 316.

28-1333 Receptacles; unauthorized use or possession; search warrant; prosecution of possessor.

Whenever any person who has filed for record any such name, mark, or device, or who has acquired from such person in writing the ownership of such name, mark, or device or the right to the exclusive use thereof, or any one representing such person, shall make oath before any county judge that he has reason to believe and does believe that any receptacle bearing such name, mark, or device is being unlawfully used or filled or had in possession by any other person, such judge shall thereupon issue a search warrant to discover and obtain such receptacle, and may also cause the person in whose possession such receptacle shall be found to be brought before him and shall then inquire into the circumstances of such possession and if it shall be found that such person is guilty of violating any provision in sections 28-1329 to 28-1334, he shall be punished as prescribed in section 28-1331 or 28-1332 and the possession of the property taken upon such warrant shall be awarded to the owner thereof. The remedy given by this section shall not be held to be exclusive, and offenders against any provision of said sections may also be prosecuted as in case of other misdemeanors.

Source: Laws 1977, LB 38, § 317.

28-1334 Sale, construed.

The requiring or taking of any deposit for any purpose upon such receptacle shall not be deemed nor held to be a sale, either optional or otherwise, in any proceeding under sections 28-1329 to 28-1334.

Source: Laws 1977, LB 38, § 318.

(n) SHOOTING FROM HIGHWAY OR BRIDGE

28-1335 Discharging any firearm or weapon from any public highway, road, or bridge; penalty; exception.

A person commits a Class III misdemeanor if such person discharges any firearm or weapon using any form of compressed gas as a propellant from any public highway, road, or bridge in this state, unless otherwise allowed by statute.

Source: Laws 1977, LB 38, § 319.

(o) NEBRASKA CRIMINAL CODE REVIEW COMMITTEE

28-1336 Repealed. Laws 1983, LB 1, § 1.

28-1337 Repealed. Laws 1983, LB 1, § 1.

28-1338 Repealed. Laws 1983, LB 1, § 1.

28-1339 Repealed. Laws 1983, LB 1, § 1.

28-1340 Repealed. Laws 1983, LB 1, § 1.

(p) COMPUTERS

28-1341 Act, how cited.

Sections 28-1341 to 28-1348 shall be known and may be cited as the Computer Crimes Act.

Source: Laws 1991, LB 135, § 2.

28-1342 Legislative findings and declarations.

The Legislature finds and declares that our society is increasingly dependent on computers, that important personal, financial, medical, and historical data is stored in computers, and that valuable data stored can be lost due to criminal action.

The Legislature further finds that specific criminal statutes are necessary to cover the actions of persons who intentionally destroy data or commit fraud using computers.

Source: Laws 1991, LB 135, § 3.

28-1343 Terms, defined.

For purposes of the Computer Crimes Act:

(1) Access shall mean to instruct, communicate with, store data in, retrieve data from, or otherwise use the resources of a computer, computer system, or computer network;

(2) Computer shall mean a high-speed data processing device or system which performs logical, arithmetic, data storage and retrieval, communication, memory, or control functions by the manipulation of signals, including, but not limited to, electronic or magnetic impulses, and shall include any input, output, data storage, processing, or communication facilities directly related to or operating in conjunction with any such device or system;

(3) Computer network shall mean the interconnection of a communications system with a computer through a remote terminal or with two or more interconnected computers or computer systems;

(4) Computer program shall mean an instruction or statement or a series of instructions or statements in a form acceptable to a computer which directs the functioning of a computer system in a manner designed to provide appropriate products from the computer;

(5) Computer security system shall mean a computer program or device that:

(a) Is intended to protect the confidentiality and secrecy of data and information stored in or accessible through the computer system; and

(b) Displays a conspicuous warning to a user that the user is entering a secure system or requires a person seeking access to knowingly respond by use of an authorized code to the program or device in order to gain access;

(6) Computer software shall mean a computer program of procedures or associated documentation concerned with the operation of a computer;

(7) Computer system shall mean related computers and peripheral equipment, whether connected or unconnected;

(8) Data shall mean a representation of information, facts, knowledge, concepts, or instructions prepared in a formalized or other manner and intended for use in a computer or computer network;

(9) Destructive computer program shall mean a computer program that performs a destructive function or produces a destructive product;

(10) Destructive function shall mean a function that (a) degrades the performance of a computer, its associated peripheral equipment, or a computer program, (b) disables a computer, its associated peripheral equipment, or a computer program, or (c) alters a computer program or data;

(11) Destructive product shall mean a product that: (a) Produces unauthorized data, including data that make computer memory space unavailable; (b) results in the unauthorized alteration of data or a computer program; or (c) produces a destructive computer program, including, but not limited to, a self-replicating program;

(12) Loss shall mean the greatest of the following:

(a) The retail market value of the property or services involved;

(b) The reasonable repair or replacement cost whichever is less; or

(c) The reasonable value of the damage created by the unavailability or lack of utility of the property or services involved until repair or replacement can be effected;

(13) Property shall include, but not be limited to, electronically processed or electronically produced data and information in computer software whether in human or computer readable form; and

(14) Services shall include, but not be limited to, computer time, data processing, and storage functions.

Source: Laws 1985, LB 371, § 2; Laws 1991, LB 135, § 4.

28-1343.01 Unauthorized computer access; penalty.

(1) A person commits the offense of unauthorized computer access if the person intentionally and without authority penetrates a computer security system.

(2) A person who violates subsection (1) of this section in a manner that creates a grave risk of causing the death of a person shall be guilty of a Class IV felony.

(3) A person who violates subsection (1) of this section in a manner that creates a risk to public health and safety shall be guilty of a Class I misdemeanor.

(4) A person who violates subsection (1) of this section in a manner that compromises the security of data shall be guilty of a Class II misdemeanor.

Source: Laws 1991, LB 135, § 5.

28-1344 Unlawful acts; depriving or obtaining property or services; penalties.

Any person who intentionally accesses or causes to be accessed, directly or indirectly, any computer, computer system, computer software, or computer network without authorization or who, having accessed any computer, computer system, computer software, or computer network with authorization, knowingly and intentionally exceeds the limits of such authorization shall be guilty of a Class IV felony if he or she intentionally: (1) Deprives another of property or services; or (2) obtains property or services of another, except that any person who obtains property or services or deprives another of property or services with a value of one thousand dollars or more by such conduct shall be guilty of a Class III felony.

Source: Laws 1985, LB 371, § 3; Laws 1991, LB 135, § 6.

28-1345 Unlawful acts; harming or disrupting operations; penalties.

Any person who accesses or causes to be accessed any computer, computer system, computer software, or computer network without authorization or who, having accessed any computer, computer system, computer software, or computer network with authorization, knowingly and intentionally exceeds the limits of such authorization shall be guilty of a Class IV felony if he or she intentionally: (1) Alters, damages, deletes, or destroys any computer, computer system, computer software, computer network, computer program, data, or other property; (2) disrupts the operation of any computer, computer system, computer software, or computer network; or (3) distributes a destructive computer program with intent to damage or destroy any computer, computer system, computer network, or computer software, except that any person who causes loss with a value of one thousand dollars or more by such conduct shall be guilty of a Class III felony.

Source: Laws 1985, LB 371, § 4; Laws 1991, LB 135, § 7.

28-1346 Unlawful acts; obtaining confidential public information; penalties.

Any person who intentionally accesses or causes to be accessed any computer, computer system, computer software, or computer network without authorization, or who, having accessed a computer, computer system, computer software, or computer network with authorization, knowingly and intentionally exceeds the limits of such authorization, and thereby obtains information filed by the public with the state or any political subdivision which is by statute required to be kept confidential shall be guilty of a Class II misdemeanor. For any second or subsequent offense under this section, such person shall be guilty of a Class I misdemeanor.

Source: Laws 1985, LB 371, § 5; Laws 1991, LB 135, § 8.

28-1347 Unlawful acts; access without authorization; exceeding authorization; penalties.

Any person who intentionally accesses any computer, computer system, computer software, computer network, computer program, or data without authorization and with knowledge that such access was not authorized or who, having accessed any computer, computer system, computer software, computer network, computer program, or data with authorization, knowingly and inten-

tionally exceeds the limits of such authorization shall be guilty of a Class V misdemeanor. For any second or subsequent offense under this section, such person shall be guilty of a Class II misdemeanor.

Source: Laws 1985, LB 371, § 6; Laws 1991, LB 135, § 9.

28-1348 Act, how construed.

The Computer Crimes Act shall not be construed to preclude the applicability of any other provision of the Nebraska Criminal Code which may apply to any transaction described in the Computer Crimes Act.

Source: Laws 1985, LB 371, § 7; Laws 1991, LB 135, § 10.

(q) ELEMENTAL MERCURY

28-1349 Legislative findings.

The Legislature finds that elemental mercury is a persistent and toxic pollutant that accumulates in the environment. The Legislature further finds that each year elemental mercury contained in liquid mercury thermometers can enter the environment and result in human exposure to elemental mercury through accidental spills, breakage, and releases. It is the intent of the Legislature to ban the sale and distribution of liquid mercury thermometers containing elemental mercury to prevent further accidental exposure.

Source: Laws 2003, LB 17, § 3.

28-1350 Liquid mercury thermometer; prohibited acts.

No liquid mercury thermometer containing elemental mercury shall be sold, given away, or otherwise distributed in this state.

Source: Laws 2003, LB 17, § 4.

ARTICLE 14

NONCODE PROVISIONS

(a) OFFENSES RELATING TO PROPERTY

Section

28-1401. Navigable streams; cutoff, chute, backwater, or bayou connected with; access by boat.
28-1402. Locksmiths; registration certificates; issued by county clerk.
28-1403. Locksmiths; registration certificates; application; contents; fee.
28-1404. Locksmiths; registration certificates; term of validity.
28-1405. Locksmiths; registration certificates; failure to acquire; penalty.

(b) JUSTIFICATION FOR USE OF FORCE

28-1406. Terms, defined.
28-1407. Justification; choice of evils.
28-1408. Public duty; execution.
28-1409. Use of force in self-protection.
28-1410. Use of force for protection of other persons.
28-1411. Use of force for protection of property.
28-1412. Use of force in law enforcement.
28-1413. Use of force by person with special responsibility for care, discipline, or safety of others.
28-1414. Mistake of law; reckless or negligent use of force.
28-1415. Justification in property crimes.
28-1416. Justification an affirmative defense; civil remedies unaffected.

(a) OFFENSES RELATING TO PROPERTY

28-1401 Navigable streams; cutoff, chute, backwater, or bayou connected with; access by boat.

To further implement the provisions of Article XV, section 5, of the Constitution of Nebraska, the Legislature herewith provides that the people of the state shall have access by boat to any cutoff, chute, backwater, or bayou connected with any navigable stream located in the State of Nebraska, but that nothing in this section shall serve to allow trespass upon the lands of any person.

Source: Laws 1974, LB 565, § 1; R.R.S.1943, § 28-589.03, (1975).

28-1402 Locksmiths; registration certificates; issued by county clerk.

All locksmiths, as defined in section 28-1315, shall be required to hold a valid registration certificate issued by the county clerk in the county in which the locksmith's business is located.

Source: Laws 1974, LB 662, § 1; R.R.S.1943, § 28-5,103, (1975).

28-1403 Locksmiths; registration certificates; application; contents; fee.

The county clerk shall provide the registration certificates upon receipt of a fee of five dollars. Every locksmith shall conspicuously display such certificate in his or her place of business. The application shall be filed in the manner and form prescribed by the Secretary of State, and shall include as a minimum (1) the name and social security number of the applicant, (2) the name of the applicant's business, (3) the address of such place of business, (4) whether the applicant has been convicted of violating the laws of any state, other than minor traffic violations, and (5) the name and address of three individuals who have knowledge of the applicant's character, experience, and ability. It shall be the duty of each county clerk to supply each applicant with an application form and to file a copy of each application, which application shall be public information.

Source: Laws 1974, LB 662, § 2; R.R.S.1943, § 28-5,104, (1975); Laws 1997, LB 752, § 84.

28-1404 Locksmiths; registration certificates; term of validity.

The registration certificate shall remain valid until such time as the name of the individual, the name of the place of business, or the address of the place of business changes. At the time of such change a new registration shall be required.

Source: Laws 1974, LB 662, § 3; R.R.S.1943, § 28-5,105, (1975).

28-1405 Locksmiths; registration certificates; failure to acquire; penalty.

Any person, firm, or corporation who fails to acquire a valid registration certificate pursuant to the provisions of sections 28-1402 to 28-1405 shall be guilty of a Class IV misdemeanor.

Source: Laws 1974, LB 662, § 4; Laws 1977, LB 41, § 4; R.R.S.1943, § 28-5,106, (1975).

(b) JUSTIFICATION FOR USE OF FORCE

28-1406 Terms, defined.

As used in sections 28-1406 to 28-1416, unless the context otherwise requires:

(1) Unlawful force shall mean force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status; not amounting to a privilege to use the force;

(2) Assent shall mean consent, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily harm;

(3) Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, shall not constitute deadly force;

(4) Actor shall mean any person who uses force in such a manner as to attempt to invoke the privileges and immunities afforded him by sections 28-1406 to 28-1416, except any duly authorized law enforcement officer of the State of Nebraska or its political subdivisions;

(5) Dwelling shall mean any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging; and

(6) Public officer shall mean any elected or appointed officer or employee of the State of Nebraska or its political subdivisions, except any duly authorized law enforcement officer of the State of Nebraska or its political subdivisions.

Source: Laws 1972, LB 895, § 1; Laws 1972, LB 1278, § 2; R.R.S.1943, § 28-833, (1975).

Justification, otherwise known as the choice of evils, is an affirmative defense. State v. Wells, 257 Neb. 332, 598 N.W.2d 30 (1999).

28-1407 Justification; choice of evils.

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

(a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

(b) Neither sections 28-1406 to 28-1416 nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Source: Laws 1972, LB 895, § 2; R.R.S.1943, § 28-834, (1975).

Generalized and nonimmediate fears are inadequate grounds upon which to justify a violation of law. State v. Mowell, 267 Neb. 83, 672 N.W.2d 389 (2003).

The choice of evils defense requires that a defendant (1) acts to avoid a greater harm, (2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm, and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur. State v. Mowell, 267 Neb. 83, 672 N.W.2d 389 (2003).

This section reflects the Nebraska Legislature's policy that certain circumstances legally excuse conduct that would otherwise be criminal. State v. Mowell, 267 Neb. 83, 672 N.W.2d 389 (2003).

The justification or ''choice of evils'' defense is unavailable in a prosecution for an offense, based on conduct as an expression of a defendant's moral belief or judgment, committed to prevent another's exercising a constitutional right or committed to deny another's constitutionally protected right. State v. Cozzens, 241 Neb. 565, 490 N.W.2d 184 (1992).

The justification or ''choice of evils'' defense operates to excuse conduct that would otherwise subject a person to criminal sanctions, but its availability and applicability require that a defendant's conduct be responsive to a legally recognized harm. State v. Cozzens, 241 Neb. 565, 490 N.W.2d 184 (1992).

28-1408 Public duty; execution.

(1) Except as provided in subsection (2) of this section, conduct is justifiable when it is required or authorized by:

(a) The law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties;

(b) The law governing the execution of legal process;

(c) The judgment or order of a competent court or tribunal;

(d) The law governing the armed services or the lawful conduct of war; or

(e) Any other provision of law imposing a public duty.

(2) Sections 28-1409 to 28-1416 shall apply to:

(a) The use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(b) The use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(3) The justification afforded by subsection (1) of this section shall apply:

(a) When the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) When the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

Source: Laws 1972, LB 895, § 3; R.R.S.1943, § 28-835, (1975).

28-1409 Use of force in self-protection.

(1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.

(3) The use of such force is not justifiable under this section to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(a) The actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest;

(b) The actor has been unlawfully dispossessed of the property and is making a reentry or recapture justified by section 28-1411; or

(c) The actor believes that such force is necessary to protect himself against death or serious bodily harm.

(4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:

(a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(i) The actor shall not be obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(ii) A public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape shall not be obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(5) Except as required by subsections (3) and (4) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(6) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can do so, unless the person confined has been arrested on a charge of crime.

Source: Laws 1972, LB 895, § 4; R.R.S.1943, § 28-836, (1975).

1. Elements
2. Evidence
3. Jury instructions
4. Lawful force
5. Unlawful force
6. Miscellaneous

1. Elements

To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force and the force used in defense must be immediately necessary and justified under the circumstances. State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003).

A defendant asserting self-defense as justification for the use of force must have a reasonable and good faith belief in the necessity of such force. State v. Thompson, 244 Neb. 375, 507 N.W.2d 253 (1993).

In order for the self-defense justification to be applicable, (1) the belief that force is necessary must be reasonable and in good faith, (2) the force must be immediately necessary, and (3) the force used must be justified under the circumstances. State v. Graham, 234 Neb. 275, 450 N.W.2d 673 (1990).

The use of deadly force shall not be justifiable unless the actor believes such force is necessary to protect himself against death or serious bodily harm, nor is it justifiable if the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter or the actor knows that he can not avoid the necessity of using such force with complete safety by retreating. State v. Menser, 222 Neb. 36, 382 N.W.2d 18 (1986).

Pursuant to subsection (4)(a) of this section, to deprive a defendant of the defense of self-defense, the defendant's provocation must be with the intent that the defendant will then cause death or serious bodily injury to the one that the defendant provoked, and it must all occur in the same encounter. State v. Butler, 10 Neb. App. 537, 634 N.W.2d 46 (2001).

2. Evidence

Under subsection (5) of this section, evidence of victims' violent or aggressive behavior which occurred 4 months after defendant shot them was not relevant to the circumstances as defendant believed them to be the night he shot them. State v. Allison, 238 Neb. 142, 469 N.W.2d 360 (1991).

3. Jury instructions

A trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense. State v. Marshall, 253 Neb. 676, 573 N.W.2d 406 (1998).

Jury instruction requiring, as an element of self-defense, that ''before using deadly force the defendant either tried to get away or did not try because he reasonably did not believe he could do so in complete safety,'' was not erroneous under this section. State v. Williams, 239 Neb. 985, 480 N.W.2d 390 (1992).

A defendant is entitled to an instruction on self-defense if there is any evidence to support it; this is true even if the defendant does not testify. State v. Graham, 234 Neb. 275, 450 N.W.2d 673 (1990).

A defendant is not entitled to a self-defense jury instruction when he could have safely retreated. State v. Kuntzelman, 215 Neb. 115, 337 N.W.2d 414 (1983).

Defendant is entitled to have jury instructed on his theory of self-defense if there is any evidence to support it. State v. Duis, 207 Neb. 851, 301 N.W.2d 587 (1981).

4. Lawful force

This section provides no defense when a defendant uses force against another's lawful force. State v. Brown, 235 Neb. 374, 455 N.W.2d 547 (1990).

Use of force was prohibited where person being arrested knew that arrest was being made by a peace officer. State v. Moore, 226 Neb. 347, 411 N.W.2d 345 (1987).

The use of deadly force is justifiable when the actor believes that such force is necessary to protect himself or herself against death or serious bodily harm unless the actor knows that he or she can avoid the necessity of using such force with complete safety by retreating. Newton v. Huffman, 10 Neb. App. 390, 632 N.W.2d 344 (2001).

Pursuant to this section, if a defendant is justified in using force toward an individual, the defendant is justified in the force employed which mistakenly strikes the actual victim. State v. Owens, 8 Neb. App. 109, 589 N.W.2d 867 (1999).

5. Unlawful force

Record did not establish that victim used ''unlawful force'' against the defendant. State v. Sutton, 231 Neb. 30, 434 N.W.2d 689 (1989).

6. Miscellaneous

The excuse of self-defense is applied to the threatening behavior of ''another person'', not to a generalized group of actors. State v. Owens, 257 Neb. 832, 601 N.W.2d 231 (1999).

28-1410 Use of force for protection of other persons.

(1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) The actor would be justified under section 28-1409 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect;

(b) Under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(c) The actor believes that his intervention is necessary for the protection of such other person.

(2) Notwithstanding subsection (1) of this section:

(a) When the actor would be obliged under section 28-1409 to retreat, to surrender the possession of a thing or to comply with a demand before using force in self-protection, he shall not be obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person;

(b) When the person whom the actor seeks to protect would be obliged under section 28-1409 to retreat, to surrender the possession of a thing or to comply with a demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to do so before using force in his protection if the actor knows that he can obtain complete safety in that way; and

(c) Neither the actor nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

Source: Laws 1972, LB 895, § 5; R.R.S.1943, § 28-837, (1975).

28-1411 Use of force for protection of property.

(1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(a) To prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property; *Provided*, that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or

(b) To effect an entry or reentry upon land or to retake tangible movable property; *Provided*, that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession; *and provided further*, that:

(i) The force is used immediately or on fresh pursuit after such dispossession; or

(ii) The actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or reentry until a court order is obtained.

(2) For the purposes of subsection (1) of this section:

(a) A person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless such property is movable and was and still is located on land in his possession;

(b) A person who has been dispossessed of land does not regain possession thereof merely by setting foot thereon; and

(c) A person who has a license to use or occupy real property is deemed to be in possession thereof except against the licenser acting under claim of right.

(3) The use of force is justifiable under this section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:

(a) Such request would be useless;

(b) It would be dangerous to himself or another person to make the request; or

(c) Substantial harm will be done to the physical condition of the property which is sought to be protected before the request can effectively be made.

(4) The use of force to prevent or terminate a trespass is not justifiable under this section if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily harm.

(5) The use of force to prevent an entry or reentry upon land or the recapture of movable property is not justifiable under this section, although the actor believes that such reentry or recapture is unlawful, if:

(a) The reentry or recapture is made by or on behalf of a person who was actually dispossessed of the property; and

(b) It is otherwise justifiable under subdivision (1)(b) of this section.

(6) The use of deadly force is not justifiable under this section unless the actor believes that:

(a) The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(b) The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(i) Has employed or threatened deadly force against or in the presence of the actor; or

(ii) The use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.

(7) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so with safety to the property, unless the person confined has been arrested on a charge of crime.

(8) The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:

(a) Such device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm;

(b) Such use of the particular device to protect such property from entry or trespass is reasonable under the circumstances, as the actor believes them to be; and

(c) Such device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(9) The use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing the actor from going to a place to which he may lawfully go is justifiable if:

(a) The actor believes that the person against whom he uses force has no claim of right to obstruct the actor;

(b) The actor is not being obstructed from entry or movement on land which he knows to be in the possession or custody of the person obstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless the circumstances, as the actor believes them to be, are of such urgency that it would not be reasonable to postpone the entry or movement on such land until a court order is obtained; and

(c) The force used is not greater than would be justifiable if the person obstructing the actor were using force against him to prevent his passage.

Source: Laws 1972, LB 895, § 6; R.R.S.1943, § 28-838, (1975).

28-1412 Use of force in law enforcement.

(1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) The use of force is not justifiable under this section unless:

(a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony;

(b) Such person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(i) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(ii) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(4) The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(5) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest is justified in using any force which he would be justified in using if the arrest were lawful; *Provided*, that he does not believe the arrest is unlawful.

(6) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, if:

(a) He believes the arrest is lawful; and

(b) The arrest would be lawful if the facts were as he believes them to be.

(7) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily harm upon

himself, committing or consummating the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, except that:

(a) Any limitations imposed by the other provisions of sections 28-1406 to 28-1416 on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

(b) The use of deadly force is not in any event justifiable under this subsection unless:

(i) The actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(ii) The actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

(8) The justification afforded by subsection (7) of this section extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can do so, unless the person confined has been arrested on a charge of crime.

Source: Laws 1972, LB 895, § 7; R.R.S.1943, § 28-839, (1975).

Police officer in making an arrest must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances. State v. Thompson, 244 Neb. 189, 505 N.W.2d 673 (1993).

Pursuant to subsection (1) of this section, a police officer in making an arrest must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting officer would have deemed necessary under the circumstances. Wagner v. City of Omaha, 236 Neb. 843, 464 N.W.2d 175 (1991).

Officer's use of force during arrest was justified and authorized. State v. Moore, 226 Neb. 347, 411 N.W.2d 345 (1987).

The legislative policy in Nebraska is that force is not to be used in making an arrest unless the arrester believes such force is immediately necessary to effect a lawful arrest. State v. White, 209 Neb. 218, 306 N.W.2d 906 (1981).

This section, which was section 28-839 under the old criminal code, does apply to police officers, notwithstanding the fact that this section refers only to ''actors'' and that the statutory definition of ''actor'' excludes law enforcement officers. Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978).

Where a police officer who pursued and fatally shot a burglary suspect whom he did not believe was involved in a crime involving the use or threatened use of deadly force and who did not present a substantial risk that he would cause death or serious bodily harm if his apprehension were delayed, the police officer used unreasonable force as a matter of law in firing at the suspect as he fled. Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978).

28-1413 Use of force by person with special responsibility for care, discipline, or safety of others.

The use of force upon or toward the person of another is justifiable if:

(1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian, or other responsible person and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his or her misconduct; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation;

(2) The actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of his or her misconduct, or, when such incompetent person is in a hospital or other institution for his or her care and custody, for the maintenance of reasonable discipline in such institution; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme or unnecessary pain, mental distress, or humiliation;

(3) The actor is a doctor or other therapist or a person assisting him or her at his or her direction and:

(a) Such force is used for the purpose of administering a recognized form of treatment which the actor believes to be adapted to promoting the physical or mental health of the patient; and

(b) Such treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his or her parent or guardian or other person legally competent to consent in his or her behalf or the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent;

(4) The actor is a warden or other authorized official of a correctional institution and:

(a) He or she believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution, unless his or her belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his or her error is the result of ignorance or mistake as to the provisions of sections 28-1406 to 28-1416, any other provision of the criminal law, or the law governing the administration of the institution;

(b) The nature or degree of force used is not forbidden by section 28-1408 or 28-1409; and

(c) If deadly force is used, its use is otherwise justifiable under sections 28-1406 to 28-1416;

(5) The actor is a person responsible for the safety of a vessel or an aircraft or a person acting at his or her direction and:

(a) He or she believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order unless such belief in the lawfulness of the order is erroneous and such error is the result of ignorance or mistake as to the law defining such authority; and

(b) If deadly force is used, its use is otherwise justifiable under sections 28-1406 to 28-1416; and

(6) The actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train, or other carrier or in a place where others are assembled, and:

(a) He or she believes that the force used is necessary for such purpose; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, bodily harm, or extreme mental distress.

Source: Laws 1972, LB 895, § 8; R.R.S.1943, § 28-840, (1975); Laws 1988, LB 316, § 2.

Whether an act that could constitute third degree assault is justifiable under this section is a question of fact. State v. Beins, 235 Neb. 648, 456 N.W.2d 759 (1990).

Whether physical act committed by person responsible for care and supervision of minor is justifiable act or unlawful assault is fact question. State v. Miner, 216 Neb. 309, 343 N.W.2d 899 (1984).

28-1414 Mistake of law; reckless or negligent use of force.

(1) The justification afforded by sections 28-1409 to 28-1412 is unavailable when:

(a) The actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous; and

(b) His error is the result of ignorance or mistake as to the provisions of sections 28-1406 to 28-1416, any other provision of the criminal law, or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under sections 28-1408 to 28-1413 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under sections 28-1408 to 28-1413 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Source: Laws 1972, LB 895, § 9; R.R.S.1943, § 28-841, (1975).

28-1415 Justification in property crimes.

Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:

(1) Sections 28-1406 to 28-1416 or the law defining the offense deals with the specific situation involved; or

(2) A legislative purpose to exclude the justification claimed otherwise plainly appears.

Source: Laws 1972, LB 895, § 10; R.R.S.1943, § 28-842, (1975).

28-1416 Justification an affirmative defense; civil remedies unaffected.

(1) In any prosecution based on conduct which is justifiable under sections 28-1406 to 28-1416, justification is an affirmative defense.

(2) The fact that conduct is justifiable under sections 28-1406 to 28-1416 does not abolish or impair any remedy for such conduct which is available in any civil action.

Source: Laws 1972, LB 895, § 11; R.R.S.1943, § 28-843, (1975).

28-1417 Transferred to section 13-1801.

(c) TOBACCO AND CIGARETTES

28-1418 Tobacco; use by minors; penalty.

Whoever, being a minor under the age of eighteen years, shall smoke cigarettes or cigars, or use tobacco in any form whatever, in this state, shall be guilty of a Class V misdemeanor. Any minor so charged with the violation of this section may be free from prosecution when he shall have furnished evidence for the conviction of the person or persons selling or giving him the cigarettes, cigars or tobacco.

Source: Laws 1911, c. 181, §§ 1, 2, 3, p. 561; R.S.1913, § 8846; C.S. 1922, § 9847; C.S.1929, § 28-1021; R.S.1943, § 28-1020; Laws 1977, LB 40, § 103; R.R.S.1943, § 28-1020, (1975).

28-1419 Tobacco; sale to minors; penalty.

Whoever shall sell, give or furnish, in any way, any tobacco in any form whatever, or any cigarettes, or cigarette paper, to any minor under eighteen years of age, shall be guilty of a Class III misdemeanor for each offense.

Source: Laws 1885, c. 105, §§ 1, 2, p. 394; Laws 1903, c. 138, § 1, p. 643; R.S.1913, § 8847; C.S.1922, § 9848; C.S.1929, § 28-1022; R.S.1943, § 28-1021; Laws 1977, LB 40, § 104; R.R.S.1943, § 28-1021, (1975).

28-1420 Tobacco; license requisite for sale; violation; penalty.

It shall be unlawful for any person, partnership, limited liability company, or corporation to sell, keep for sale, or give away in course of trade, any cigars, tobacco, cigarettes, or cigarette material to anyone without first obtaining a license as provided in sections 28-1421 and 28-1422. It shall also be unlawful for any wholesaler to sell or deliver any cigars, tobacco, cigarettes, or cigarette material to any person, partnership, limited liability company, or corporation who, at the time of such sale or delivery, is not the recipient of a valid tobacco license for the current year to retail the same as provided in such sections. It shall also be unlawful for any person, partnership, limited liability company, or corporation to purchase or receive, for purposes of resale, any cigars, tobacco, cigarettes, or cigarette material if such person, partnership, limited liability company, or corporation is not the recipient of a valid tobacco license to retail such tobacco products at the time the same are purchased or received. Whoever shall be found guilty of violating this section shall be guilty of a Class III misdemeanor for each offense.

Source: Laws 1919, c. 180, § 1, p. 401; C.S.1922, § 9849; C.S.1929, § 28-1023; Laws 1941, c. 50, § 1, p. 242; C.S.Supp.,1941, § 28-1023; R.S.1943, § 28-1022; Laws 1977, LB 40, § 105; R.R.S.1943, § 28-1022, (1975); Laws 1993, LB 121, § 187.

28-1421 License for sale of tobacco; where obtained; prohibited sales.

Licenses for the sale of cigars, tobacco, cigarettes, and cigarette material to persons over the age of eighteen years shall be issued to individuals, partnerships, limited liability companies, and corporations by the clerk or finance director of any city or village and by the county clerk of any county upon application duly made as provided in section 28-1422. The sale of cigarettes or cigarette materials that contain perfumes or drugs in any form is prohibited and is not licensed by the provisions of this section. Only cigarettes and cigarette material containing pure white paper and pure tobacco shall be licensed.

Source: Laws 1919, c. 180, § 2, p. 401; C.S.1922, § 9850; C.S.1929, § 28-1024; R.S.1943, § 28-1023; Laws 1961, c. 128, § 1, p. 379; R.R.S.1943, § 28-1023, (1975); Laws 1993, LB 121, § 188.

28-1422 License for sale of tobacco; application; contents.

Every person, partnership, limited liability company, or corporation desiring a license under sections 28-1420 to 28-1429 shall file with the clerk or finance department of the city, town, or village where his, her, their, or its place of business is located, if within the limits of a city, town, or village or with the clerk of the county where such place of business is located if outside the limits of any city, town, or village a written application stating the name of the person, partnership, limited liability company, or corporation for whom such license is desired and the exact location of the place of business and shall deposit with such application the amount of the license fee provided in section 28-1423. If the applicant is an individual, the application shall include the applicant's social security number.

Source: Laws 1919, c. 180, § 3, p. 401; C.S.1922, § 9851; C.S.1929, § 28-1025; R.S.1943, § 28-1024; Laws 1961, c. 128, § 2, p. 379; R.R.S.1943, § 28-1024, (1975); Laws 1993, LB 121, § 189; Laws 1997, LB 752, § 85.

28-1423 License for sale of tobacco; term; fees; false swearing; penalty.

The term for which such license shall run shall be from the date of filing such application and paying such license fee to and including December 31 of the calendar year in which application for such license is made, and the license fee for any person, partnership, limited liability company, or corporation selling at retail shall be twenty-five dollars in cities of the metropolitan class, fifteen dollars in cities of the primary and first classes, and ten dollars in cities of all other classes and in towns and villages and in locations outside of the limits of cities, towns and villages. Any person, partnership, limited liability company, or corporation selling annually in the aggregate more than one hundred fifty thousand cigars, packages of cigarettes, and packages of tobacco in any form, at wholesale, shall pay a license fee of one hundred dollars, and if such combined annual sales amount to less than one hundred fifty thousand cigars, packages of cigarettes and packages of tobacco, the annual license fee shall be fifteen dollars. No wholesaler's license shall be issued in any year on a less basis than one hundred dollars per annum unless the applicant for the same shall file with such application a statement duly sworn to by himself or herself, or if applicant is a partnership, by a member of the firm, or if a limited liability company, by a member or manager of the company, or if a corporation, by an

officer or manager thereof, that in the past such wholesaler's combined sales of cigars, packages of cigarettes, and packages of tobacco in every form have not exceeded in the aggregate one hundred fifty thousand annually, and that such sales will not exceed such aggregate amount for the current year for which the license is to issue. Any person swearing falsely in such affidavit shall be guilty of perjury and upon conviction thereof shall be punished as provided by section 28-915 and such wholesaler's license shall be revoked until the full license fee of one hundred dollars is paid. If application for license is made after July 1 of any calendar year, the fee shall be one-half of the fee provided in this section.

Source: Laws 1919, c. 180, § 4, p. 402; C.S.1922, § 9852; Laws 1923, c. 136, § 1, p. 335; Laws 1927, c. 198, § 1, p. 565; C.S.1929, § 28-1026; R.S.1943, § 28-1025; Laws 1978, LB 748, § 20; R.R.S.1943, § 28-1025, (1975); Laws 1993, LB 121, § 190.

28-1424 License for sale of tobacco; rights of licensee.

The license, provided for in sections 28-1421 and 28-1422 when issued, shall authorize the sale of cigars, tobacco, cigarettes, and cigarette material by the licensee and employees, to persons over the age of eighteen years, at the place of business described in such license for the term therein authorized, unless the same be forfeited as provided in section 28-1425.

Source: Laws 1919, c. 180, § 5, p. 402; C.S.1922, § 9853; C.S.1929, § 28-1027; R.S.1943, § 28-1026; Laws 1957, c. 100, § 2, p. 359; R.R.S.1943, § 28-1026, (1975).

28-1425 Licensees; sale of tobacco to persons under the age of eighteen years; penalty.

Any licensee who shall sell, give or furnish in any way to any person under the age of eighteen years, or who shall willingly allow to be taken from his place of business by any person under the age of eighteen years, any cigars, tobacco, cigarettes or cigarette material, shall be guilty of a Class III misdemeanor. Any officer, director, or manager having charge or control either separately or jointly with others, of the business of any corporation which violates the provisions of sections 28-1420 to 28-1429, if he have knowledge of the same, shall be subject to the penalties provided in this section. In addition to the penalties provided in this section, such licensee shall be subject to the additional penalty of a revocation and forfeiture of his, their, or its license, at the discretion of the court before whom the complaint for violation of said sections may be heard. If such license be revoked and forfeited, all rights under such license shall at once cease and terminate.

Source: Laws 1919, c. 180, § 6, p. 402; C.S.1922, § 9854; C.S.1929, § 28-1028; R.S.1943, § 28-1027; Laws 1957, c. 100, § 3, p. 360; Laws 1977, LB 40, § 106; R.R.S.1943, § 28-1027, (1975).

28-1426 Licenses for sale of tobacco; fees inure to school fund.

All money collected as license fees under the provisions of sections 28-1420 to 28-1429, shall be paid over by the clerk or finance director receiving it to the treasurer of the school fund for the particular city, town, village or county, as the case may be.

Source: Laws 1919, c. 180, § 7, p. 403; C.S.1922, § 9855; C.S.1929, § 28-1029; R.S.1943, § 28-1028; Laws 1961, c. 128, § 3, p. 380; R.R.S.1943, § 28-1028, (1975).

28-1427 Minor misrepresenting age to obtain tobacco; penalty.

Any person under the age of eighteen years who shall obtain cigars, tobacco, cigarettes or cigarette material from a licensee hereunder by representing that he is of the age of eighteen years or over, shall be guilty of a Class V misdemeanor.

Source: Laws 1919, c. 180, § 8, p. 403; C.S.1922, § 9856; C.S.1929, § 28-1030; R.S.1943, § 28-1029; Laws 1947, c. 98, § 1, p. 281; Laws 1977, LB 40, § 107; R.R.S.1943, § 28-1029, (1975).

28-1428 Transfer of tobacco license.

In case of the sale of a business where the owner has a license hereunder, the licensing authority may authorize such license to be transferred to the purchaser. In case of a change of location by any licensee hereunder, the licensing authority may transfer such license to the new location.

Source: Laws 1919, c. 180, § 9, p. 403; C.S.1922, § 9857; C.S.1929, § 28-1031; R.S.1943, § 28-1030.

28-1429 Revocation of tobacco license; reissue.

In the event that the license of a licensee hereunder shall be revoked and forfeited as provided in section 28-1425, no new license shall be issued to such licensee until the expiration of one year from the date of such revocation and forfeiture.

Source: Laws 1919, c. 180, § 10, p. 403; C.S.1922, § 9858; C.S.1929, § 28-1032; R.S.1943, § 28-1031.

28-1429.01 Vending machines; legislative findings.

The Legislature finds that the incumbent health risks associated with smoking tobacco products have been scientifically proven. The Legislature further finds that the growing number of minors who start smoking is staggering and even more abhorrent are the ages at which such children begin this deadly habit. The Legislature has established an age restriction on the use of tobacco products by minors. To ensure that the use of tobacco products among minors is discouraged to the maximum extent possible, it is the intent of the Legislature to ban the use of vending machines and similar devices to dispense tobacco products in facilities, buildings, or areas which are open to the general public within Nebraska.

Source: Laws 1992, LB 130, § 1.

28-1429.02 Vending machines; restrictions on use; violation; penalty; local ordinances; authorized.

(1) Except as provided in subsection (2) of this section, it shall be unlawful to dispense cigarettes or other tobacco products from a vending machine or similar device. Any person violating this section shall be guilty of a Class III misdemeanor. In addition, upon conviction for a second offense, the court shall order a six-month suspension of the offender's license to sell tobacco if any and, upon conviction for a third or subsequent offense, the court shall order the permanent revocation of the offender's license to sell tobacco if any.

(2) Cigarettes or other tobacco products may be dispensed from a vending machine or similar device when such machine or device is located in an area,

office, business, plant, or factory which is not open to the general public or on the licensed premises of any establishment having a license issued under the Nebraska Liquor Control Act for the sale of alcoholic liquor for consumption on the premises when such machine or device is located in the same room in which the alcoholic liquor is dispensed.

(3) Nothing in this section shall be construed to restrict or prohibit a governing body of a city or village from establishing and enforcing ordinances at least as stringent as or more stringent than the provisions of this section.

Source: Laws 1992, LB 130, § 2.

(d) MANUFACTURE AND SALE OF TOYS

28-1430 Repealed. Laws 1997, LB 622, § 136.

28-1431 Repealed. Laws 1997, LB 622, § 136.

28-1432 Repealed. Laws 1997, LB 622, § 136.

28-1433 Repealed. Laws 1997, LB 622, § 136.

(e) BUILDING REGULATIONS

28-1434 Repealed. Laws 1993, LB 251, § 10.

28-1435 Repealed. Laws 1993, LB 251, § 10.

28-1436 Repealed. Laws 1993, LB 251, § 10.

(f) DRUGS

28-1437 Legend drugs; unlawful acts; definition; prescription by facsimile or electronic transmission.

(1) It shall be unlawful for any person knowingly or intentionally to possess or to acquire or obtain or to attempt to acquire or obtain by means of misrepresentation, fraud, forgery, deception, or subterfuge possession of any drug substance not classified as a controlled substance under the Uniform Controlled Substances Act, but which can only be lawfully distributed, under federal statutes in effect on April 16, 1996, upon the written or oral order of a practitioner authorized to prescribe such substances.

(2) Such substances as referred to in subsection (1) of this section shall be known as legend drug substances, which shall be defined as including all drug substances not classified as controlled substances under the Uniform Controlled Substances Act, but which require a written or oral prescription from a practitioner authorized to prescribe such substances and which may only be lawfully dispensed by a duly licensed pharmacist, in accordance with the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 to 392, in effect on April 16, 1996.

(3) A prescription for a legend drug may be transmitted by the practitioner or the practitioner's agent to a pharmacy by facsimile or electronic transmission. Except as otherwise provided in section 28-414 for prescriptions for Schedule

II, III, IV, or V controlled substances, the facsimile or electronic transmission shall serve as the original prescription for purposes of this subsection.

Source: Laws 1976, LB 485, § 1; R.R.S.1943, § 28-476.01, (1975); Laws 1988, LB 1100, § 1; Laws 1996, LB 1108, § 5; Laws 2005, LB 382, § 4.

Cross References

Uniform Controlled Substances Act, see section 28-401.01.

28-1438 Legend drugs; violations; penalty.

Any person who violates the provisions of section 28-1437 shall be guilty of a Class III misdemeanor.

Source: Laws 1976, LB 485, § 2; Laws 1977, LB 41, § 3; R.R.S.1943, § 28-476.02, (1975).

28-1438.01 Controlled substance; practitioner; provide information; limit on liability or penalty.

(1) Any practitioner who gives information to a law enforcement officer or professional board shall not be subject to any civil, criminal, or administrative liability or penalty for giving such information.

(2) As used in this section, unless the context otherwise requires:

(a) Information shall mean information regarding unlawfully obtaining or attempting to obtain from a practitioner (i) a controlled substance, (ii) a written or oral prescription for a controlled substance, or (iii) the administration of a controlled substance;

(b) Law enforcement officer shall have the definition found in section 81-1401; and

(c) Practitioner shall have the definition found in section 28-401.

Source: Laws 1988, LB 273, § 2.

28-1439 Controlled substances; chemical analysis; admissible as evidence in preliminary hearing.

Whenever matter is submitted to the criminalistics laboratory of the Nebraska State Patrol for chemical analysis to determine if the matter is, or contains, a controlled substance, the report of that analysis shall be admissible in any preliminary hearing in any court in Nebraska as prima facie evidence of the identity, nature, and quantity of the matter analyzed. Nothing in this section is intended to require the use of a laboratory report in a preliminary hearing or to prohibit the use of other evidence, including circumstantial evidence, in the preliminary hearing to establish the identity, nature, and quantity of a controlled substance.

Source: Laws 1976, LB 487, § 1; R.R.S.1943, § 28-4,135.01, (1975); Laws 1984, LB 403, § 3.

28-1439.01 Uniform Controlled Substances Act; conviction; uncorroborated testimony; how treated.

No conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual.

Source: Laws 1978, LB 276, § 2; R.S.1943, § 28-439, (1979); Laws 1990, LB 571, § 7; Laws 1992, LB 1019, § 34.

Cross References

Uniform Controlled Substances Act, see section 28-401.01.

The evidence supporting each count charged must independently satisfy the corroboration requirements of this section. State v. Johnson, 261 Neb. 1001, 627 N.W.2d 753 (2001).

Corroboration is sufficient for the purposes of this section if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. State v. Goodro, 251 Neb. 311, 556 N.W.2d 630 (1996).

Corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. State v. Jimenez, 248 Neb. 255, 533 N.W.2d 913 (1995).

This section requires only that a conviction be based on something more than a cooperating individual's testimony. It is sufficient if the cooperating individual's testimony is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. State v. Kramer, 238 Neb. 252, 469 N.W.2d 785 (1991).

Corroboration may be supplied by observation that the meeting between the subject and the cooperating individual actually took place and by searches of the cooperating individual both before and within a reasonable time after the drug purchase took place. State v. Knoefler, 227 Neb. 410, 418 N.W.2d 217 (1988).

This section requires only that a conviction be based on something more than a cooperating individual's testimony. It is sufficient for conviction if the cooperating individual is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. State v. Cain, 223 Neb. 796, 393 N.W.2d 727 (1986).

Corroboration is sufficient, for purposes of this statute, if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. State v. Taylor, 221 Neb. 114, 375 N.W.2d 610 (1985).

The requirement of corroboration in this section does not operate to exclude testimony which is not corroborated by other evidence; rather, it only requires that the conviction be based on something more than only such testimony. State v. Beckner, 211 Neb. 442, 318 N.W.2d 889 (1982).

Searches of the cooperating individual performed by citizens, trained by law enforcement officials and working as agents of law enforcement, along with other evidence, were valid to establish corroboration of the cooperating individual's testimony as required by this section. State v. Kuta, 12 Neb. App. 847, 686 N.W.2d 374 (2004).

28-1439.02 Drug forfeitures; county treasurer; duties; County Drug Law Enforcement and Education Fund.

(1) The proceeds from any sale ordered pursuant to section 28-431, less legal costs, charges, and claims allowed, and any money forfeited pursuant to section 28-431 shall be paid to the county treasurer of the county in which the seizure was made. The county treasurer shall dispose of all such proceeds from property forfeited pursuant to subdivision (1)(f) of section 28-431 and fifty percent of the money forfeited pursuant to subdivision (1)(g) of section 28-431 in the manner provided for disposition of fines, penalties, and license money under the Constitution of Nebraska. The county treasurer shall disburse the remaining fifty percent of the money forfeited pursuant to subdivision (1)(g) of section 28-431 to his or her respective County Drug Law Enforcement and Education Fund. Each county shall create a County Drug Law Enforcement and Education Fund.

(2) Money remitted to any county pursuant to section 77-4310.01 shall be credited by the county treasurer of such county to the County Drug Law Enforcement and Education Fund.

Source: Laws 1985, LB 247, § 2; Laws 1991, LB 773, § 2.

28-1439.03 County Drug Law Enforcement and Education Fund Board; membership; terms; powers and duties; rules and regulations.

A County Drug Law Enforcement and Education Fund Board shall be created by each county of this state to administer its respective fund pursuant to section 28-1439.02. The board may authorize use of the fund for drug

enforcement and drug education purposes, in its own or any other county, by village, city, county, or state law enforcement agencies.

The board shall consist of the county attorney and three representatives of law enforcement agencies who shall be appointed by the county attorney. One representative shall be from the county sheriff's office, one representative shall be from a city or village police department within the county, and one representative shall be from the Nebraska State Patrol. Terms shall be for two years, except that the initial term of the police department representative shall be for one year. The county attorney shall serve as chairperson.

If during any fiscal year the fund contains money forfeited pursuant to subdivision (1)(g) of section 28-431, the board shall meet at least once during such year and make an accounting of the expenditures of the fund. At the end of any fiscal year in which the fund has contained money, the board shall make a report summarizing the use of the fund during such year to the Auditor of Public Accounts, except that such report shall contain no information which would jeopardize an ongoing investigation. Such report shall indicate the amount of money placed in the fund, the amount of money disbursed, the number of cases opened and closed in which the fund was utilized, and the drug education activities for which money in the fund was utilized. The board may adopt and promulgate all rules and regulations necessary for the expenditures and accountability of such fund.

Source: Laws 1985, LB 247, § 3; Laws 1991, LB 773, § 3.

28-1439.04 Terms, defined.

For purposes of sections 28-1439.02 to 28-1439.05:

(1) Drug education purposes shall mean drug education activities conducted by the Nebraska State Patrol or other law enforcement agencies in cooperation with elementary and secondary schools in Nebraska; and

(2) Drug enforcement purposes shall include, but not be limited to, the following when used or expended by law enforcement agencies or their agents in discharging their responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances:

(a) Salaries for informants and any expenses of all agents and informants;

(b) Flash money for drug purchases; and

(c) Money for drug purchases.

Source: Laws 1985, LB 247, § 4; Laws 1991, LB 773, § 4.

28-1439.05 County Drug Law Enforcement and Education Fund Boards; legislative intent.

The Legislature hereby finds and declares that it is the intent of section 28-1439.03 to foster cooperation among the County Drug Law Enforcement and Education Fund Boards in the state by encouraging boards which have no use for the funds to disburse the funds to boards in other counties.

Source: Laws 1985, LB 247, § 5; Laws 1991, LB 773, § 5.

(g) ILLEGAL SOLICITATION OF FUNDS

28-1440 Repealed. Laws 1996, LB 972, § 4.

28-1441 Repealed. Laws 1996, LB 972, § 4.

28-1442 Repealed. Laws 1996, LB 972, § 4.

28-1443 Repealed. Laws 1996, LB 972, § 4.

28-1444 Repealed. Laws 1996, LB 972, § 4.

28-1445 Repealed. Laws 1996, LB 972, § 4.

28-1446 Repealed. Laws 1996, LB 972, § 4.

28-1447 Repealed. Laws 1996, LB 972, § 4.

28-1448 Repealed. Laws 1996, LB 972, § 4.

28-1449 Repealed. Laws 1996, LB 972, § 4.

(h) ABUSE OF MINOR CHILDREN, INCOMPETENT, OR DISABLED PERSONS

28-1450 Repealed. Laws 1978, LB 748, § 61.

28-1451 Repealed. Laws 1978, LB 748, § 61.

28-1452 Repealed. Laws 1978, LB 748, § 61.

28-1453 Repealed. Laws 1978, LB 748, § 61.

28-1454 Repealed. Laws 1978, LB 748, § 61.

28-1455 Repealed. Laws 1978, LB 748, § 61.

28-1456 Repealed. Laws 1978, LB 748, § 61.

28-1457 Repealed. Laws 1978, LB 748, § 61.

(i) TRANSFER OF SOUNDS RECORDED

28-1458 Repealed. Laws 1978, LB 748, § 61.

28-1459 Repealed. Laws 1978, LB 748, § 61.

28-1460 Repealed. Laws 1978, LB 748, § 61.

28-1461 Repealed. Laws 1978, LB 748, § 61.

(j) USING FIREARMS TO COMMIT A FELONY

28-1462 Repealed. Laws 1978, LB 748, § 61.

(k) CHILD PORNOGRAPHY PREVENTION ACT

28-1463 Transferred to section 28-1463.03.

28-1463.01 Act, how cited.

Sections 28-1463.01 to 28-1463.05 shall be known and may be cited as the Child Pornography Prevention Act.

Source: Laws 1985, LB 668, § 1.

28-1463.02 Terms, defined.

As used in the Child Pornography Prevention Act, unless the context otherwise requires:

(1) Child, in the case of a participant, shall mean any person under the age of eighteen years and, in the case of a portrayed observer, shall mean any person under the age of sixteen years;

(2) Erotic fondling shall mean touching a person's clothed or unclothed genitals or pubic area, breasts if the person is a female, or developing breast area if the person is a female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more persons involved. Erotic fondling shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved;

(3) Erotic nudity shall mean the display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved;

(4) Sadomasochistic abuse shall mean flagellation or torture by or upon a nude person or a person clad in undergarments, a mask, or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained when performed to predominantly appeal to the morbid interest;

(5) Sexually explicit conduct shall mean: (a) Real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oral-anal between persons of the same or opposite sex or between a human and an animal or with an artificial genital; (b) real or simulated masturbation; (c) real or simulated sadomasochistic abuse; (d) erotic fondling; (e) erotic nudity; or (f) real or simulated defecation or urination for the purpose of sexual gratification or sexual stimulation of one or more of the persons involved; and

(6) Visual depiction shall mean live performance or photographic representation.

Source: Laws 1985, LB 668, § 2; Laws 1986, LB 788, § 1.

Age of child may be proved by stipulation of defendant. State v. Burke, 225 Neb. 625, 408 N.W.2d 239 (1987).

28-1463.03 Visual depiction of sexually explicit conduct; prohibited acts.

(1) It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(2) It shall be unlawful for a person knowingly to purchase, rent, sell, deliver, distribute, display for sale, advertise, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(3) It shall be unlawful for a person to knowingly employ, force, authorize, induce, or otherwise cause a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(4) It shall be unlawful for a parent, stepparent, legal guardian, or any person with custody and control of a child, knowing the content thereof, to consent to

such child engaging in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

Source: Laws 1978, LB 829, § 1; R.S.1943, (1979), § 28-1463; Laws 1985, LB 668, § 3.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

A person who generates differing and multiple prohibited visual depictions or causes a child to engage in the creation of such visual depictions commits multiple offenses of subsection (1) or (3) of this section, even though each such differing visual depiction involves the same subject captured in a narrow timeframe. State v. Mather, 264 Neb. 182, 646 N.W.2d 605 (2002).

The sexual nature of a photograph is not determined solely from the subjects of the photograph, but from the motives of the persons generating the photograph. State v. Saulsbury, 243 Neb. 227, 498 N.W.2d 338 (1993).

Under previous statute, the act of appearing in an obscene film depicting children was prohibited. State v. Jensen, 226 Neb. 40, 409 N.W.2d 319 (1987).

Subsection (1) of this section is neither overbroad nor vague under federal Constitution, but there is an open question of constitutionality under the Nebraska Constitution. One may ''publish'' by showing a videotape; the phrase ''portrayed observer'' is not unconstitutionally overbroad; the phrase ''sexually explicit conduct'' is not unconstitutionally vague; and sexual excitement is not an element or substantial motivational factor of some of the conduct proscribed under subsection (1) of this section. State v. Burke, 225 Neb. 625, 408 N.W.2d 239 (1987).

28-1463.04 Violation; penalty.

Any person who violates section 28-1463.03 shall be guilty of a Class III felony for the first offense and shall be guilty of a Class II felony for each subsequent offense.

Source: Laws 1978, LB 829, § 2; R.S.1943, (1979), § 28-1464; Laws 1985, LB 668, § 5.

First time violation of section 28-1463.03 constitutes a Class III felony. State v. Burke, 225 Neb. 625, 408 N.W.2d 239 (1987).

28-1463.05 Visual depiction of sexually explicit acts related to possession; violation; penalty.

(1) It shall be unlawful for a person to knowingly possess with intent to rent, sell, deliver, distribute, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(2) Any person who violates this section shall be guilty of a Class IIIA felony for each offense.

Source: Laws 1985, LB 668, § 4; Laws 1986, LB 788, § 2; Laws 2004, LB 943, § 7.

Cross References

Registration of sex offenders, see sections 29-4001 to 29-4014.

Prosecutor is free to prosecute conduct arguably within this provision under another provision with harsher penalties, so long as decision is not based on race, religion, or other arbitrary classification. State v. Burke, 225 Neb. 625, 408 N.W.2d 239 (1987).

28-1464 Transferred to section 28-1463.04.

(l) OPERATION OF AIRCRAFT

28-1465 Aircraft; operation while under influence of liquor or drug; prohibited.

It shall be unlawful for any person to operate or be in the actual physical control of any aircraft while under the influence of alcoholic liquor or of any

drug or when that person has five-hundredths of one percent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood or breath.

Source: Laws 1978, LB 903, § 1; Laws 2001, LB 773, § 1.

28-1466 Aircraft; operation while under influence of liquor or drug; violation; penalty.

Any person who shall operate or be in the actual physical control of any aircraft while under the influence of alcoholic liquor or of any drug or while having five-hundredths of one percent by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood or breath shall be deemed guilty of a crime and, upon conviction thereof, shall be punished as provided in sections 28-1467 to 28-1469.

Source: Laws 1978, LB 903, § 2; Laws 2001, LB 773, § 2.

28-1467 Aircraft; operation while under influence of liquor or drug; first offense; penalty.

If a conviction under section 28-1466 is for a first offense, the person shall be guilty of a Class III misdemeanor and the court shall, as part of the judgment of conviction, order such person not to operate any aircraft for any purpose for a period of six months from the date ordered by the court. The order of the court shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later. If the court suspends the proceedings and places such person on probation as provided by law, the court as one of the conditions of probation shall order such person not to operate any aircraft for any purpose for a period of thirty days from the date of the order.

Source: Laws 1978, LB 903, § 3; Laws 1997, LB 772, § 1.

28-1468 Aircraft; operation while under influence of liquor or drug; second offense; penalty.

If a conviction under section 28-1466 is for a second offense, the person shall be guilty of a Class III misdemeanor and shall be imprisoned in the county jail for not less than five days and the court shall, as part of the judgment of conviction, order such person not to operate any aircraft for any purpose for a period of one year from the date ordered by the court. The order of the court shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later. If the aircraft which such person was operating or was actually physically controlling, while under the influence of alcoholic liquor or any drug, is registered in the name of such person, the aircraft shall be impounded by the court for a period of not less than two months nor greater than one year at the expense and risk of the owner thereof; except that any aircraft so impounded shall be released to the holder of a bona fide lien thereon, executed prior to such impounding, when possession of such aircraft is requested in writing by such lienholder for the purpose of foreclosing and satisfying the lien thereon.

Source: Laws 1978, LB 903, § 4; Laws 1997, LB 772, § 2.

28-1469 Aircraft; operation while under influence of liquor or drug; third or subsequent offense; penalty.

If a conviction under section 28-1466 is for a third offense or subsequent offense thereafter, the person shall be guilty of a Class IV felony, and the court shall, as part of the judgment of conviction, order such person not to operate any aircraft for any purpose for a period of one year from the date ordered by the court. The order of the court shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later.

Source: Laws 1978, LB 903, § 5; Laws 1997, LB 772, § 3.

28-1470 Aircraft; implied consent of operator to submit to chemical test.

Any person who operates or has in his or her actual physical control an aircraft within this state shall be deemed to have given his or her consent to submit to a chemical test of his or her blood or breath, for the purpose of determining the amount of alcoholic content in his or her body fluid.

Source: Laws 1978, LB 903, § 6; Laws 2001, LB 773, § 3.

28-1471 Aircraft; operation while under influence of liquor or drug; chemical test; law enforcement officer; powers.

Any law enforcement officer who has been duly authorized to make arrests for violations of traffic laws of this state or of ordinances of any city or village may require any person arrested for any offense arising out of acts alleged to have been committed while the person was operating or was in actual physical control of an aircraft while under the influence of alcoholic liquor to submit to a chemical test of his or her blood or breath for the purpose of determining the alcoholic content of his or her body fluid, when the officer has reasonable grounds to believe that such person was operating or was in the actual physical control of an aircraft within this state while under the influence of alcoholic liquor.

Source: Laws 1978, LB 903, § 7; Laws 2001, LB 773, § 4.

28-1472 Aircraft; operation while under influence of liquor or drug; breath test; refusal; penalty.

Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village may require any person who operates or has in his actual physical control an aircraft within the airspace of this state to submit to a preliminary test of his breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his body, or has committed a violation of flying regulations, or has been involved in an aircraft accident. Any person who refuses to submit to such preliminary breath test or whose preliminary breath test results indicate an alcohol content of five-hundredths of one percent or more shall be placed under arrest. Any person who refuses to submit to such preliminary breath test shall be guilty of a Class V misdemeanor.

Source: Laws 1978, LB 903, § 8.

28-1473 Aircraft; operation while under influence of liquor or drug; chemical test; refusal; penalty.

Any person arrested pursuant to sections 28-1465 to 28-1474 may, upon the direction of a law enforcement officer, be required to submit to a chemical test

of his or her blood or breath for a determination of the alcohol content. Any person who refuses to submit to a chemical blood or breath test required pursuant to sections 28-1465 to 28-1474 shall be guilty of a crime and, upon conviction thereof, shall be punished in the same manner as he or she would be if convicted for a violation of section 28-1465.

Source: Laws 1978, LB 903, § 9; Laws 2001, LB 773, § 5.

28-1474 Aircraft; operation while under influence of liquor or drug; breath or chemical test; refusal; advised of consequences.

Any person who is required to submit to a preliminary breath test, or to a chemical blood or breath test pursuant to sections 28-1465 to 28-1474 shall be advised of the consequences of refusing to submit to such test.

Source: Laws 1978, LB 903, § 10; Laws 2001, LB 773, § 6.

(m) MISCELLANEOUS PROVISIONS

28-1475 Revisor of Statutes; crimes categorized; duties.

The Revisor of Statutes shall place in the Appendix to the Reissue Revised Statutes of Nebraska a list of all crimes which have been categorized pursuant to sections 28-105 and 28-106. An updated list shall be included in the annual supplement to the statutes.

Source: Laws 1978, LB 748, § 58; Laws 1995, LB 589, § 5.

28-1475.01 State or local law enforcement agency; authorized to receive forfeited property.

Notwithstanding any other provision of the laws of the State of Nebraska, any state or local law enforcement agency which participated directly with federal law enforcement agencies in any of the acts which led to the seizure or forfeiture of property being held by federal law enforcement agencies shall be authorized to receive such property directly from the federal government.

Source: Laws 1985, LB 247, § 6.

(n) DECEPTIVE OR MISLEADING ADVERTISING

28-1476 Advertisement; untrue, deceptive, or misleading; unlawful.

After July 19, 1980, it shall be unlawful for any person, firm, corporation, or association, with intent to sell or in any way dispose of merchandise, securities, service, or anything offered by such person, firm, corporation, or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make, publish, disseminate, circulate or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, containing any assertion, representation, or statement of fact which is known to be untrue, deceptive, or misleading.

Source: Laws 1980, LB 185, § 1.

28-1477 Deceptive or misleading advertising; unlawful acts; enumerated.

For the purpose of section 28-1476 any person, firm, corporation, or association shall be deemed guilty of deceptive or misleading advertising that makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any merchandise for sale at retail at less than original actual cost or less than original replacement cost, whichever is lower, if the merchant does not have a sufficient quantity of merchandise to meet the reasonable expected demand, or the advertisement either (1) fails to state in such advertisement the quantity of merchandise available for sale, or (2) fails to state that the advertiser is discontinuing the item.

Source: Laws 1980, LB 185, § 2.

28-1478 Deceptive or misleading advertising; violation; penalty.

Any person, firm, corporation or association violating the provisions of section 28-1476 shall be deemed guilty of a Class III misdemeanor.

Source: Laws 1980, LB 185, § 3.

(o) BEVERAGE CONTAINERS

28-1479 Cans with disposable tabs; sale prohibited; violation; penalty.

(1) No person in this state shall sell at retail or otherwise, any carbonated soft drink or beer can which has a removable, disposable tab or grip for opening which does not remain attached to the can after opening.

(2) Any person violating this section shall be guilty of a Class III misdemeanor.

Source: Laws 1981, LB 291, § 1.

(p) CIVIL DISORDERS INVOLVING EXPLOSIVES OR FIREARMS

28-1480 Terms, defined.

As used in sections 28-1480 to 28-1482, unless the context otherwise requires:

(1) Civil disorder shall mean any public disturbance involving acts of violence which causes an immediate danger of or results in damage or injury to persons or property;

(2) Explosive or incendiary device shall mean (a) dynamite and all other forms of high explosives, (b) any explosive bomb, grenade, missile, or similar device, and (c) any incendiary bomb or grenade, firebomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound and (ii) can be carried or thrown by one individual acting alone; and

(3) Firearm shall mean any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon.

Source: Laws 1986, LB 772, § 1.

28-1481 Acts prohibited.

It shall be unlawful within the boundaries of this state:

(1) For any person to teach or demonstrate to any other person the use, application, or making of any firearm or explosive or incendiary device capable of causing injury or death to persons when such person knows or has reason to know or intends that such information or ability will be unlawfully employed for use in or in furtherance of a civil disorder; or

(2) For any person to assemble with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm or explosive or incendiary device capable of causing injury or death to persons when such person intends to unlawfully employ such training, practice, or instruction for use in or in furtherance of a civil disorder.

Source: Laws 1909, c. 90, § 68, p. 385; R.S.1913, § 3966; C.S.1922, § 3364; C.S.1929, § 55-182; R.S.1943, § 55-188; Laws 1969, c. 459, § 74, p. 1605; R.S.1943, (1984), § 55-176; Laws 1986, LB 772, § 2.

28-1482 Violation; penalty.

Any person violating section 28-1481 shall be guilty of a Class IV felony.

Source: Laws 1909, c. 90, § 69, p. 386; R.S.1913, § 3967; C.S.1922, § 3365; C.S.1929, § 55-183; R.S.1943, § 55-189; Laws 1969, c. 459, § 75, p. 1605; Laws 1977, LB 39, § 54; R.S.1943, (1984), § 55-177; Laws 1986, LB 772, § 3.

(q) FOOD

28-1483 Donated food; resale prohibited; violation; penalty.

(1) It shall be unlawful for any person or charitable or nonprofit organization receiving food pursuant to section 25-21,189 to sell or offer to sell such food.

(2) Violation of the provisions of subsection (1) of this section shall be a Class V misdemeanor.

Source: Laws 1981, LB 38, § 3; R.S.1943, (1981), § 81-217.31; Laws 1987, LB 201, § 2.

ARTICLE 15

TASK FORCE

Section
28-1501. Repealed. Laws 1996, LB 897, § 1.

28-1501 Repealed. Laws 1996, LB 897, § 1.